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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2026

Public sitting

held on Wednesday 14 January 2026, at 3 p.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 15 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

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

COMPTE RENDU

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

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

M. Gautier, greffier

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

The Court meets this afternoon to resume hearing the first round of oral argument of The Gambia on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 11 States intervening)*.

I shall now give the floor to Mr Andrew Loewenstein. You have the floor, Sir.

Mr LOEWENSTEIN:

I. THE EXISTENCE OF THE *ACTUS REUS* OF GENOCIDE

1. Mr President, Members of the Court, good afternoon. We turn now to Myanmar's breaches of the Convention. I will begin by addressing the *actus reus* of genocide. I will be followed by Professor Sands, and subsequently by Mr Reichler, who will explain that genocidal intent is manifestly a reasonable inference, and, in fact, the *only* reasonable inference that can be drawn from the evidence.

2. As you know, the *actus reus* of genocide is set out in Article II of the Convention[1]. Genocide occurs with the commission of *any one of* the acts set out in paragraphs *(a)-(e)*, provided it is perpetrated with the subsidiary and specific intent to that act, and with the *dolus specialis* of genocidal intent. The Gambia's case implicates paragraphs *(a)-(d)*, which I will address in turn.

1. Article II *(a)*: killing members of the group

3. The act falling under paragraph *(a)* is self-explanatory. As the Court has confirmed, this paragraph refers to "the act of *intentionally killing* members of the group"[2].

4. As you have heard, the record is replete with evidence establishing that the Tatmadaw and other security forces intentionally killed members of the Rohingya group and did so in an unlawful manner. The FFM determined: "The Tatmadaw and other security forces (often in concert with

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

[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. 69, para. 156 (emphasis added).

civilians) *intentionally and unlawfully killed Rohingya men, women and children* throughout the period under review."[3]

5. The Mission "concluded on reasonable grounds" that the second wave of "clearance operations" *alone* "directly resulted in more than 10,000 deaths"[4], adding that this was a "conservative"[5] estimate and noting that "[o]ther statistically based estimates have indicated significantly higher numbers"[6]. The evidence of intentional killings abounds and I need not repeat what you heard yesterday and this morning beyond observing that The Gambia's written pleadings presented voluminous evidence of intentional killings committed by the Tatmadaw and security forces in more than 40 villages[7].

6. Despite that evidence, Myanmar denies any having committed any *actus reus* under paragraph *(a)*. In addition to vaguely complaining about the supposed "general deficiencies in The Gambia's evidence" — issues that Mr Reichler addressed on Monday[8] — Myanmar appears to advance two arguments in support of this contention.

7. *First*, without expressly denying that Rohingya civilians were killed during the "clearance operations", Myanmar claims that any such killings would not fall under paragraph *(a)* because they would have been "caused by a military attack . . . [that] was exclusively directed at military targets, and the civilian casualties were not caused deliberately"[9].

8. *Second*, Myanmar argues that the *actus reus* under Article II requires that the acts "be *capable* of bringing about" the physical or biological destruction of the protected group in whole or in part[10]. From this, Myanmar suggests that the estimated death toll of 10,000 was *incapable* of

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[3] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1394 (emphasis added). MG, Vol. II, Annex 40.

[4] *Ibid.*, para. 1395.

[5] *Ibid.*, para. 1008.

[6] *Ibid.*, para. 1007. See also International Commission of Journalists, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 14, note 8, p. 50. RG, Vol. II, Annex 12 (additional excerpts to MG, Vol. IV, Annex 109). M. Habib *et al.*, Forced Migration of Rohingya: The Untold Experience (Ontario International Development Agency, 2018), p. 68. RG, Vol. III, Annex 34.

[7] MG, Chapters 8 and 9.

[8] CR 2026/2, pp. 12-30 (Reichler).

[9] CMM, para. 4.52. See also RM, para. 4.65 (citing *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. 134, para. 463).

[10] CMM, para. 4.57.

destroying the Rohingya group, given that it is said to represent a "limited number" when compared to the overall Rohingya population in northern Rakhine State prior to the "clearance operations"[11].

9. As to the first argument, the premise appears to be that every Rohingya was an ARSA terrorist. That, of course, is false, as Mr Suleman explained earlier today.

10. Myanmar's assertion that "the civilian casualties were not caused deliberately" is likewise disproven by the evidence, which establishes beyond doubt that the Tatmadaw failed to distinguish between militants and civilians during the "clearance operations"[12]. In fact, it did the opposite. It specifically targeted civilians.

11. In short, the evidence leaves no doubt that the "clearance operations" were exactly what their name suggests: operations to destroy the Rohingya, undertaken under the *pretext* of counter-terrorism. Where members of a protected group are killed under the guise of a miliary operation, and convincing evidence shows they were targeted due to their protected status, those killings fall within the scope of Article II *(a)*. All the more so when the killings are committed against children, as I addressed this morning.

12. As to Myanmar's second argument, the suggestion that an estimated death toll of 10,000 is somehow "limited" is — to be charitable — troubling. The argument is flawed, regardless. As Professor Sands explained on Monday[13], genocide is not a numbers game and the *actus reus* of killing is met irrespective of a specific number of deaths. As he also explained, and as you have heard throughout these hearings, the part of the Rohingya group targeted is, by any measure, substantial, or "significant enough", to use the words of the Court in the *Bosnia* case[14].

2. Article II *(b)*: causing serious bodily or mental harm to members of the group

13. I now turn to paragraph *(b)* of Article II: "Causing serious bodily or mental harm to members of the group."

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[11] CMM, para. 13.45.

[12] See e.g. International Crisis Group, *Myanmar: A New Muslim Insurgency in Rakhine State*, Asia Report No. 283 (15 December 2016), Executive Summary. CMM, Vol. VII, Annex 296.

[13] CR 2026/1, p. 26, para. 8 (Sands).

[14] *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. 126, para. 198.

14. As held by the Court, "the serious bodily or mental harm within the meaning of Article II *(b)* . . . must be such as to *contribute to* the physical or biological destruction of the group, in whole or in part"[15].

15. In keeping with that interpretation, acts of torture, rape and other forms of sexual violence have been held to be capable of falling within the scope of paragraph *(b)*[16]. Specifically, in the *Croatia Genocide* case, the Court found that *actus reus* was established under paragraph *(b)* on the basis of the serious bodily harm inflicted on Croats by the *Jugoslovenska narodna armija* (JNA, Yugoslav People's Army) and Serb forces, including through rape and sexual violence[17]. And you heard Ms Pasipanodya this morning address the international jurisprudence concerning rape and sexual violence.

16. As clarified by the ICTY Appeals Chamber, the forcible transfer of a civilian population out of an area can also, depending on the circumstances, "be an additional means by which to ensure the physical destruction of the protected group . . . by causing serious mental harm"[18]. In determining whether a forcible transfer contributes or amounts to conduct falling within paragraph *(b)*, the Appeals Chamber observed that one may consider "post-transfer suffering", to assess "whether serious mental harm was inflicted"[19].

17. Concerning serious bodily harm, Myanmar asserts that "The Gambia's evidence is not capable of proving . . . the acts satisfying the *actus reus* of genocide under Article II *(b)*"[20]. However, The Gambia has presented a plethora of evidence — including UN investigative reports, witness statements and medical testimony — that the Tatmadaw and security forces inflicted brutal, lasting, i.e. serious, bodily harm to members of the Rohingya group.

18. For instance, the FFM determined that survivors of the "clearance operations" "bear the after-effects of bullet, burn and knife wounds that cause not only disfigurement, but long-term and

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[15] *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. 70, para. 157 (emphasis added).

[16] *Ibid.*, p. 70, para. 158.

[17] *Ibid.*, p. 109, para. 360.

[18] *Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 209.

[19] *Ibid.*

[20] CMM, para. 13.48.

serious injury"[21], expressly concluding that "[t]he physical injuries of large numbers [of them] *rise to the level of serious bodily harm*"[22].

19. In witness statement after witness statement, survivors corroborate those findings, recounting — in excruciating detail — the injuries they sustained. The findings are supported by a range of medical evidence, including a study by Physicians for Human Rights, which concluded that "[t]he vast majority" of the interviewed Rohingya refugees who suffered from long-term disabilities were injured because they "were gunned down as they fled attackers"[23]. The organization specifically determined: "Many of the bullet wounds have resulted in *permanent neurological impairment that* limits limb function and causes severe and persistent pain" making "simple tasks like walking . . . extremely painful or impossible."[24]

20. Sexual violence was central to the serious bodily harm inflicted against the Rohingya. The FFM concluded that during the "clearance operations", rape was "used as a form of torture"[25]. As Ms Pasipanodya explained this morning, the sexual violence itself was accompanied by the additional infliction of serious bodily harm, leaving the victims bitten, scarred or mutilated.

21. With respect to mental harm, the evidence is equally compelling. The "clearance operations" were inherently traumatic. Survivors faced a multitude of terrors, including not least of being captured and killed[26]. The FFM found that, for those who did not immediately escape, the threat of impending death constituted "serious mental harm as a separate genocidal act from the killing itself"[27].

22. Mr President, parents had to endure the overwhelming pain of watching their children die. Here is but one example: a mother who had been forced to make the split-second decision as to which

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[21] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1397. MG, Vol. II, Annex 40.

[22] *Ibid.* (emphasis added).

[23] Physicians for Human Rights, *Shot While Fleeing: Rohingya Disabled by Myanmar Authorities' Targeted Violence* (June 2019), pp. 3-4. MG, Vol. V, Annex 123.

[24] *Ibid.* (emphasis added).

[25] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 941. MG, Vol. II, Annex 40.

[26] *Ibid.*, para. 1398. MG, Vol. II, Annex 40 citing *Prosecutor* v. *Blagojevic and Jokic*, IT-02-60-T, Trial Judgment (17 January 2005), para. 647.

[27] *Ibid.*, citing *Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 206.

of her children to try to save, posed the following question to the FFM: "How can I continue with my life having made this choice?"[28]

23. The mental anguish caused by the "clearance operations" crossed and crosses generational divides. Children witnessed parents being shot before their eyes. The OHCHR reported that the Tatmadaw "forced . . . small children[] to watch their family members" being "beaten, sexually abused, raped or killed", rightly likening this to "psychological torture"[29]. As one 16-year-old recounted to Save the Children: "Now we are orphans. My siblings are always crying for their parents. They don't understand that they will never see them again."[30]

24. The FFM also determined that the horrendous sexual violence perpetrated during the "clearance operations" "continues to have a devastating and lasting impact" on the Rohingya community, not just physically, but also "mentally"[31]. Ms Pasipanodya addressed that this morning.

25. The "clearance operations" and forced exodus to Bangladesh resulted in lasting mental harm to those now forced to live in refugee camps. According to Fortify Rights' survey of Rohingya refugees, close to 90 per cent of the respondents experienced symptoms indicative of depression; over 60 per cent reported symptoms indicative of post-traumatic stress disorder. Over 90 per cent of the surveyed refugees reported challenges in "carrying out common daily activities, such as maintaining basic hygiene, engaging in social or religious activities, or performing other daily tasks"[32].

26. In short, there is compelling evidence that Myanmar committed the *actus reus* of genocide by inflicting serious bodily and mental harm to members of the Rohingya group.

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[28] *Ibid.*, para. 825.

[29] UN OHCHR, *Flash Report* (2017), p. 28. MG, Vol. II, Annex 30.

[30] Save the Children, *"Horrors I will never forget": The stories of Rohingya children* (2017), p. 13. MG, Vol. IV, Annex 100.

[31] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 941. MG, Vol. II, Annex 40.

[32] Fortify Rights, *"The Torture In My Mind": The Right to Mental Health for Rohingya Survivors of Genocide in Myanmar and Bangladesh* (December 2020), available at https://www.fortifyrights.org/mya-inv-rep-2020-12-10, p. 10. See also RG, para. 9.15 and fn. 1039. See also UN OHCHR, *Flash Report* (2017), p. 22. MG, Vol. II, Annex 30.

3. Article II *(c)*: deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part

27. This leads me to Article II *(c)*: "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part."

28. As the Court has held, paragraph *(c)*

> "covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group . . . Such methods of destruction include notably deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion"[33].

29. In addition to those methods of destruction, rape and other acts of sexual violence —where they take place on a sufficient scale — are also "capable of bringing about" the physical destruction of the group in whole or in part[34]. As the ICTY Appeals Chamber confirmed in the *Tolimir* case, forced displacement or removal of a protected group from an area is also capable of being an act falling within Article II *(c)* so long as it leads "to conditions of life calculated to bring about the group's physical destruction"[35].

30. The evidence shows that this *actus reus* was satisfied through several methods of physical destruction.

31. *First*, as presented throughout these proceedings[36] and recalled by Ms Pasipanodya this morning, Rohingya women were subjected to pervasive rape and sexual violence "capable of bringing about" the physical destruction of the group in whole or in part[37]. The FFM found that the sexual violence "perpetrated *on a massive scale* during the 'clearance operations'"[38] "was perpetrated with an intended effect, at least in part, to weaken the social cohesion of the Rohingya community

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[33] *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. 70, para. 161.

[34] *Ibid.*, p. 110, para. 364.

[35] *Prosecutor* v. *Zdravko Tolimir*, IT-05-88/2-A, Appeals Chamber Judgment (8 April 2015), para. 209.

[36] MG, Chapter 9; RG, Chapter 7.

[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. 110, para. 364.

[38] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 920 (emphasis added). MG, Vol. II, Annex 40.

and *contribute to the destruction of the Rohingya as a group an*d the breakdown of the Rohingya way of life"[39].

32. In its Rejoinder, Myanmar invoked the fact that in *Croatia* v. *Serbia* the Court declined to find *actus reus* under Article II *(c)* on the basis of acts of rape committed against Croat women[40], in an apparent effort to draw an analogy here. However, Myanmar overlooks the obvious. In the *Croatia* case, the Court could only credit: "*a number of instances* of rape and other acts of sexual violence [that] were perpetrated within the context of the conflict"[41]. The factual record of the present case is entirely different.

33. *Second*, in addition to the sexual violence, there has been — and continues to be — a widespread and severe deprivation of the Rohingya's basic human needs. Prior to and after 2016, Myanmar imposed severe restrictions on the Rohingya's movement, employment, access to food and health care for decades. This resulted in, among other things, severe acute malnutrition among the Rohingya[42]. Following the "clearance operations", and as detailed in The Gambia's written submissions[43], a significant number of Rohingya remain confined in internment camps and ghettos, where their movement is severely restricted, and their access to citizenship, basic services and livelihoods is persistently impeded[44].

34. *Third*, the forced mass exodus to Bangladesh resulting from the "clearance operations" also inflicted on the group conditions of life calculated to bring about its physical destruction in whole or in part. The FFM determined:

> "The 'clearance operations' forced hundreds of thousands of Rohingya to flee and walk for days, or even weeks, through forests and over mountains, to reach

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[39] *Ibid.*

[40] RM, paras. 4.99-4.102.

[41] *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. 110, para. 363 (emphasis added).

[42] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 534 (citing to Ministry of Health and Sports, Myanmar — 2015-2016 Demographic and Health Survey — Key Findings (2017)). RG, Vol. II, Annex 1 (additional excerpts to MG, Vol. II, Annex 40).

[43] RG, Chapters 5 and 6.

[44] UN General Assembly, *Report of the Special Rapporteur on the situation of human rights in Myanmar, Thomas H. Andrews*, UN doc. A/76/314 (2 September 2021), Annex 1 — Additional Human Rights Concerns Observed by the Special Rapporteur, available at https://www.ohchr.org/Documents/Countries/MM/GA76report-annex-SR-Myanmar.pdf, para. 20; UN General Assembly, Third Committee, *Situation of human rights of Rohingya Muslims and other minorities in Myanmar*, UN doc. A/C.3/76/L. 30/Rev. 1 (adopted 17 November 2021), Preamble (cited in The Gambia Observations to Myanmar's Fourth Implementation Report, para. 8).

> Bangladesh. On this journey, many more died or were killed or injured. There was minimum shelter, with people having to sleep in the open, and little food or water."[45]

35. *Fourth*, the systemic and well-documented destruction, burning and bulldozing of, *inter alia*, houses, community buildings and agricultural fields, resulting in the deprivation of essential means of subsistence, also falling within paragraph *(c)*.

4. Article II *(d)*: imposing measures intended to prevent births within the group

36. Finally, Mr President, I turn to paragraph *(d)*. In addition to direct and indirect measures intended to prevent births within the group — such as forced sterilization or the separation of men[46] — the Court has recognized that acts of rape and sexual violence can also fall within paragraph *(d)*, so long as they are "of a kind which prevent births within the group"[47]. In order for that to be the case, "the circumstances of the commission of those acts, and their consequences, [must be] such that the capacity of members of the group to procreate is affected" and "the systematic nature of such acts has to be considered"[48].

37. The case for *actus reus* under paragraph *(d)* is clear. First, there are the discriminatory plans and policies, which Ms Pasipanodya detailed on Monday[49]. Those measures, and most notable, Regional Order 1/2005, were *specifically* designed to target the Rohingya and suppress its population growth. As she explained, for years Myanmar launched and pursued a co-ordinated campaign, which involved requiring permission for marriage, restricting the number of Rohingya children and denying the birth registration of newborns. In the words of the FFM, those measures, "when considered both individually and cumulatively, appear targeted at the capacity of the group to 'live and reproduce normally'"[50]. They are thus paradigmatic examples of the acts that fall under paragraph *(d)*.

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[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 September 2018), para. 984. MG, Vol. II, Annex 40.

[46] *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. 190, para. 355.

[47] *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.

[48] *Ibid.*, p. 72, para. 166.

[49] CR 2026/2, pp. 30-43 (Pasipanodya).

[50] FFM, Report of the Detailed Findings (2018), para. 1409. MG, Vol. II, Annex 40 citing *Prosecutor* v. *Popović et al.*, IT-05-88-T, Judgment (10 June 2010), para. 855.

38. In addition to such measures, The Gambia submits that the sexual violence against the Rohingya was precisely the kind of "systematic" violence that would "prevent births within the group"[51]. On this, you heard Ms Pasipanodya this morning.

39. In its written submissions, Myanmar asserts paragraph *(d)* is established only where the impugned population control measure *in fact* reduced the birth rate to such a degree that the "very existence of the [protected] group" is threatened[52]. Likewise, Myanmar argues that, in order to fall within paragraph *(d)*, sexual violence must have *in fact* prevented "meaningful numbers of victims" from procreating[53].

40. Those arguments are misconceived for the same reasons discussed under paragraph *(a)*. Neither the Convention nor this Court's jurisprudence imposes any requirement that births must be reduced by a particular *rate*, or that demographic decline must be empirically demonstrated before paragraph *(d)* can be engaged. The focus of paragraph *(d)* is not on a particular statistical outcome; it is on the character of the measures and the intent with which they are adopted and enforced. As the plain text of paragraph *(d)* makes clear, the measures need only be "intended", that is, aimed at, to bring about the physical destruction of the group; evidence of the measures' success is not required.

41. That said, even if it were, the circumstances of the violence and the specific manner in which it was perpetrated leaves no doubt that the acts indeed affected the capacity of the Rohingya to procreate. In that regard, I refer you to the study of LAW on this issue which Ms Pasipanodya mentioned this morning[54].

42. Mr President, Members of the Court, this concludes my presentation. Thank you for your kind attention. I request that you invite Professor Sands to the podium.

The PRESIDENT: We thank Mr Loewenstein for his statement. I now invite Professor Philippe Sands to address the Court. You have the floor, Sir.

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[51] *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.

[52] CMM, para. 4.77.

[53] CMM, para. 13.61.

[54] LAW, *"Every Day, I Remember They Destroyed My Life": Long-Term Physical and Psychosocial Consequences of Genocidal Sexual and Gender-Based Violence the Myanmar Military Committed against the Rohingya in its 2017 "Clearance Operations"* (November 2023), pp. 41-42. RG, Vol. II, Annex 16. See also The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar's Rakhine State: Factual Findings & Legal Analysis Report* (December 2018), p. 40. MG, Vol. IV, Annex 121.

Mr SANDS:

II. THE EXISTENCE OF GENOCIDAL *MENS REA*

1. Mr President, Members of the Court, you have now heard the detailed, forensic and extensive evidence of Myanmar's acts against the Rohingya community. You have also homed in on the appalling events in three particular locations — Min Gyi, Chut Pyin and Maung Nu — as well as other key places. You are aware, now, fully aware, of the extensive and established pattern of conduct by the Tatmadaw across these villages and others in northern Rakhine State — a pattern that embraces extreme and brutal violence, killings, pervasive sexual harms, the targeting of children and women, the destruction of evidence and then total impunity for every perpetrator. Mr Suleman brought to you, in graphic detail, some contemporaneous messages that were publicly circulated by the Tatmadaw, on their Facebook pages, and elsewhere, as these terrible events were being prepared and as they unfolded.

2. The UN FFM did not have the totality of the material that he took you through available to it. Nevertheless, it observed that there was a "remarkable similarity in the timing of operations, the sequence of events, the types of weapons used, the assistance received from other security forces or ethnic Rakhine and division of roles between perpetrators, the types of violations and the manner in which they were committed"[55]. With those Facebook posts we now know that the remarkable similarity was not a coincidence, it was a consequence; the putting into effect of an intention that was planned and that was orchestrated.

3. The purpose of this speech, then, is to show that a reasonable inference to be drawn from this mass of evidence points to the existence of a genocidal intent. Mr Reichler, following me, will tell you why it is the "only" reasonable inference within the meaning of the jurisprudence of this Court.

4. As I mentioned on Monday, it is invariably the case that in the absence of a published plan a genocidal intent falls to be established on the basis of convincing circumstantial evidence. Myanmar did not document its genocidal plan by way of a direct or written evidence, and I cannot take you to a written plan (although, I have to say, the Facebook messages we were taken to by

[55] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1429. MG, Vol. II, Annex 40.

Mr Suleman earlier this week do look very consistent with the existence of a plan). What I can take you to is the circumstantial evidence, the nature of the acts, the manner in which they were perpetrated. And we say that that evidence is fully convincing, in terms both of the particular circumstances of individual villages and the broader pattern of conduct of the "clearance operations" across the whole region.

5. Mr President, in determining the existence of a genocidal intent, the Court's previous judgments, with which I am very familiar, provide important guidance. The critical parts of the Court's previous jurisprudence on genocidal intent may be found in paragraphs 296 and 373 of the Court's *Bosnia* Judgment. The Court's approach was then repeated and clarified in the *Croatia* Judgment, in particular at paragraphs 142 and 145. These paragraphs, when you take them together, clarify, very helpfully, the process of how this Court will look at the facts and determine and infer the existence of a genocidal intent from circumstantial evidence. I can assure you, as my colleagues have, that The Gambia has paid the closest possible attention to the Court's words.

6. The Court has set out key factors: paragraph 296 in the *Bosnia* Judgment, identifies the factors to which the Court will have regard in determining whether there was a genocidal intent to destroy the Rohingya group, as such, in whole or in part:

> "The Court now turns to the requirement of Article II that there must be the intent to destroy a protected 'group' in whole or in part. It recalls its earlier statement of the law and in particular the three elements there discussed: substantiality (the primary requirement), relevant geographic factors and the associated opportunity available to the perpetrators, and emblematic or qualitative factors"[56].

Three key factors.

7. Substantiality was then further explained in the 2015 Judgment, at paragraph 142:

> "[T]he destruction of the group 'in part' within the meaning of Article II of the Convention must be assessed by reference to a number of criteria. In this regard, it held in 2007 that 'the intent must be to destroy at least a substantial part of the particular group' . . ., and this is a 'critical' criterion . . . The Court further noted that 'it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area' . . . and that, accordingly, '[t]he area of the perpetrator's activity and control are to be considered' . . . Account must also be taken of the prominence of the allegedly targeted part within the group as a whole."[57]

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[56] *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. 166, para. 296.

[57] *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. 65, para. 142.

8. Having cited from the ICTY judgment in *Krstić*, the Court then stated as follows:

> "[I]n evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group"[58].

And, it must be emphasized, the quantitative element relates to the part of the group that is targeted, not the part of the group that, as a result, is in fact destroyed. Substantiality is a matter of intent, not of *actus reus*.

9. So, to recap, for a genocidal intent to be inferred, the 2007 Judgment identifies three elements:

(a) first, substantiality, which the *Bosnia* Judgment characterizes as "the primary requirement", clarified in the *Croatia* case as requiring assessment of the "quantitative element";

(b) second, relevant geographic factors and the associated opportunity available to the perpetrators; and

(c) third, emblematic or qualitative factors including the prominence of the targeted part of the group.

We say, all three of these elements are plainly met in this case.

10. Paragraph 373 of the *Bosnia* Judgment set out the standard of proof to establish genocidal intent from circumstantial evidence, by reference to these three elements. It does so by reference to two distinct approaches, in the absence of direct evidence of a general plan. First, "the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances"[59]. The requisite standard in this case is that the proof must be "convincing". And second, and distinctly, the Court states that "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent"[60].

11. This distinction is really important. It may be that there are "particular circumstances" — perhaps in respect of a single incident or place (that was the case in relation to Srebrenica) — that are enough to show "convincingly" — on their own and without any need to have reference to any pattern of conduct — a genocidal intent. Or it may be that there is a wider "pattern of conduct" from

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[58] *Ibid.*

[59] *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. 196, para. 373.

[60] *Ibid.*

which genocidal intent is the only reasonable inference. Or it may be — third possibility (and we say that is the case in the present matter) — that there exist both "particular circumstances" established by "convincing" evidence (for example, in relation to each of the three villages separately), and a pattern of conduct that establishes genocidal intent as "the only reasonable inference".

12. I am going to address the application of each of these identified features to the circumstances of the present case.

1. Substantiality/the quantitative element

13. Substantiality first. On the quantitative element, let me reiterate what I said on Monday and what Mr Loewenstein repeated this afternoon: genocide is not a numbers game: there is no minimum number of victims necessary for genocide to have been committed. You do not have to have destroyed all of a group, or even most of it. What matters is that the targeted part of the group that is intended to be destroyed that is substantial, so that the targeting of that part is (and I quote from your Judgment in *Bosnia)* "significant enough to have an impact on the group as a whole"[61].

14. I am sorry to say that substantiality is convincingly established in the present case. The number of Rohingya targeted during the Tatmadaw's "clearance operations" was, by any reasonable standard, very significant, very substantial: this is because of the sheer number of villages attacked over the two waves of "clearance operations"; the number of people living in each those villages; and the nature and extent of the attacks in each of those villages. I have to say, we find it difficult to imagine that this Court could reasonably conclude that the number of Rohingya who were targeted and then actually the subjects of attacks could not be characterized as significant.

15. According to the FFM, the second wave of "clearance operations" alone — which began on 25 August 2017 — resulted in at least 10,000 deaths, and some estimates have stated a figure more than twice as high as that number — that is just the second wave of "clearance operations"[62]. It is also of course highly relevant that many children were targeted, explicitly, and killed — you are going to hear specific accounts from the witnesses next week on that kind of targeting that is not

[61] *Ibid.*, p. 126, para. 198.

[62] The International State Crime Initiative estimates that 22,000 Rohingya were killed: International Commission of Journalists, *Genocide Achieved, Genocide Continues: Myanmar's Annihilation of the Rohingya* (2018), p. 14, note 8, p. 50. RG, Vol. II, Annex 12 (additional excerpts to MG, Vol. IV, Annex 109). The Ontario International Development Agency reached a similar estimate of approximately 23,000 deaths: M. Habib *et al.*, *Forced Migration of Rohingya: the Untold Experience* (Ontario International Development Agency 2018), p. 68. RG, Vol. III, Annex 34.

targeting as counter-terror activity. As the joint interveners make clear in their very persuasive submission, children are essential to the survival of the group, so that the specific targeting of children — which is established by the evidence before you — is fully indicative on its own of an intent to destroy a substantial part of the group.

16. The "clearance operations" were also conducted on a significant scale, and this, too, bears on the quantitative aspect of the Court's assessment. The FFM verified through multiple sources that "clearance operations" took place in at least 54 different locations, with accounts of other "clearance operations" in a further 22 locations[63]. Those operations all took place at around the same time — what an amazing coincidence — and that is totally consistent with a co-ordinated and pre-prepared plan of action. It is, on its own, reflective of a particular intention. You do not accidentally attack 76 different sites at the same time. That requires planning and co-ordination. Their widespread and concurrent nature indicates that they were planned acts of violence. These were not operations that were reactive to incidents that occurred, and that is not even argued. I have to say that Myanmar's evidence to the contrary on this really is hopeless. There were large-scale massacres, in the words of the FFM, and they were against a substantial part of the Rohingya group. This is all confirmed by the language of the Facebook posts which you saw earlier in the week.

17. Two of the FFM's indicators of genocidal intent are, we say, especially significant in this respect: the extreme brutality of the attacks, first; and second, the sheer nature and scale and embrace of acts of sexual violence. Sexual violence is not ever an act of counter-terror or insurgency. It is these elements that evoke the Court's observations in *Croatia* v. *Serbia*, that in relation to a pattern of conduct 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"[64].

18. I apologize that we have come back more than once to this language, but it is absolutely central to establishing a genocidal intent. Mr President, any assessment of the quantitative aspect of substantiality in this case must take account of the overall "scale" of the timing of the attacks, within

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[63] MG, para. 12.2.

[64] *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.

each location, and numerically across so many different locations, and their systematic nature. The evidence before the Court reflects a common purpose to destroy — to destroy the Rohingya group, in whole or in part. Let me put it as a question on the basis of what you have heard. Would you say that it is a reasonable inference from the evidence before you that the intention was to destroy the group in whole or in part? That is a personal question for each of you to reflect upon and for each of you to come to your own conclusion. But can that question really be answered in the negative? We really think it cannot. And that is the first step to finding genocidal intent — a reasonable genocidal intent.

19. Let me put it another way. Even if — contrary to what is required by the law — even if one were to take the narrowest of focuses on the number of actual victims (rather than on the size of the targeted part of the protected group), then the number of Rohingya alone killed by the Tatmadaw "clearance operations" was at least as substantial, in respect of the group, as the number of Bosnian Muslims killed at Srebrenica. As you know, painfully, some 8,000 Bosnian Muslim men were killed at Srebrenica, out of a total population of around 50,000, that population having swelled as people fled from nearby areas. That means around 16 per cent of the Bosnian Muslims of Srebrenica were murdered in the genocide.

20. Let us look at each of the three villages addressed this week by The Gambia, where the particular circumstances convincingly demonstrate a genocidal intent. In Min Gyi, 750 people were murdered; about 400 of them were inhabitants of the village, while others had more recently fled there, as had happened at Srebrenica. So for the inhabitants alone, it is 10 per cent of the village's population, but if you take those who had fled to the area, it climbs closer to 20 per cent of the total, a population of 4,300 at the time of the "clearance operation". In Chut Pyin, out of a total population of 1,200, 328 people were killed — that is the murder of some 25 per cent or more of the entire Rohingya population. In Maung Nu, the total population of the village at the time of the "clearance operations" is not as clear, but the FFM describes there being about 400 households, and 100 people were killed in that village. That means one in four households had someone killed. That is, by any standard, a substantial number.

21. But it is not only the number of *deaths* that is going to be relevant. As Mr Loewenstein set out, the killings are just one of the elements of the *actus reus* of genocide. As the evidence before

you makes plain, there were acts of other kinds that took place. Hundreds of Rohingya women and girls were subjected to sexual violence. Hundreds of thousands of Rohingya were forcibly displaced from their homes — Cox's Bazar in Bangladesh is currently home — it is a staggering figure — to about one million Rohingya refugees, making it the largest refugee camp in the whole world[65]. At least 178 Rohingya villages have been totally destroyed — not damaged — totally destroyed, burned to the ground. And what that means is there is no village to which any of the survivors — tens of thousands of them from those villages — will ever be able to return[66]. I really invite you to focus on what it means to have 178 villages destroyed. Nothing on that scale — nothing close to that scale — happened in any part of the Yugoslavia conflict, not in Bosnia, not in Croatia, not in Serbia. The nature, timing and scale of these operations is vast and it makes clear that it targeted a substantial part of the Rohingya community, and the sheer numbers of the targets show, beyond any doubt — not even a reasonable doubt — the existence of a reasonably inferable genocidal intent.

2. Relevant geographic factors and the opportunity available to the perpetrators

22. Let me turn to the second criterion identified by the Court: the geographic element of the targeted group, and the opportunity that was available to the perpetrators to kill and to maim.

23. The Court has noted, in a passage that I took you to earlier, that "it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area"[67]. What this means, according to the Court, is that "[t]he area of the perpetrator's activity and control are to be considered"[68]. Myanmar, in its written pleadings, says that

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[65] See "Inside the Kutupalong refugee camp, Cox's Bazar", *Malteser International*, available at https://www.malteser-international.org/en/our-work/asia/bangladesh/life-in-a-refugee-camp.html; "Rohingya in Bangladesh: the world's largest refugee camp", *Help Refugees Now*, available at https://help.refugees.now/en/news/rohingya-in-bangladesh-the-worlds-largest-refugee-camp/; United Nations Population Fund, *Cox's Bazar, Bangladesh*, available at https://www.unfpa.org/coxs-bazar-bangladesh.

[66] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 959. MG, Vol. II, Annex 40; United Nations Institute for Training and Research, *Affected settlements in Buthidaung, Maungdaw and Rathedaung Townships of Rakhine State in Myanmar* (18 October 2018). MG, Vol. III, Annex 70.

[67] *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. 65, para. 142, citing *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. 126, para. 199.

[68] *Ibid.*, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 126-127, para. 199.

it had the opportunity to target even more members of the Rohingya community[69]. With great respect, that is a truly horrible argument. It is made in particular at paragraphs 13.114-13.116 of their Counter-Memorial. Please read it, because what it seems to be saying — who knows who wrote it — is that what has passed cannot be characterized as genocide within the meaning of the 1948 Convention because even more people could have been targeted or killed. It is not genocide, they say, because we did not make use of the full opportunities available to us, to target or to kill. Now, that really is not an attractive argument. But more importantly, it ignores the point of the Court's jurisprudence that we have to focus not on the totality of all areas but the limited areas where the activities took place. You have said that feature is to be taken into account, and we have taken it into account in making our arguments.

24. Although the Tatmadaw carried out "clearance operations" across three townships in northern Rakhine State, its focus was more extensive. According to data from the UN Operational Satellite Applications Programme, the targeted area of the Tatmadaw's "clearance operations" stretches across more than 110 km — from the northernmost tip of Maungdaw Township, all the way to the settlements of Koe Tan Kauk and Chein Khar Li on the southern coast[70], and this covers the area — amazing coincidence — that just happens to have the largest Rohingya population in northern Rakhine State[71]. And it is only in northern Rakhine State, of course, that the Rohingya are a majority of the population, where they make up 80 per cent of the population. The fact that some Rohingya in other areas were not targeted in the same way cannot and does not undermine the genocidal intent that is a reasonable inference for Myanmar's actions in the geographically more limited targeted area — it is precisely to account for such realities that this Court (in its earlier cases) identified the need to address the particular geographical area of a perpetrator's activities, in considering the substantiality threshold, not the totality of all geographic areas. The area that was targeted in this case is a significant and representative geographical area for the Rohingya group, and its targeting is, plainly, of a substantial part of the Rohingya group, by any reasonable standard.

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[69] CMM, paras. 13.114-13.116.

[70] "The Rohingya Crisis, Burned to the ground", *Reuters Graphics* (31 December 2017), available at https://fingfx.thomsonreuters.com/gfx/rngs/MYANMAR-ROHINGYA-RAKHINE/0100606Y0FE/index.html.

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

25. In respect of the opportunity available to the perpetrator, Myanmar identifies other opportunities that it says it had, but did not take, to kill members of the Rohingya. For example, on Myanmar's approach, you, the Court, are invited to take account of the fact that there have been no killings of Rohingya in the internally displaced persons (IDP) camp, where approximately 126,000 Rohingya have been confined, and the fact that it would have been possible to kill a lot more Rohingya inhabitants of Rakhine State, but somehow that did not happen. But the argument ignores the fact that killing is not the only genocidal act of relevance; it ignores the fact that the Court has made clear that genocide may, definitionally, target the group *in part*, in a limited geographic area; and it ignores the fact that the part of the group targeted in this case — a very substantial part — were those who lived in the villages and areas set out by the FFM and in The Gambia's evidence. Myanmar witters on about targeting others in the IDP camps and elsewhere. Yet it has targeted them, just with acts other than killing. It has confined them in camps — under conditions, with restrictions on movement, employment, livelihood and on access to healthcare. And we say that too is genocidal in effect, because the confinement destroys the community's way of life and its culture and the conditions to which the community is exposed are calculated to ensure their destruction as a group.

3. Emblematic or qualitative factors

26. The third and final consideration in respect of the targeting of a substantial part of the group is whether there are emblematic or qualitative factors which make the targeted part of the group particularly significant. And there are: you can read it for yourself in the FFM report. There was targeting of "educated, wealthy and influential men" who comprised the Rohingya leadership. They were, according to the FFM, "specifically targeted"[72]. And so, too, were children targeted, as you have heard from Mr Lowenstein — described in appalling detail. The intentional killing of children offers the clearest evidence that Myanmar's actions against the Rohingya were committed with the intent to destroy the group, in whole or in part. What other reason is there for targeting children and infants? What is the justification for throwing a child into a fire pit or into a river? What is the justification? We look forward to hearing what the justifications are later in the week. And, of course, the same can be said of sexual violence, which targeted so many women and young girls.

[72] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1431. MG, Vol. II, Annex 40.

The acts that have been described to you are shocking by any standard, in nature and in scale. Ask yourself the question: what was the intention of those acts? Counter-insurgency? Really!

27. In short, emblematic groups were targeted, and that offers further confirmation of the existence of a genocidal intent.

4. Particular circumstances and the "convincingly shown" standard

28. I turn back briefly to the standard of proof of genocidal intent, set out by the Court in *Bosnia* v. *Serbia*, at paragraph 373. In the absence of said direct evidence of a general plan, we have the two approaches to the standard for circumstantial evidence: "particular circumstances" require "convincing" evidence; and a "pattern of conduct" requiring that genocidal intent is to be established on the basis of "the only reasonable inference" test.

29. There is no magic to the Court's formulation; in fact, it seems ultimately to be an approach with which both Parties and all the interveners largely agree. These are pretty regular and ordinary legal thresholds, familiar to anyone involved in practice before this Court and other courts. But they point to essentially the same position: you have got to be sure from the evidence that the acts identified took place with a genocidal intent.

30. And we submit that the particular circumstances of the acts that took place in Chut Pyin, Min Gyi and Maung Nu, and at the other villages identified by the FFM, allow the Court to conclude, with really no difficulty at all, that a genocidal intent is established by reference to the standard of convincing evidence — because of the nature of the attacks: because of their extreme brutality; because of the extensive and sadistic sexual violence, including against children; the heinous murder of infants and children, and the substantial number of Rohingya affected in these locations. To the extent that the Court needs anything more to be convinced, to get you over the line, I refer you to the submissions of Mr Suleman on Monday, and in particular that part of his submissions that addressed "Myanmar's clandestine anti-Rohingya propaganda campaign on Facebook"[73]. Please go back over that material and read it against the background of what actually happened, and ask yourself the question: what does that establish as the intent of those actions? The Facebook messages and the

[73] CR 2026/2, p. 53 *et seq.* (Suleman).

other messages, circulated at the time of "clearance operations", offer the most graphic and compelling confirmation that these acts were plainly accompanied by a genocidal intent.

5. Pattern of conduct and the "only reasonable inference" standard

31. And as regards the wider "pattern of conduct" standard, we submit that exactly the same conclusion is easily justified. This is not just across those three villages, but the three taken together with the 51 other locations identified in northern Rakhine State, where "clearance operations" took place — places where the Rohingya villagers were killed, where women and girls were raped and mutilated; where fleeing children were shot in the back or thrown into burning fires; and where villages and homes were razed to the ground by fire. Taken together, we invite you to ask yourself a simple question — anyone in this room can ask the question: having regard to the totality of the evidence that you have heard, this week, on the acts that have been carried out, and the accompanying material you have seen, is it a reasonable inference that they reflected a genocidal intent? The answer to that question is straightforward. The question answers itself. It has to be: yes. And this is all the more so when you take into account the other material to which I have not yet taken you: the history of discriminatory persecution, the long-standing anti-Rohingya hate propaganda, the videos of utterances by soldiers as they carried out their atrocities, the clandestine propaganda, the destruction of evidence, and the total impunity that has followed, now for almost a decade.

32. The FFM assessed all of these elements, although you have more material available to you than they did. It found a strikingly similar "pattern of conduct". How could it possibly have concluded otherwise? It identified the seven indicators of genocidal intent and found every single one of them to be present in the case of the Rohingya. We have taken you through those indicators over the course of our presentations this week. The FFM concluded that the inference of a genocidal intent is a reasonable one. You have got even more material than they had available to them.

33. So we invite the Court to conclude, as a first step in its analysis on genocidal intent, that it is a reasonable inference to conclude that the pattern of conduct reflects a genocidal intent. The conclusion is supported by the language of the 1948 Convention; by the interpretation and application of the Convention by this Court, by other international criminal tribunals and courts, and by national courts (and, in particular, I am thinking of the courts in Germany, which have done so much to clarify

and help on genocidal intent). It would be extraordinary, we say, for the Court to reach a different conclusion than the FFM, namely that a genocidal intent is a reasonable inference to be drawn from all of this material.

34. And now, Mr Reichler will set out why genocidal intent is the *only* reasonable inference to be drawn from the pattern of conduct. I thank the Court once again for its attention and invite you to call Mr Reichler to the Bar.

The PRESIDENT: I thank Professor Sands for his statement. I now call Mr Paul Reichler to the podium. You have the floor, Sir.

Mr REICHLER:

III. GENOCIDAL INTENT IS THE *ONLY* REASONABLE INFERENCE

1. Mr President, Members of the Court, good afternoon.

2. Professor Sands has shown you that Myanmar's intent to destroy the Rohingya group, as such, is a manifestly reasonable inference to draw from its pattern of conduct. In fact, it is *more* than a manifestly reasonable inference. It is the *only* reasonable inference that can be drawn from that conduct.

3. This is true for at least two compelling reasons, upon which I will focus this afternoon.

4. First, the inference that Myanmar asks you to draw from its conduct — that their intention was counter-terrorism — is manifestly *un*reasonable. This is the only alternative inference that Myanmar offers. In light of the evidence you have heard this week, an inference of counter-terrorism would be both counter-intuitive and counter-factual. It is simply not reasonable.

5. I will not rehash that evidence. You heard it this morning from my good friend Mr Suleman. You do not need to hear it again from me. I will simply state the *nine* conclusions that, we say, must inevitably be drawn from that evidence.

6. *One*, deliberately targeting, shooting indiscriminately at, and massacring thousands of Rohingya civilians — unarmed, unthreatening and defenceless Rohingya civilians — is not counter-terrorism; it is the opposite of counter-terrorism. It is mass, premeditated murder. And this is what the evidence shows Myanmar did systematically in scores of Rohingya villages.

7. *Two*, inflicting extreme brutality on these civilians — by setting fire to their homes and burning them alive; by rounding up men and young boys and killing them execution-style; by butchering women and children with bayonets and long knives; by bashing in infants' skulls with rifle butts in front of their mothers before killing them, too — this is not counter-terrorism; yet this, too, is what the FFM found to have taken place in multiple Rohingya villages across Rakhine State[74].

8. *Three*, engaging in widespread acts of sexual violence and cruelty is not counter-terrorism; yet it is irrefutable that the Tatmadaw raped and gang raped hundreds of Rohingya women and girls, including children, in these villages, often torturing and mutilating them, by cutting off their breasts and slicing their genitals, in too many cases and too many different villages to be coincidental[75]. This cannot be counter-terrorism.

9. *Four*, razing and completely destroying more than 175 Rohingya villages and partially or mostly destroying over 210 more cannot be counter-terrorism. Counter-terrorism does not destroy villages, it protects them, by securing them against attack and bringing physical safety and protection to the inhabitants. This is the exact opposite of what the evidence shows Myanmar did.

10. *Five*, it is not counter-terrorism when the Tatmadaw completely ignore and egregiously violate their own rules of engagement, as they did during the "clearance operations" in scores of Rohingya villages across northern Rakhine State, and they treat the entire Rohingya population — men, women, children, the elderly, the infirm — as an enemy to be destroyed. As Professor Newton, the counter-terrorism expert, explains, Myanmar knows what counter-terrorism is and what it requires. Its armed forces are not primitive. They are sophisticated, well organized, disciplined and obedient to the chain of command. Their rules of engagement reflect modern, universal standards, incorporating the laws of war, emphatic on the need to protect the civilian population rather than target it. Yet, they might just as well have tossed the rules of engagement into the same fires they set to destroy the Rohingya and their villages, for all the attention they paid to them[76].

11. *Six*, the "clearance operations" were so wildly and blatantly disproportionate to the threat that ARSA was said to represent, and involved such an overwhelming number of troops and use of

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[74] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), paras. 1432-1433. MG, Vol. II, Annex 40.

[75] *Ibid.*, paras. 920-941.

[76] See Second Expert Report of Michael A. Newton (May 2024), paras. 11-18. RG, Vol. IV, Annex 67.

force in relation to that threat, that it cannot be reasonably inferred that Myanmar's intent in carrying out these operations was simply to defeat a low-level, poorly armed and ill-equipped group of rebels who controlled absolutely no territory. Of course, Myanmar had the right to respond to ARSA's provocations, whatever their size or threat; we do not contend otherwise. What we *do* contend is that it is not reasonable to infer that the Tatmadaw were deployed in such numbers and force, in so many Rohingya villages, in response to ARSA, especially when the "clearance operations" targeted the entire Rohingya population in those villages, as if every single Rohingya was by Myanmar's definition an ARSA combatant. And these murderous operations were carried out in more than 180 Rohingya villages, as you were shown this morning, in which — Myanmar itself admits — there was no ARSA presence. If their objective was to defeat ARSA, the means they chose was to destroy all the Rohingya as a group. That is not counter-terrorism.

12. *Seven*, the "clearance operations" in northern Rakhine State differed markedly from actual counter-terrorism or counter-insurgency operations carried out by the Tatmadaw elsewhere in Myanmar. Myanmar contends that the same *modi operandi* were employed in those other regions, where they have *not* been accused of genocide and it suggests that, if similar operations were considered counter-terrorism there, it is reasonable to infer that they were counter-terrorism operations here. But this is based on an entirely false predicate. Myanmar has not provided the evidence to show that the "clearance operations" against the Rohingya bear a significant resemblance to its operations elsewhere. And the FFM, whose mandate included investigating and reporting on Myanmar's operations against insurgencies in other parts of the country, concluded that those operations did *not* bear the hallmarks of genocidal intent that the Mission found to exist during the "clearance operations" against the Rohingya in northern Rakhine State[77].

13. *Eight*, within Rakhine State, there was an insurgency larger and more threatening than that of ARSA. If the intent of the "clearance operations" was counter-terrorism, why were they not directed at the Arakan Army? Why were ethnic Rakhine villages undisturbed? In mixed villages, why were only Rohingya houses and structures destroyed, with Rakhine structures left standing? The Arakan Army —which, as you heard, the UN Mission describes as "a well-trained force that operates

[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 September 2018), paras. 1362-1364, 1418, 1439-1441. MG, Vol. II, Annex 40.

under a clear command structure" with a significant military armoury[78] differed from ARSA not only in its size and potency, but also — and most significantly for present purposes — in its ethnic and religious composition. As you have heard, the Arakan Army was composed of ethnic Rakhine Buddhists. You have seen the satellite imagery. In the many villages depicted, only the Rohingya areas were burned to the ground, while the Rakhine areas were untouched[79]. Why did the Tatmadaw attack Rohingya civilians and villages but not Rakhine civilians or villages, when the bigger threat of terrorism was from the Rakhine Arakan Army? The answer is obvious. This was not counter-terrorism. This was counter-Rohingya.

14. *Nine*, and finally, as distinguished from the ethnic Rakhine, the Rohingya were despised, discriminated against and targeted by the Myanmar Government, based on their race and religion, since long before ARSA existed. It is undisputed that Myanmar refused to recognize or accept the Rohingya as a national racial group, excluding them as foreign "Bengalis", despite their presence in the country for centuries, and excoriating them as subhuman. They were denied citizenship and nationality; subjected to restrictions on marriage and childbirth to prevent population growth; denied opportunities of employment and livelihood; restricted in their movement and access to food and health care; deprived of basic rights available to other ethnic, racial and religious groups. They were also regularly subjected to barrages of hate speech, not only as tolerated by the Government but as practised by it — especially by the Tatmadaw in public declarations by its leaders and on social media — and by its incitement of other racial groups, including Rakhine Buddhists, to despise and rise up violently against them. As publicly proclaimed by the Tatmadaw's supreme commander, the very presence of the Rohingya had long been a problem, an alien group whose procreation threatened to "swallow up" Myanmar's favoured racial and religious groups; and the "clearance operations" were launched to finally solve this problem. This was not counter-terrorism. It was the antithesis of counter-terrorism. It was genocide.

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[78] UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/ CRP.5 (16 September 2019), paras. 261, 263.

[79] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), paras. 972-974. MG, Vol. II, Annex 40; Amnesty International, *"My World Is Finished"* (2017), pp. 35-37. MG, Vol. IV, Annex 99.

15. Mr President, Members of the Court, in their written pleadings the Parties have placed two different inferences before you, only two — inferences to be drawn from Myanmar's pattern of conduct. We say, the only reasonable inference that can be drawn from the evidence is that Myanmar acted with the intent to destroy the Rohingya as a group, as such, in whole or in part. They say that the evidence permits you to infer that all of this conduct was intended as counter-terrorism, and nothing more. Mr President, this is simply not sustainable. It is not reasonable. As Professor Sands said, it is hopeless. The evidence before you not only fails to permit a reasonable inference that Myanmar's intent was counter-terrorism, it precludes such an inference.

16. I come now to the second reason why genocidal intent is the only reasonable inference that can be drawn from Myanmar's pattern of conduct. This assumes *quod non* that Myanmar's motive, or at least one of its motives, in carrying out the "clearance operations" in northern Rakhine State, was, as it tells us, to respond to ARSA. *Even if* this were a *motive*, which we do not accept, it would *still* be the case that the only reasonable inference that can be drawn from Myanmar's pattern of conduct is that its *intent* was to destroy the Rohingya as a group. This is because the law and your jurisprudence recognize a distinction between motive and intent, as reflected in the judgments of the ICTY on which the Court relied in both the *Bosnia* and *Croatia* cases.

17. The point was made most clearly by the ICTY Appeals Chamber's ruling in the *Krnojelac* case, citing the earlier *Jelisić* case, in which it explained that in determining whether the specific intent required to prove genocide is present, there is a "necessity to distinguish specific intent from motive"[80]. In particular

> "[t]he personal motive of the perpetrator of the crime of genocide may be, for example, to obtain personal economic benefits, or political advantage or some form of power. The existence of a personal motive does not preclude the perpetrator from also having the specific intent to commit genocide."[81]

18. In the *Blaškić* case, the Appeals Chamber further explained that

> "*[m]ens rea* is the mental state or degree of fault which the accused held at the relevant time. Motive is generally considered as that which causes a person to act . . . [A]s far as

[80] *Prosecutor* v. *Milorad Krnojelac*, IT-97-25-A, Appeals Judgement (17 September 2003), para. 102 (citing *Jelisić*, IT-95-10-A, Judgement (5 July 2001), para. 49).

[81] *Ibid.*

> criminal responsibility is concerned, motive is generally irrelevant in international criminal law."[82]

19. Where the perpetrator is a State, like Myanmar, the motives of its senior officials may also be personal or political, and may include, for example, to defeat an insurgent force, such as ARSA. On Myanmar's case, we can proceed on an assumption, *quod non*, without agreeing, that this may have been one of their motives for launching the "clearance operations" at the time they chose. But there is no inconsistency between Myanmar or its officials having this motive and, at the same time, having a specific intent, during the "clearance operations", while committing the *actus reus* of genocide to destroy the Rohingya as a group — either as an end in itself or as a means of defeating ARSA by depriving it of its potential base of support. The motive to defeat ARSA can thus exist alongside a specific intent, to destroy the Rohingya group, or a substantial part of it, manifested in the manner and means by which the "clearance operations" were carried out against the civilian population. Indeed, the Tatmadaw's putative motive and specific intent were complementary: the ostensible object of defeating ARSA was pursued by means of the deliberate destruction of the Rohingya group, as such. The stated objective served as a convenient façade behind which the Rohingya group as a whole could be targeted for destruction, as the evidence shows it was.

20. Now, this is not the first armed conflict in which a warring party seized the opportunity, under cover of combat, to target for destruction a despised racial, ethnic or religious minority, which it treated as an enemy population to be destroyed. On Monday, I recalled Judge Cançado Trindade's prescient words from the *Croatia* case, which ring as true as ever in the circumstances of this case: the "perpetrators of genocide will almost always allege that . . . their actions were taken 'pursuant to an ongoing military conflict'" — they are not very original — "yet 'genocide may be a means of achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan'"[83].

21. The International Criminal Tribunal for Rwanda (hereinafter ICTR) considered this very issue in the *Akayesu* case, about which my colleagues have spoken. The Trial Chamber there faced

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[82] *Prosecutor* v. *Tihomir Blaškić*, IT-95-14-A, Judgement (29 July 2004), para. 694 (citing *Tadić*, IT-94-1-A, Judgement (15 July 1999), para. 268).

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

the question "whether the tragic events that took place in Rwanda . . . occurred solely within the context of the conflict between the [Rwandan Armed Forces] and the [Tutsi-led Rwanda Patriotic Front, or RPF]"[84]. The Chamber found that these events did not take place *solely* within that context, finding that "the genocide did indeed take place against the Tutsi group, alongside the conflict"[85]. The Tribunal explained:

> "[T]he massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin and not because they were RPF fighters. In any case, the Tutsi children and pregnant women would, naturally, not have been among the fighters"[86].

Likewise, the FMM emphasized, the Rohingya civilian villagers of northern Rakhine State, including but not limited to pregnant women and children who were killed by the Tatmadaw, were targeted because they were Rohingya, not because they were ARSA fighters[87].

22. Another example can be found in the *Karadžić* case in the Appeals Chamber of the IRMCT. Karadžić, the leader of the Bosnian Serbs, appealed his conviction of genocide for his role in the Srebrenica massacre. He claimed in both the Trial and Appeals Chambers that certain statements attributed to him demonstrated that he had military objectives, thus — in his view — ruling out genocidal intent as the only reasonable inference. The Appeals Chamber rejected this argument and upheld his conviction: "Karadžić merely provide[d] an alternative interpretation of the evidence but fail[ed] to demonstrate that the Trial Chamber's interpretation of his statement or its reliance on it in establishing his intent was unreasonable."[88]

23. Belgium, in its intervention in these proceedings, cited a decision by a German court, the Higher Regional Court of Frankfurt, in the criminal prosecution of an ISIS fighter for participation in the genocide of the Yazidis in northern Iraq. The court there found that genocide was an interim goal in the Islamic State's broader military campaign aimed at establishing a caliphate. For Belgium,

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[84] *Prosecutor* v. *Jean-Paul Akayesu*, ICTR-96-4-T, Trial Judgement (2 September 1998), para. 127.

[85] *Ibid.*, para. 127.

[86] *Ibid.*, para. 125.

[87] UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 751. MG, Vol. II, Annex 40.

[88] *Prosecutor* v. *Radovan Karadžić,* MICT-13-55-A, Appeals Judgement (20 March 2019), para. 631.

the case illustrates that genocidal intent may be present "even when the ultimate military objective with which the intent coincides goes beyond the immediate destruction of the protected group"[89].

24. Myanmar's "clearance operations", which it claims were aimed at ARSA, did not succeed in defeating ARSA, which still exists, and in fact — in fact — ARSA is now allied with the Tatmadaw against the Arakan Army. This gives new meaning to the concept of "strange bedfellows" — and it reflects the ultimate cynicism of *both* members of this unholy union. But the "clearance operations" *did* fulfil their intention of destroying the Rohingya, in substantial part, as a group within Myanmar, by killing many thousands of them, clearing them out of hundreds of their villages, preventing them from returning, and forcing hundreds of thousands to flee to safety in Bangladesh, where they remain — without any foreseeable hope of repatriation — in the squalid and life-draining conditions of the world's largest refugee camp.

25. *Mission accomplished!* At least, that is what the Tatmadaw and its Supreme Commander and Head of State, Senior General Min Aung Hlaing, and his criminal accomplices, could smugly conclude about the success of their carefully planned "clearance operations".

26. Mr President, the Court itself has recognized the difference between motive and intent, in its own reasoning, and by its reliance on the relevant ICTY judgments in both the *Bosnia* and *Croatia* cases. In *Bosnia*, the Court stated that the intent to commit genocide is "to be distinguished from other reasons or motives the perpetrator may have"[90]. It found in that case that that the Serb perpetrators massacred Muslim men and boys at Srebrenica with genocidal intent, despite finding that "an essential motive of much of the Bosnian Serb leadership — to create a larger Serb State, by a war of conquest if necessary — did not necessarily require the destruction of the Bosnian Muslims and other communities, but their expulsion"[91].

27. Judge Bhandari, recalling the *Bosnia* case in his separate opinion in the *Croatia* case, agreed that "genocidal *intent* may exist *simultaneously* with other, *ulterior motives*", and he called

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[89] Declaration of intervention of the Kingdom of Belgium, para. 25 (citing Higher Regional Court of Frankfurt, Taha Al-J. case, first instance, 30 Nov. 2021, available at https://www.rv.hessenrecht.hessen.de/bshe/document/LARE220002903, IV (1) *(b) (bb)*; German Federal Court of Justice, Taha Al-J. case, appeal, 30 Nov. 2022, available at https://www.hrrstrafrecht.de/hrr/3/14/3-575-14-1.php, B (II) (1) *(a) (aa)*).

[90] *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. 122, para. 189.

[91] *Ibid.*, p. 196, para. 372.

attention to the ICTY's finding in *Popović* "that the massacre at Srebrenica enclave was in part motivated by the strategic advantage of uniting a 'Greater Serbia'"[92]. He went on to observe: "Never was it suggested that this tactical motivation precluded the attack from possessing genocidal intent."[93]

28. In the *Bosnia* case, as you know, the Court found that, *outside* of Srebrenica, an intent to commit genocide was *not* the only reasonable inference that could be drawn from the Bosnian Serb forces' pattern of conduct. This was because, the Court found that it could also be reasonably inferred from the evidence in that case that the intent of those forces was the expulsion, or ethnic cleansing, of Muslims from Serb-occupied territory, rather than their destruction. However, the Court made a point of explaining that, where the evidence warrants, it can be concluded that acts of ethnic cleansing have been committed with genocidal intent:

> "This is not to say that acts described as 'ethnic cleansing' may never constitute genocide, if they are such as to be characterized as, for example, 'deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part' . . . that is to say with a view to the destruction of the group, as distinct from its removal from the region."[94]

29. In the present case, as we underscored on Monday, Myanmar does not defend itself by arguing that its "clearance operations" were for the purpose of ethnic cleansing, or the removal of the Rohingya group from the region they inhabited. It argues that its purpose in carrying out these operations was counter-terrorism. But the lessons from the *Bosnia* and ICTY cases are just as pertinent. What they tell us is that whatever the *motive* for the perpetrator's *actus reus*, if the particular circumstances or pattern of conduct show that this act, or these acts, were carried out with specific *intent* to destroy the group, genocidal intent will be the only reasonable inference. On this basis, the only reasonable inference to be drawn from the killings, burnings, extreme brutality, sexual violence, destruction of villages and massive forced displacement of the Rohingya population, carried out by Myanmar in the name of "counter-terrorism", must be that Myanmar acted with genocidal intent.

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[92] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, separate opinion of Judge Bhandari, p. 441, para. 50 (emphasis in original).

[93] *Ibid.*

[94] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 123, para. 190.

30. The *Croatia* case is also pertinent. There, as in the *Bosnia* case, the Court found that genocidal intent was *not* the only reasonable inference that could be drawn from the Serb forces' pattern of conduct. Instead, it concluded that the acts constituting the *actus reus* of genocide "were not committed with intent to destroy the Croats, but rather with that of forcing them to leave the regions concerned so that an ethnically homogeneous Serb State could be created"[95]. However, the Court accepted that genocidal intent could have been established, if the evidence had shown that "the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group"[96]. Thus, even where the perpetrator's motive is forced displacement, or ethnic cleansing, a finding that it acted with genocidal intent is not precluded, if the intent of the perpetrators, at the time they carried out these acts, was to destroy the group.

31. The Joint Interveners — Germany, France, Canada, Denmark, the Netherlands and the United Kingdom — make the same point: that forced displacement can be carried out in circumstances that demonstrate genocidal intent. Citing the ICTY, they say:

> "In relation to Article 11 *(b)* [of the Convention] . . . 'forced displacement may — depending on the circumstances of the case — inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.'"[97]

32. As we made clear in our written pleadings[98], we agree. In fact, we have already said: the massive forcible displacement of the Rohingya group, with hundreds of thousands forced to flee across the border to Bangladesh, during and in the wake of the "clearance operations" that destroyed or partially destroyed more than 390 Rohingya villages, was carried out — along with the other atrocities attendant to the "clearance operations" — with the specific intent to destroy the Rohingya as a group within Myanmar.

33. What the jurisprudence shows is that the perpetrator's motive may be forced displacement or ethnic cleansing to establish an ethnically pure State, or it may be counter-terrorism to defeat an

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[95] *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. 124, para. 426.

[96] *Ibid.*, p. 114, para. 376.

[97] Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, para. 46 (citing *Tolimir*, IT-05-88/2-A, Judgment, 8 April 2015, para. 209).

[98] MG, para. 4.19; RG (23 May 2024), para. 3.21.

insurgency. But motive, whatever it is, does not tell us whether genocide has been committed. That depends on the intent of the perpetrators in carrying out these actions, and whether the particular circumstances or the pattern of conduct manifests a specific intention to destroy a protected group, as such, in whole or in part.

34. What this means is that it is insufficient for Myanmar to tell us that its motive for launching the "clearance operations" against hundreds of Rohingya villages was counter-terrorism, even if such were the case — *quod non.* That motive, even in the unlikely event that the Court were to suspend disbelief and allow itself to be persuaded that it was present, does *not* displace or disprove the existence of genocidal intent. Far from it. On the evidence before the Court — evidence which, as you have heard, is compelling and overwhelming — there is only one reasonable inference that can be drawn regarding Myanmar's intent: to destroy the Rohingya group, as such.

35. Mr President, it is worth observing that the Court has used different linguistic formulations to express this standard of proof, which has come to be known as the "only reasonable inference" standard. In the *Bosnia* case, for example, the Court said, in respect of genocidal intent, "for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it *could only point* to the existence of such intent"[99].

36. In the *Croatia* case, the Court framed the question thusly: "Is there a pattern of conduct from which *the only reasonable inference* to be drawn is an intent of the Serb authorities to destroy, in part, the protected group?"[100] Then, in explaining its approach to answering this question, the Court said that

> "the Court will examine first whether the acts committed by the JNA [the Yugoslav army] and Serb forces form part of a pattern of conduct and, if so, it will then consider whether an intent to destroy the Croat group is the *only reasonable conclusion* that can be inferred from that pattern of conduct"[101].

So we see from these two cases three different ways of describing the applicable standard of proof of genocidal intent: evidence that "could only point to" it; evidence from which it is the "only

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[99] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373 (emphasis added).

[100] *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. 119 (emphasis added).

[101] *Ibid.*, p. 120, para. 410 (emphasis added).

reasonable inference" to be drawn; and evidence from which it is "the only reasonable conclusion" that can be inferred.

37. To be clear, we are not suggesting that there is any uncertainty about what the standard of proof is. There is no uncertainty. The different formulations in the *Bosnia* and *Croatia* cases, in our view, all describe the same standard, the "only reasonable inference" standard. The Court has been very clear about this, in our view. But the different words used by the Court to describe the standard help us to better understand what it means. By "only *reasonable* inference" or "only *reasonable* conclusion," we understand that other inferences or conclusions — besides an intent to destroy the protected group — may be possible or plausible, but they will not prevent a finding of *dolus specialis* unless they are *reasonable.* There may be other points on the compass, but they are irrelevant if the arrow "could only point to" genocidal intent.

38. We say, based on the evidence, that counter-terrorism is not even a possible or a plausible inference to be made in this case. It is not even a point on the compass. But even if it were, it would not prevent genocidal intent from being the only reasonable inference, because counter-terrorism is by no means a reasonable inference.

39. The Court's approach to inferring intent works. It works because it understands and takes account of human nature. Science teaches us that human beings rarely act for one single reason. Freud explained that any human behaviour is typically caused by multiple interconnected factors. Human motivation, in his view, is driven by "a seething cauldron of conflicting motives and desires" rather than any single reason[102]. The Court's task, as defined in its jurisprudence, is not to dive into that cauldron and psychoanalyse the perpetrators — in this case the Tatmadaw — but to discern from the particular circumstances, or from their pattern of conduct, whether — whatever else may be seething among their conflicting motives — they acted with a specific intent to destroy the Rohingya as a group, in whole or in part.

40. In its intervention, the Democratic Republic of the Congo cites to a 2024 treatise, entitled *The Genocide Convention, an Article by Article Commentary*, authored by Professors Tams, Berster and Schiffbauer. In it, the distinguished authors observe that "no monocausal psychological

[102] Rod A. Martin, *The psychology of humor: An integrative approach* (2007). Elsevier (referencing Sigmund Freud, *A general introduction to psycho-analysis* (1935) New York: Liveright Publishing), available at https://archive.org/details/psychologyofhumo00martrich/page/32/mode/2up?q=cauldron, p. 33.

relationship is required" to prove *dolus specialis* and "the victims' group affiliation may be one reason to act within a 'bundle of motives'"[103]. They go on to explain:

> "Within the complex realm of human decision-making, even the perpetrators themselves will often be incapable to discern the extent to which their actions relied on one motive versus another within a multitude of motives. All the more, a court would have tremendous difficulty in attaining adequate clarity regarding the significance and hierarchical structure of the motives at play."[104]

41. This is why, we submit, criminal law, and international law, distinguish between motive and intent. Thus, even if, within their own seething cauldron, the Tatmadaw harboured a motive to combat ARSA, which we say Myanmar has not proven, it would be irrelevant to the central issue before the Court: whether they acted with the intent to destroy the Rohingya as a group, in whole or in part.

42. In sum, what both the Court's jurisprudence and our knowledge of human behaviour teach us is that Myanmar can incant the word "counter-terrorism" all it wants. But there are no magic words that can turn fiction into reality or, in this case, turn its proffered inference, which is completely belied by its own conduct during the "clearance operations", into a reasonable one. We submit that the compelling evidence you have heard this week, and have seen in our written pleadings, should leave you with no doubt that the only *reasonable* inference — the only *reasonable* conclusion — you can draw from it is that Myanmar's armed forces acted with the specific intent to destroy the Rohingya as a group. As the Court said in the *Bosnia* case: "Where these requirements are satisfied . . . the law must not shy away from referring to the crime committed by its proper name"[105]: genocide.

43. Mr President, before concluding, I wish to make a correction to something I said in my presentation on Monday afternoon. In discussing the witness statements submitted by The Gambia, I said that of the 48 statements, not including those supplied by the IIMM, 14 had the names of the

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[103] Declaration of intervention of the Democratic Republic of the Congo, para. 26 (citing Christian J. Tams, Lars Berster and Björn Schiffbauer, *The Genocide Convention. Article-by Article Commentary*, München, C.H. Beck, 2nd ed., 2024, pp. 168-169 (Lars Berster)).

[104] *Ibid.*

[105] *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. 164, para. 293 (citing *Krstić*, IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, paras. 37-38).

witnesses redacted for their protection, at their request. The correct number is 30. I apologize for the error, and for any inconvenience this might have caused for the Court or the Registry.

44. This, Mr President, Members of the Court, concludes my presentation this afternoon. And it also concludes The Gambia's presentation for the day. I thank you again for your kind courtesy and patient attention. And I bid you a good evening.

The PRESIDENT: I thank Mr Reichler, whose statement brings this sitting to a close. The oral proceedings in the case will resume tomorrow, Thursday 15 January 2026 at 10 a.m., when the Court will hear the remainder of The Gambia's first round of oral argument.

The sitting is closed.

The Court rose at 4.50 p.m.

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