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International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2026

Public sitting

held on Friday 16 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 vendredi 16 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

The Government of the Republic of The Gambia is represented by:

HE Mr Dawda Jallow, Attorney General and Minister of Justice, Republic of The Gambia,

as Agent;

Ms Yasmin Al Ameen, Attorney at Law, Foley Hoag LLP, member of the Bar of the State of New York,

Mr Pierre d'Argent, Full Professor, Université catholique de Louvain, member of the Institut de droit international, Foley Hoag LLP, member of the Bar of Brussels,

Ms Diem Huong Ho, Attorney at Law, Foley Hoag LLP, member of the Bars of England and Wales and the State of New York,

Ms Jessica Jones, Barrister at Law, Matrix Chambers, London, member of the Bar of England and Wales,

Mr Andrew Loewenstein, Attorney at Law, Foley Hoag LLP, member of the Bar of the Commonwealth of Massachusetts,

Mr Chalis Combeh Njai, Principal State Counsel, Attorney General's Chambers, Ministry of Justice, Republic of The Gambia,

Ms Mariama Ngum, State Counsel, Attorney General's Chambers, Ministry of Justice, Republic of The Gambia,

Ms Tafadzwa Pasipanodya, Attorney at Law, Foley Hoag LLP, member of the Bars of the State of New York and the District of Columbia,

Mr Paul S. Reichler, Attorney at Law, 11 King's Bench Walk Chambers, member of the Bars of the Supreme Court of the United States and the District of Columbia,

Mr Philippe Sands, KC, Professor of International Law, University College London, Barrister at Law, 11 King's Bench Walk Chambers,

Mr M. Arsalan Suleman, Attorney at Law, Foley Hoag LLP, member of the Bars of the District of Columbia and the State of New York,

as Counsel and Advocates;

Ms Alejandra Torres Camprubí, Partner at Torres Iuris, member of the Madrid and Paris Bars, Adjunct Professor of International Environmental Law, IE University,

Ms Sun Young Hwang, Attorney at Law, Foley Hoag LLP,

as Counsel;

HE Mr Pa Musa Jobarteh, Ambassador of the Republic of The Gambia to the Kingdom of Belgium and Permanent Mission to the European Union,

HE Mr Habib T. Jarra, Chargé d'affaires, Embassy of the Republic of The Gambia in the Kingdom of Saudi Arabia and Acting Permanent Representative of the Republic of The Gambia to the Organisation of Islamic Cooperation,

Le Gouvernement de la République de Gambie est représenté par :

S. Exc. M. Dawda Jallow, *Attorney General* et ministre de la justice de la République de Gambie,

comme agent ;

M^me^ Yasmin Al Ameen, avocate au cabinet Foley Hoag LLP, membre du barreau de l'État de New York,

M. Pierre d'Argent, professeur ordinaire à l'Université catholique de Louvain, membre de l'Institut de droit international, cabinet Foley Hoag LLP, membre du barreau de Bruxelles,

M^me^ Diem Huong Ho, avocate au cabinet Foley Hoag LLP, membre du barreau d'Angleterre et du pays de Galles, et du barreau de l'État de New York,

M^me^ Jessica Jones, avocate, Matrix Chambers (Londres), membre du barreau d'Angleterre et du pays de Galles,

M. Andrew Loewenstein, avocat au cabinet Foley Hoag LLP, membre du barreau du Commonwealth du Massachusetts,

M. Chalis Combeh Njai, *Principal State Counsel*, cabinet de l'*Attorney General*, ministère de la justice de la République de Gambie,

M^me^ Mariama Ngum, *State Counsel*, cabinet de l'*Attorney General*, ministère de la justice de la République de Gambie,

M^me^ Tafadzwa Pasipanodya, avocate au cabinet Foley Hoag LLP, membre des barreaux de New York et du district de Columbia,

M. Paul S. Reichler, avocat au cabinet 11 King's Bench Walk, membre des barreaux de la Cour suprême des États-Unis d'Amérique et du district de Columbia,

M. Philippe Sands, KC, professeur de droit international au University College London, avocat au cabinet 11 King's Bench Walk (Londres),

M. M. Arsalan Suleman, avocat au cabinet Foley Hoag LLP, membre des barreaux du district de Columbia et de l'État de New York,

comme conseils et avocats ;

M^me^ Alejandra Torres Camprubí, associée au cabinet Torres Iuris, membre des barreaux de Madrid et de Paris, professeure associée en droit international de l'environnement à l'IE University,

M^me^ Sun Young Hwang, avocate au cabinet Foley Hoag LLP,

comme conseils ;

S. Exc. M. Pa Musa Jobarteh, ambassadeur de la République de Gambie auprès du Royaume de Belgique et chef de la mission permanente auprès de l'Union européenne,

S. Exc. M. Habib T. Jarra, chargé d'affaires de l'ambassade de la République de Gambie au Royaume d'Arabie saoudite et représentant permanent par intérim de la République de Gambie auprès de l'Organisation de la coopération islamique,

Mr Kalifa Singhateh, First Secretary, Embassy of the Republic of The Gambia in the Kingdom of Belgium,

Mr Yousuf Ali,

Ms Noor Begum,

Mr Mohammed Eliyas,

Ms Fatema Fatema,

Mr Nay San Lwin, Free Rohingya Coalition,

Mr Sayedul Karim, Rohingya Justice Initiative,

Mr Maung Tun Khin, Burmese Rohingya Organisation UK,

Mr Matthew Smith, Fortify Rights,

as Members of the Delegation;

Mr Khairul Amin, Interpreter,

Ms Amina Chaudary,

Ms Maisha Farzana, Interpreter,

Ms Rahima Khatun, Interpreter,

Ms Nancy Lopez, Foley Hoag LLP,

Mr Himel Biswas Manna, Interpreter,

Mr Jonathan Mercer,

Ms Jennifer Schoppmann, Foley Hoag LLP,

as Assistants.

The Government of the Republic of the Union of Myanmar is represented by:

HE Mr Ko Ko Hlaing, Union Minister for the Ministry (2) of the President's Office of the Republic of the Union of Myanmar,

as Agent;

HE Mr Thi Da Oo, Union Minister for Legal Affairs and Attorney General of the Republic of the Union of Myanmar,

as Alternate Agent;

Mr Christopher Staker, 39 Essex Chambers, member of the Bar of England and Wales,

as Lead Counsel and Advocate;

M. Kalifa Singhateh, premier secrétaire, ambassade de la République de Gambie au Royaume de Belgique,

M. Yousuf Ali,

M^me^ Noor Begum,

M. Mohammed Eliyas,

M^me^ Fatema Fatema,

M. Nay San Lwin, Free Rohingya Coalition,

M. Sayedul Karim, Rohingya Justice Initiative,

M. Maung Tun Khin, Burmese Rohingya Organization UK,

M. Matthew Smith, Fortify Rights,

comme membres de la délégation ;

M. Khairul Amin, interprète,

M^me^ Amina Chaudary,

M^me^ Maisha Farzana, interprète,

M^me^ Rahima Khatun, interprète,

M^me^ Nancy Lopez, cabinet Foley Hoag LLP,

M. Himel Biswas Manna, interprète,

M. Jonathan Mercer,

M^me^ Jennifer Schoppmann, cabinet Foley Hoag LLP,

comme assistants.

Le Gouvernement de la République de l'Union du Myanmar est représenté par :

S. Exc. M. Ko Ko Hlaing, ministre de l'Union pour le ministère 2 auprès du bureau du président de la République de l'Union du Myanmar,

comme agent ;

S. Exc. M. Thi Da Oo, ministre des affaires juridiques et *Attorney General* de la République de l'Union du Myanmar,

comme agent suppléant ;

M. Christopher Staker, 39 Essex Chambers, membre du barreau d'Angleterre et du pays de Galles,

comme conseil principal et avocat ;

Mr Sam Blom-Cooper, 25 Bedford Row Chambers, member of the Bar of England and Wales,

Ms Leigh Lawrie, KC, Advocate, Faculty of Advocates, Edinburgh,

Mr Stefan Talmon, Professor of International Law, University of Bonn, Twenty Essex Chambers, member of the Bar of England and Wales,

Ms Alina Miron, Professor of International Law, University of Angers, member of the Paris Bar, Founding Partner of FAR Avocats,

Mr David Hooper, KC, 25 Bedford Row Chambers, member of the Bar of England and Wales,

Ms Chiara Cordone, 39 Essex Chambers, member of the Bar of England and Wales,

as Counsel and Advocates;

Mr Khin Thidar Aye, Chargé d'affaires a.i./Head of Mission, Embassy of the Republic of the Union of Myanmar in Brussels,

Ms Khin Oo Hlaing, Legal Co-ordinator, Member of the Advisory Board to the Acting President, Chairman of the State Security and Peace Commission of the Republic of the Union of Myanmar,

Mr Myo Win Aung, Deputy Judge Advocate General, Ministry of Defence, Republic of the Union of Myanmar,

Mr Tun Tun Win, Head of the Law and Regulation Department, Ministry of Defence, Republic of the Union of Myanmar,

Mr Than Htwe, Director-General, Ministry of Foreign Affairs, Republic of the Union of Myanmar,

Mr Zaw Zaw Htwe, Deputy Director-General, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Mr Kyaw Thu Hein, Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Ms Saw Yu Nwe, Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,

Mr Ngwe Zaw Aung, Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Mr Thant Sin Oo, Minister Counsellor, Embassy of the Republic of the Union of Myanmar in Brussels,

Mr Myat Nyi Nyi Win, Deputy Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,

Ms Cho Nge Nge Thein, Deputy Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Ms May Nyat Noe Naing, Deputy Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,

M. Sam Blom-Cooper, 25 Bedford Row Chambers, membre du barreau d'Angleterre et du pays de Galles,

M^me^ Leigh Lawrie, KC, avocate, *Faculty of Advocates*, Édimbourg,

M. Stefan Talmon, professeur de droit international à l'Université de Bonn, Twenty Essex Chambers, membre du barreau d'Angleterre et du pays de Galles,

M^me^ Alina Miron, professeure de droit international à l'Université d'Angers, membre du barreau de Paris, associée fondatrice du cabinet FAR Avocats,

M. David Hooper, KC, 25 Bedford Row Chambers, membre du barreau d'Angleterre et du pays de Galles,

M^me^ Chiara Cordone, 39 Essex Chambers, membre du barreau d'Angleterre et du pays de Galles,

comme conseils et avocats ;

M. Khin Thidar Aye, chargé d'affaires par intérim/chef de mission, ambassade de la République de l'Union du Myanmar à Bruxelles,

M^me^ Khin Oo Hlaing, coordonnatrice juridique, membre du comité consultatif auprès du président par intérim, présidente de la commission d'État de sécurité et de paix de la République de l'Union du Myanmar,

M. Myo Win Aung, juge-avocat général adjoint, ministère de la défense, République de l'Union du Myanmar,

M. Tun Tun Win, chef du département des affaires juridiques et réglementaires, ministère de la défense, République de l'Union du Myanmar,

M. Than Htwe, directeur général, ministère des affaires étrangères, République de l'Union du Myanmar,

M. Zaw Zaw Htwe, directeur général adjoint, ministère des affaires juridiques, République de l'Union du Myanmar,

M. Kyaw Thu Hein, directeur, ministère des affaires juridiques, République de l'Union du Myanmar,

M^me^ Saw Yu Nwe, directrice, ministère des affaires étrangères, République de l'Union du Myanmar,

M. Ngwe Zaw Aung, directeur, ministère des affaires juridiques, République de l'Union du Myanmar,

M. Thant Sin Oo, ministre-conseiller, ambassade de la République de l'Union du Myanmar à Bruxelles,

M. Myat Nyi Nyi Win, directeur adjoint, ministère des affaires étrangères, République de l'Union du Myanmar,

M^me^ Cho Nge Nge Thein, directrice adjointe, ministère des affaires juridiques, République de l'Union du Myanmar,

M^me^ May Nyat Noe Naing, directrice adjointe, ministère des affaires étrangères, République de l'Union du Myanmar,

Mr Yan Naing Khant, Counsellor, Embassy of the Republic of the Union of Myanmar in Brussels,

Mr Nyein Chang Maung, Staff Officer (Grade 2), Office of the Adjutant General, Ministry of Defence, Republic of the Union of Myanmar,

Mr Biak Chan, Assistant Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Ms M Ja Dim, Assistant Director, Ministry of Legal Affairs, Republic of the Union of Myanmar,

Ms Hsu Ma Ma Hein, First Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,

Ms May Oo Kyinnar Naing, First Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,

Ms Yu Za Na Khin Zaw, First Secretary, Embassy of the Republic of the Union of Myanmar in Brussels,

Mr Wai Yan Min Myint, Assistant Director, Ministry of Foreign Affairs, Republic of the Union of Myanmar,

Mr Myo Myint Aung, Staff Officer, General Administration Department, Ministry of Home Affairs, Republic of the Union of Myanmar,

Ms Mary Lobo, Legal Assistant,

Ms Capucine Hamon, *avocate à la Cour*, member of the Paris Bar, Associate, FAR Avocats,

as Members of the Delegation.

_____

M. Yan Naing Khant, conseiller, ambassade de la République de l'Union du Myanmar à Bruxelles,

M. Nyein Chang Maung, officier d'état-major G2, bureau de l'adjudant général, ministère de la défense, République de l'Union du Myanmar,

M. Biak Chan, sous-directeur, ministère des affaires juridiques, République de l'Union du Myanmar,

M^me^ M Ja Dim, sous-directrice, ministère des affaires juridiques, République de l'Union du Myanmar,

M^me^ Hsu Ma Ma Hein, première secrétaire, ambassade de la République de l'Union du Myanmar à Bruxelles,

M^me^ May Oo Kyinnar Naing, première secrétaire, ambassade de la République de l'Union du Myanmar à Bruxelles,

M^me^ Yu Za Na Khin Zaw, première secrétaire, ambassade de la République de l'Union du Myanmar à Bruxelles,

M. Wai Yan Min Myint, sous-directeur, ministère des affaires étrangères, République de l'Union du Myanmar,

M. Myo Myint Aung, officier d'état-major, département de l'administration générale, ministère de l'intérieur, République de l'Union du Myanmar,

M^me^ Mary Lobo, assistante juridique,

M^me^ Capucine Hamon, avocate à la Cour, membre du barreau de Paris, collaboratrice, cabinet FAR Avocats,

comme membres de la délégation.

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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 Myanmar 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 now give the floor to Professor Stefan Talmon. You have the floor, Sir.

Mr TALMON:

I. QUESTIONS OF PROOF – PART 1: BURDEN AND STANDARD OF PROOF

1. Mr President, Madam Vice-President, distinguished Members of the Court, good afternoon. It is a great honour and a privilege to appear before you. I have been asked by Myanmar to set out its position on the burden and standard of proof.

2. I am afraid I will not be doing Charles Dickens[1] nor James Joyce[2]. I probably could do Goethe or Schiller but, as this is a court of law, I will focus on the legal issues before you.

1. Burden of proof

3. Let me start with the question of the burden of proof. I can be brief here.

4. The Parties agree on the principle that the party alleging a fact bears the burden of proof[3]. While the Court has held that "this principle is not an absolute one"[4], it has consistently applied the principle in cases of alleged genocide. In such cases, neither the subject-matter nor the nature of the dispute makes it appropriate to contemplate a reversal of the burden of proof[5].

5. The mere fact that the alleged facts occurred in the territory under the control of a State also does not shift the burden of proof[6].

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[1] CR 2026/6, p. 49, para. 3 (Sands).

[2] CR 2026/1, p. 35, para. 35 (Sands).

[3] MG, paras. 4.71-4.72; RG, para. 4.4; CMM, paras. 5.1.-5.4; RM, para. 5.1.

[4] *Croatia Genocide, 2015 Judgment*, p. 73, para. 172.

[5] *Ibid.*, p. 73, para. 174. See also *Bosnia Genocide, 2007 Judgment*, pp. 128-129, paras. 204-206.

[6] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

6. In the *Croatia* case, the Court expressly stated that it was not for the Respondent "to prove a negative fact, for example the absence of facts constituting the *actus reus* of genocide"[7]. The same, of course, applies to the absence of facts establishing the *mens rea* and, in particular, genocidal intent.

7. The burden is thus squarely on The Gambia to demonstrate the existence of the facts put forward in support of its allegations of genocide. It is not for Myanmar to provide explanations of the facts alleged by The Gambia[8]. Yet, as Professor Miron has just shown, The Gambia's methodology leads in practice to a reversal of the burden of proof, since the so-called indicators of genocide seek to create a presumption of genocidal intent.

2. Standard of proof

8. Mr President, Members of the Court, let me move on to the standard of proof. Again, there is general agreement between the Parties on the applicable standard[9].

9. As the Court held in the *Bosnia* and *Croatia* cases, a finding of genocide requires evidence that is "fully conclusive". The Court must be "fully convinced" that it has been clearly established that the crime of genocide or the other acts enumerated in Article III of the Genocide Convention have been committed[10].

10. This is a heightened standard of proof, which is reserved for charges of exceptional gravity[11]. As the Court noted most recently in *Ukraine* v. *Russia*, "'charges of exceptional gravity' such as the crime of genocide, require proof at 'a high level of certainty'"[12].

11. The Parties disagree over what is meant by the standard of conclusive evidence and what degree of certainty the evidence must provide.

12. Myanmar submits that fully conclusive evidence must compel a certain conclusion. It must be more than just credible and persuasive evidence: it is evidence that must not be contradicted by other evidence and it must establish a fact beyond reasonable doubt. The fully conclusive evidence

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[7] *Croatia Genocide, 2015 Judgment*, p. 73, para. 174.

[8] *Ibid.*, p. 74, para. 175.

[9] MG, para. 4.73; CMM, paras. 5.11-5.12.

[10] *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

[11] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)*, *Judgment, I.C.J. Reports 2024 (I)*, p. 127, para. 81 (hereinafter "*Ukraine* v. *Russia, 2024 Judgment*").

[12] *Ibid.*

standard is in fact equivalent to the "beyond reasonable doubt" standard of proof applied by international criminal courts and tribunals. This is also the view widely held in the literature[13].

13. But, more importantly, Myanmar's submission is supported by the Court's case law.

14. When the Court adopted the conclusive evidence standard in the *Bosnia* and *Croatia* cases, it made clear that it applied the same conclusive evidence standard as in the *Corfu Channel* case[14]. In that case, the Court held that "proof may be drawn from inferences of fact, *provided they leave no room for reasonable doubt*"[15]. When the judgment is read as a whole, it is apparent that the expressions "conclusive evidence" and "no room for reasonable doubt" were intended to have the same meaning.

15. In the *Bosnia* case, the Court found that one of the conditions for the responsibility for complicity in genocide was not fulfilled because some of the facts were not established "beyond any doubt"[16]. Commenting on this finding, Judge Gaja wrote in his separate opinion in the *Croatia* case: "In substance, although different wording was used, the Court applied the same standard of 'beyond all reasonable doubt' that the ICTY and the ICTR apply with regard to individual crimes."[17]

16. That the standard of proof applied by the Court in genocide cases is comparable to the "beyond reasonable doubt" standard was also confirmed by the Court's President in a presentation of the Court's jurisprudence to the Sixth Committee of the UN General Assembly in November 2007. After referring to the standard of fully conclusive evidence in the Court's *Bosnia* case, President Higgins stated: "There have been some curious comments by observers as to this being a 'higher' or 'lower' standard than 'beyond reasonable doubt'. It is simply a *comparable* standard, but employing terminology more appropriate to a civil, international law case."[18]

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[13] Lars Berster, Article II, in: Christian J. Tams, Lars Berster and Björn Schiffbauer, *The Genocide Convention: Article-by-Article Commentary* (2nd edn., 2024), pp. 150-151 MN 124; Marko Milanovic, Proving Genocide, EJIL: Talk!, 18 September 2025 (available at https://www.ejiltalk.org/proving-genocide/).

[14] *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

[15] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18 (emphasis added).

[16] *Bosnia Genocide, 2007 Judgment*, p. 218, para. 422. See also *Croatia Genocide, 2015 Judgment*, separate opinion of Judge Gaja, p. 397, para. 4.

[17] *Croatia Genocide, 2015 Judgment*, separate opinion of Judge Gaja, p. 398, para. 4.

[18] Speech by HE Judge Rosalyn Higgins, President of the International Court of Justice, to the Sixth Committee of the General Assembly, 2 November 2027 (available at https://www.icj-cij.org/sites/default/files/press-releases/3/14123.pdf).

17. The Gambia, of course, says this is incorrect because the Court is not an international criminal tribunal[19]. The Gambia is mistaken. There is no distinction between a criminal standard of proof and a civil, State responsibility standard of proof, when it comes to allegations of State responsibility for violations of the Genocide Convention. While the terminology may be different, the substance of the standard is the same as shown by the Court's case law. If the fully convincing evidence standard were indeed a different standard, The Gambia would need to define that standard — something it has not done either in its written or in its oral pleadings.

18. The heightened standard of fully conclusive evidence or evidence beyond reasonable doubt can be met either by direct evidence, which directly proves a fact, or by indirect or circumstantial evidence. Circumstantial evidence consists of facts from which a relevant fact can be inferred. The basis of such inference must itself be facts established by fully conclusive evidence.

19. Mr President, Members of the Court, this brings me to one of the decisive questions in the present case: the proof by fully conclusive evidence of the intent to destroy, in whole or in part, a protected group — the genocidal intent or *dolus specialis*.

20. According to The Gambia, documents that reference the intention to destroy a group in whole or in part may be considered direct evidence of genocidal intent[20]. The Gambia has not provided any direct evidence, despite a claim to the contrary in its Reply[21]. In the present case, genocidal intent can thus only be established by circumstantial evidence[22].

21. The Court has recognized that a State that is not in a position to provide direct proof of certain facts "should be allowed a more liberal recourse to inferences of fact and circumstantial evidence"[23]. A more liberal recourse to circumstantial evidence does not, however, entail any lowering of the standard of proof[24]. In the *Bosnia* and *Croatia* cases, the Court, despite being faced with circumstantial evidence, required fully conclusive evidence in order to prove that the crime of

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[19] RG, para. 4.5.

[20] MG, para. 4.24.

[21] RG, para. 9.25.

[22] *Croatia Genocide, 2015 Judgment*, p. 65, para. 143.

[23] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 55, para. 120 (hereinafter "*Armed Activities (Reparations), 2022 Judgment*"), quoting *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 18.

[24] *Croatia Genocide, 2015 Judgment*, p. 78, para. 198.

genocide or the other acts enumerated in Article III of the Genocide Convention were committed. The same standard was also applied to prove attribution of such facts[25].

3. The proof of genocidal intent by circumstantial evidence

22. Mr President, Members of the Court, this raises the question of how genocidal intent can be proven by circumstantial evidence. This is a question on which Myanmar and The Gambia fundamentally disagree.

23. While Myanmar follows the Court's approach in the *Bosnia* and *Croatia* cases, The Gambia, following in the footsteps of the FFM[26], tries to establish a new "indicators of genocidal intent" approach. It is so set on establishing this new approach that it referred to it no more than 25 times in its presentation on the first day alone.

24. The Gambia even suggested that the Court itself "indicated in the *Croatia* Judgment some of the most important indicators"[27]. However, there is no mention of "indicators" of genocidal intent in either the *Croatia* or the *Bosnia* Judgment.

25. Mr President, let me compare The Gambia's "indictors of genocidal intent" approach with the Court's approach. On your screens, you can see a chart that depicts The Gambia's approach. It is essentially an inductive approach. Although if you listen to The Gambia's presentation, it is more assertion than induction.

26. The Gambia uses seven so-called indicators which allegedly establish genocidal intent. It does not tell us why these seven and not others. It also does not tell us how many of these indicators would have to be fulfilled for the Court to find genocidal intent. But all this does not matter, because, of course, all of exactly these very indicators are fulfilled in the present case.

27. The Gambia also adopts a somewhat circular argument. It says the indicators "emerge" from the evidence[28], only to then show that on exactly that very same evidence these indicators are all fulfilled. In the course of The Gambia's presentation, the indicators mutate from "strong"[29] to

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[25] *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

[26] MG, Vol. III, Annex 39, p. 73, para. 224.

[27] CR 2026/1, p. 37, para. 39 (Sands).

[28] CR 2026/1, p. 37, para. 41 (Sands).

[29] CR 2026/3, p. 35, para. 13 (Pasipanodya).

"compelling"[30] to "powerful"[31] and, finally, to "conclusive indicators of genocidal intent"[32]. What makes these indicators conclusive — either individually or collectively — The Gambia does not tell.

28. Let me now show you a chart that depicts the Court's approach in the *Bosnia* and *Croatia* cases. Unlike The Gambia, the Court follows a deductive approach. Genocidal intent is proven by way of inference from a pattern of conduct[33]. The Court first examines whether genocidal acts and other atrocities committed during an attack on a protected group have been established by conclusive evidence[34].

29. In a second step, the Court then examines on the basis of four factors, which are listed in the box on the left, whether these acts form a pattern of conduct[35]; that is to say, "a consistent series of acts carried out over a specific period of time"[36]. It is in this context, that the Court in the *Croatia* case identified the four "factors"[37], which The Gambia now claims to be "indicators" of genocidal intent[38]. If at all, these factors indicate the existence of a pattern of conduct[39]; they are not indicators of genocidal intent.

30. It is only in a third and final step that the Court examines whether genocidal intent can be inferred from the pattern of conduct[40]. Thus, while the Court found in the *Croatia* case that widespread similar attacks on localities with Croat populations amounted to a pattern of conduct[41], the Court was unable to infer a genocidal intent from that conduct[42].

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[30] CR 2026/2, p. 44, para. 4 (Suleman).

[31] CR 2026/2, p. 47, para. 18 (Suleman).

[32] CR 2026/2, p. 64, para. 85 (Suleman).

[33] *Bosnia Genocide, 2007 Judgment*, para. 207 and paras. 370-376; *Croatia Genocide, 2015 Judgment*, p. 66, para. 145; also p. 67, para. 148.

[34] *Bosnia Genocide, 2007 Judgment*, para. 277.

[35] *Croatia Genocide, 2015 Judgment*, p. 119, para. 407.

[36] *Ibid.*, p. 151, para. 510.

[37] *Ibid.*, p. 121, para. 413.

[38] CR 2026/1, p. 37, para. 39 (Sands).

[39] See *Croatia Genocide, 2015 Judgment*, p. 120, para. 409.

[40] *Ibid.*, p. 88, para. 242.

[41] *Ibid.*, p. 122, para. 416.

[42] *Ibid.*, p. 128, para. 440.

4. The standard for inference

31. Mr President, this brings me to another important question: when can genocidal intent be inferred from a pattern of conduct?

32. According to your own case law, the Court is only fully convinced that genocidal intent has been established by inferenc if genocidal intent "is the only inference that [can] reasonably be drawn from the acts in question"[43].

33. This has been referred to as "the only reasonable inference" standard. While The Gambia pays lip service to that standard[44], it does not apply it. Neither does it prove a "pattern of conduct", nor does it establish that genocidal intent is the only reasonable inference from such pattern of conduct. All The Gambia does, is assert "that the only reasonable conclusion is that Myanmar acted in this case with genocidal intent"[45]. Mr President, Members of the Court, it thereby relies on a conclusion by the FFM, conveniently overlooking that the FFM had concluded "on reasonable grounds that the evidence supports an inference of genocidal intent"[46]. An inference on reasonable grounds is not the same as the only reasonable inference.

34. Furthermore, the "reasonable grounds to conclude" standard is a standard of proof, which is applied by United Nations and other fact-finding missions. It is a much lower standard of proof than the fully conclusive evidence standard applicable in the present case.

35. But this all is not the question. What is at issue here, is not a standard of proof at all, but a standard for inference. "The only reasonable inference" standard refers to the degree of certainty that is required when drawing conclusions from circumstantial evidence. It ensures that the conclusions drawn by deductive reasoning are reliable and not based on speculation or unsupported assumptions. The graver the accusation, the higher the standard for inference.

36. The standard for inference must also be distinguished from the standard of proof applicable in the present case[47]. The standard of proof in genocide cases requires that the Court must be fully convinced that there is genocidal intent. In order for the Court to be fully convinced of genocidal

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[43] *Croatia Genocide, 2015 Judgment*, p. 67, para. 148.

[44] RG, para. 3.28; CR 2026/1, p. 22, para. 17 (Jallow).

[45] CR 2026/1, p. 38, para. 41 (Sands).

[46] MG, Vol. III, Annex 49, p. 71, para. 220. See also *ibid.*, p. 73, para. 223.

[47] See *Croatia Genocide, 2015 Judgment*, separate opinion of Judge Keith, p. 179, para. 4.

intent, the standard for inference requires that genocidal intent must be the only reasonable inference from the circumstances.

37. Mr President, it is submitted that the "only reasonable inference" standard is a logical consequence of the "fully conclusive evidence standard" that, in the words of President Higgins, is comparable to the "beyond reasonable doubt" standard of proof[48]. If genocidal intent is not the only reasonable inference to be drawn from a pattern of conduct, there will inevitably be reasonable doubt as to the existence of genocidal intent. If, on the other hand, genocidal intent is the only reasonable inference, there cannot be any reasonable doubt about the existence of genocidal intent.

38. Mr President, it is not sufficient that genocidal intent is "a manifestly reasonable inference", as stated by The Gambia's Agent on Monday[49]; it must be the *only reasonable* inference to be drawn from the established facts. However, The Gambia devoted a whole speech on Wednesday to demonstrate that genocidal intent was "*a* reasonable inference"[50]. The only purpose of that speech was to muddle the waters and to misconstrue the applicable legal standard for inference. I can only invite the Court to re-read The Gambia's submissions at CR 2026/5, page 31, paragraph 28, and compare it with paragraph 373 of your Judgment in the *Bosnia* case to see the whole fallacy of The Gambia's argument[51].

39. It is also not sufficient to claim negatively that it is unreasonable to infer one specific other intent[52]. However, again on Wednesday The Gambia went to great length attempting to show that counter-terrorism was not a reasonable intention to infer from the facts[53]. What The Gambia did not do, was to demonstrate positively that genocidal intent is the only reasonable inference from a pattern of conduct. For The Gambia, the world of inference is binary: counter-terrorism or genocide — *tertium non datur!* But, as I will show shortly, there are a number of other potential intentions that could be underlying the alleged conduct in the present case. If there is only one — one other

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[48] *Ibid.*, p. 67, para. 148; referring to ICTY Trial Chamber, *Prosecutor* v. *Tolimir*, No. IT-05-88/2-T, Judgement of 12 December 2012, para. 745. See also *ibid.*, para. 782.

[49] CR 2026/1, p. 22, para. 17 (Jallow). Also CR 2026/5, p. 12, para. 1 (Loewenstein); CR 2026/5, p. 33, para. 2 (Reichler).

[50] CR 2026/5, p. 22, para. 3 (Sands) (emphasis added).

[51] See CR 2026/5, p. 31, para. 28 (Sands).

[52] CR 2026/1, p. 22, para. 17.

[53] CR 2026/4, pp. 26-76, and CR 2026/5, pp. 33-37 (Reichler).

reasonable alternative inference, then the inference of genocidal intent is not the *only* reasonable one and, therefore, genocidal intent is not established to the required standard of proof.

40. It has been said recently, in the literature and otherwise, that the only reasonable inference standard sets the bar unduly high and makes it virtually impossible to prove genocidal intent[54]. This view overlooks that the "only reasonable inference" standard is a general standard for inferences from circumstantial evidence whenever the heightened "fully conclusive" or "beyond reasonable doubt" standard of proof applies[55], and it is not limited or specific to the inference of genocidal intent. Any change to the standard of inference would thus have much wider repercussions.

41. Mr President, Members of the Court, the only reasonable inference standard has not prevented international criminal tribunals from finding that genocide has been committed. The requirement that genocidal intent was "the only inference that could reasonably be drawn from the acts in question"[56] also did not prevent the Court from making the finding in the *Bosnia* case that genocide had been committed in Srebrenica. The claim that the only reasonable inference standard makes it virtually impossible to prove genocidal intent is in reality a cry of despair by those unable to prove genocide in the present case. The reason is not because the standard for inference is too high. The reason is because there is no evidence to prove genocidal intent. The Gambia and others therefore seek to move the goalposts.

42. Mr President, The Gambia argues that "Myanmar seeks to generate confusion from the 'only reasonable inference' language used by the Court"[57]. However, it is The Gambia that creates confusion by mixing up the concepts of motive and intent and claiming that several motives may be underpinning a certain pattern of conduct[58]. For example, it claims that the existence of "an ethnic cleansing *motive* does not preclude the existence of genocidal intent"[59]. However, motive and intent

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[54] See *Croatia Genocide, 2015 Judgment*, dissenting opinion of Judge Cançado Trindade, pp. 359-360, para. 467.

[55] See *Ukraine* v. *Russia, 2024 Judgment*, p. 152, paras. 170-171 and p. 159, para. 196. See also *ibid.*, pp. 171-172, para. 238; p. 201, para. 357. See further *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, *Advisory Opinion of 19 July 2024*, separate opinion of Judge Nolte, paras. 12-13.

[56] *Croatia Genocide, 2015 Judgment*, p. 67, para. 148.

[57] RG, para. 3.34.

[58] RG, paras. 3.28-3.37; CR 2026/1, pp. 34-37, paras. 3-38 (Sands).

[59] RG, para. 3.32 (emphasis added). See also CR 2026/5, pp. 42-43, para. 33 (Reichler).

are not the same[60] — a point The Gambia accepts[61]. While motives explain why a person is doing something, intent refers to the person's aim or objective. By an ingenious parlour trick The Gambia simply declares all other intentions, including the intent to defeat terrorists, to be motives, so that the intent to destroy remains the only reasonable inference. But, as the Court found in the *Bosnia* and *Croatia* cases, ethnic cleansing[62], discrimination[63] and punishment[64] fall under intent, not motive, and the same, of course, is true for the intent to defeat terrorists.

43. Even if a pattern of conduct could be underpinned by two or more different intents at the same time, it would still be necessary to prove conclusively that genocidal intent was indeed one of them. On the screen you can see several possible intentions on the right-hand side, including the intent to destroy, an intent to kill, an intent to cause bodily harm, an intent to punish, an intent to take revenge, an intent to discriminate or an intent to displace. In order to conclusively prove the existence of the intent to destroy, the intent to destroy must be the only reasonable inference to be drawn from the pattern of conduct. If both an intent to destroy and another intent can reasonably be inferred from the pattern of conduct, then genocidal intent is not the only reasonable inference and, consequently, the standard of proof is not met[65].

44. Mr President, The Gambia further argues that Myanmar fails to establish the existence of any other reasonable inferences to be drawn from the alleged pattern of conduct, leaving genocidal intent as the only inference that was reasonable[66]. This argument is based on a misunderstanding of the rules on the burden of proof. Myanmar does not have to prove other reasonable inferences that could be drawn from the alleged pattern of conduct[67]. On the contrary, it is for The Gambia to establish that genocidal intent is the only reasonable inference, something it has not done.

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[60] *Bosnia Genocide, 2007 Judgment*, p. 122, para. 189.

[61] CR 2026/5, p. 37, para. 16 (Reichler).

[62] *Bosnia Genocide, 2007 Judgment*, p. 122, para. 190. See also *Croatia Genocide, 2015 Judgment*, p. 112, para. 374.

[63] *Bosnia Genocide, 2007 Judgment*, p. 121, para. 187; *Croatia Genocide, 2015 Judgment*, pp. 93-94, para. 270; pp. 96-97, para. 285.

[64] *Croatia Genocide, 2015 Judgment*, pp. 125-126, para. 430.

[65] See RM, paras. 4.39-4.48.

[66] RM, para. 9.26; MG, para. 12.126.

[67] *Croatia Genocide, 2015 Judgment*, pp. 73-74, paras. 174-175.

45. It is also not correct that there are no other reasonable intents that could be inferred in the present case. I have just shown you a whole list of other potential intentions. The Gambia itself mentions counter-terrorism as a potential other intention[68]. Counter-insurgency could be another intention[69], and so could be revenge and punishment. During the oral hearings on provisional measures, reference was also made to other reasonable inferences such as ethnic cleansing[70]. Myanmar submits that the information in The Gambia's written and oral pleadings provide ample alternative inferences to be drawn from the alleged conduct, other than genocidal intent[71].

5. Conclusion

46. Let me conclude, The Gambia has the burden of proof to establish the existence of each and every fact that is required to establish the alleged breaches of the Genocide Convention. It must do so by meeting the heightened standard of fully conclusive evidence; that is, evidence "beyond reasonable doubt". Where genocidal intent is to be established by circumstantial evidence, the conclusive evidence standard of proof is only met if genocidal intent is the only reasonable inference to be drawn from the facts in question.

47. I thank the Court for its kind attention.

48. Mr President, may I ask you now to call on Ms Cordone to present Myanmar's position on the method of proof. Thank you.

The PRESIDENT: I thank Professor Talmon for his statement. I now invite Ms Chiara Cordone to address the Court. You have the floor, Madam.

Ms CORDONE:

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[68] RG, para. 9.36.

[69] CR 2019/19, p. 35, para. 43 (Shabas).

[70] CR 2019/19, p. 33, para. 37 (Shabas); p. 42, paras. 6-7 (Staker).

[71] CR 2019/19, p. 28, para. 22 (Shabas).

II. QUESTIONS OF PROOF — PART 2: METHODS OF PROOF

1. Introduction

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is a distinct honour to appear here before you.

2. Professor Talmon has addressed the burden and standard of proof, and it is my turn now to address the method of proof.

2. Evidential weight of evidence: general principles

3. Let me start with the obvious. Not all evidence is to be given the same weight. Passage of time, hearsay, opinion rather than facts — all affect the weight that is to be given to evidence.

4. The Gambia does not dispute these general principles of the law of evidence, but it disregards them in practice. For example:

(i) While it accepts that opinion evidence has no evidential weight[72], it repeatedly advances such evidence[73].

(ii) While it does not dispute that hearsay cannot be conclusive evidence[74], it consistently relies on hearsay evidence[75].

(iii) And while it does not dispute[76] that media articles are not "evidence capable of proving facts"[77], it extensively references media articles[78] in an attempt to bolster its otherwise weak evidence.

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[72] CMM, para. 5.30.

[73] CMM, paras. 6.57, 7.120, 7.129-7.130, 7.144-7.149, 7.155, 7.157-7.159, 7.160-7.161, 7.162, 7.172, 7.194-7.195, 7.208, 7.209, 7.218, 9.263, 10.157, 12.19, 12.44, 12.49-12.50, 12.73-12.75, 12.79, 13.29, 13.65, 14.35, 14.55, 16.18-16.19; RM, paras. 7.90 (4), 7.108-7.109, 7.111, 7.148, 7.153, 8.154, 9.176, 10.9, 10.12-10.13, 10.33 (1), 10.44, 10.89, 10.96, 12.33, 12.93, 12.101, 13.141, 13.170, 16.23 (1) and (7).

[74] RG, para. 4.65.

[75] CMM, paras. 3.105, 6.54-6.55, 6.68, 7.119, 7.125, 7.138, 7.159, 7.161, 7.178, 7.189, 8.103, 9.21, 9.42, 9.58, 9.92, 9.112, 9.132, 9.147, 9.169, 9.173, 9.215, 9.221, 9.223, 9.243, 9.248, 9.254, 9.271, 9.281, 9.290, 9.300, 9.304, 11.99, 13.41, 16.18; RM, paras. 5.67, 6.10, 7.11, 7.103, 7.104, 7.112 (2), 7.148, 8.85, 8.92, 8.109, 8.154, 9.30, 9.57, 9.62, 9.71, 9.81-9.82, 9.91-9.92, 9.155, 9.176, 9.189, 10.33 (1), 10.42 (2), 10.64 (1),10.82 (1), 13.154, 16.23 (1)-(3).

[76] RG, para. 4.65.

[77] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment*, *I.C.J. Reports 1986*, p. 40, para. 62 (hereinafter "*Nicaragua* v. *United States*"); *Croatia Genocide, 2015 Judgment*, p. 87, para. 239.

[78] MG, footnotes 33, 97, 106, 141, 168, 173, 175, 356, 376, 388, 405, 406, 448, 453, 457-459, 491, 493, 525, 530, 533, 534,539, 543-549, 551, 565, 570, 572, 578-584, 590, 595-602, 610-617, 623, 624, 626-629, 631, 632, 639-650, 652, 662, 682, 683, 845, 848, 854, 859, 874, 875, 877, 947, 1035, 1082, 1122, 1141, 1209, 1311, 1358-1360, 1367-1369,1370, 1373, 1374, 1377, 1380-1383, 1386-1389, 1391,1402, 1404, 1406, 1414, 1416, 1428-1430, 1456,1481, 1484, 1485, 1551, 1535, 1538-1540, 1544-1546, 1564, 1565, 1566, 1656, 1671-1674,1677, 1719, 1767; RG, footnotes 301, 302, 359, 363, 473, 556, 558, 559, 591-593, 600, 677, 970, 972, 985, 1003,

5. These principles are not an end in themselves. Together with the "best evidence" rule[79], they ensure that the Court gives due weight only to those pieces of evidence which can safely be afforded such weight.

3. Reports of official bodies and NGOs

6. Mr President, let me move on from the general principles to particular types of evidence.

7. The Gambia relies overwhelmingly on reports of the FFM, as well as reports of other official bodies and NGOs.

8. According to The Gambia these whole proceedings are essentially superfluous — the presentation, testing and evaluation of evidence, the hearing and cross-examination of witnesses are all a waste of time, because all the facts, including genocidal acts and genocidal intent, have already been established by the FFM. No need for the Court to go any further — just adopt the findings of the FFM and these proceedings can conclude today.

9. But the Court, however, cannot avoid its duties and absolve itself of its judicial responsibilities. It is for the Court to test the evidence, establish the facts to the requisite standard of proof and then come to a verdict. There are no shortcuts here.

10. It is for that reason that Myanmar calls on the Court to carefully assess and weigh the evidence put before it, especially the reports of the FFM, the IIMM and the reports of other UN bodies and NGOs.

11. Members of the Court, The Gambia tells you that you have relied on such reports before, but for what purpose? The Gambia does not tell you. Was it to establish a simple fact, such as the date of a meeting, or to establish genocidal acts and intent? Neither in the *Bosnia* nor the *Croatia* case did the Court rely on such reports for evidence of specific acts of alleged genocide or of genocidal intent. The Gambia also does not tell you what evidentiary weight you attributed to such reports. Were the findings of fact in those reports simply noted, treated as credible, persuasive or treated as conclusive? Because it is "*conclusive*" that they must be in the present case.

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[79] RM, para. 5.88.

12. As with other methods of proof, the relevance and probative value of these reports must be considered on a case-by-case basis. The Court has identified the key criteria which bear on the relevance and value of such reports[80]:

— First, the source of the report; that is, whether it emanates from a single source or multiple sources[81] and whether the source is partisan or neutral;

— Second, the process by which the report has been generated. For example, whether it is based on anonymous sources or whether it is the product of a careful court or court-like process;

— Third, the quality or character of the report; that is, whether it contains statements against interest or statements of agreed or uncontested facts[82];

— Fourth, the first-hand nature of the report; that is whether or not the body creating the report had access to the territory in which the events in question occurred[83].

13. There is nothing inherent in the nature of a report produced by a UN body, or an NGO, that affords it weight as such. The Court has scrutinized such reports like any other evidence and has stated that UN reports will be taken into account only "to the extent that they are of probative value and are corroborated, if necessary, by other credible sources"[84]. For example, in the *Armed Activities* case, which you see on your screens, while finding that some UN documents contained convincing evidence, the Court did not afford any weight to several reports, including one generated by the UN Secretary-General, because of its reliance on second-hand reports[85]. The Court has never blindly accepted the conclusions of a report simply because it was prepared by a UN body and it should not do so in this case.

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[80] *Ukraine* v. *Russia, 2024 Judgment*, pp. 153-154, paras. 175-176 (hereinafter "*Ukraine* v. *Russia, 2024 Judgment*"), citing *Bosnia Genocide, 2007 Judgment*, p. 135, para. 227; *Croatia Genocide, 2015 Judgment*, p. 76, paras. 190-191; *Armed Activities (Reparations), 2022 Judgment*, p. 56, para. 122.

[81] *Croatia Genocide, 2015 Judgment*, p. 98, para. 292, quoting *Armed Activities (Reparations), 2022 Judgment*, p. 201, para. 61; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 701, para. 83.

[82] *Ukraine* v. *Russia*, *2024 Judgment*, pp. 153-154, paras. 175-176, citing *Bosnia Genocide, 2007 Judgment*, p. 135, para. 227; *Croatia Genocide, 2015 Judgement*, p. 76, paras. 190-191.

[83] *Ukraine* v. *Russia*, *2024 Judgment*, p. 165, para. 215.

[84] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 239, para. 205 (hereinafter "*Armed Activities, 2005 Judgment*").

[85] *Armed Activities, 2005 Judgment*, p. 239, para. 159.

14. Where the Court did give significant weight to a report by an official body, such as the Porter Commission in the *Armed Activities* case, the report had the following qualities[86]:

(a) it contained evidence obtained by examinations of persons directly involved;

(b) those persons were subsequently cross-examined by judges skilled in examination and experienced in assessing large amounts of factual information; and

(c) the correctness of the evidence was not challenged by impartial persons for the correctness of what it contained.

15. In addition, the credibility of the report containing the evidence was not challenged and, in fact, was accepted by both parties to the dispute[87]. None of the evidence submitted by The Gambia meets these qualities and none, especially the FFM and IIMM material, has been accepted by Myanmar.

16. Contrary to what The Gambia contends[88], the Court has not consistently relied on independent fact-finding reports. For example, in *Ukraine* v. *Russia* — which The Gambia referred to on Monday in support of its claims on this point[89] — the Court, in fact, after close examination, either did not rely at all on the documents and reports submitted by the applicant, or found them to be of limited or insufficient evidentiary value in proving the relevant facts or alleged violations[90].

17. There is no evidence in the Court's case law of wholehearted acceptance, or even great reliance on such reports as claimed by The Gambia. Reports and other evidence lacking the qualities identified earlier are not capable of being relied upon to any great extent, and certainly not to the extent necessary for establishing facts to the high standard of proof required in the present case.

18. Finally, and importantly, where such reports purport to state a fact, but in reality rely on another document as probative of that fact, the Court should look *to the underlying document and evaluate its evidential weight*. Thus, in the *Oil Platforms* case the Court examined satellite images

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[86] *Ibid.,* p. 201, para. 61.

[87] *Ibid.*

[88] RG, para. 4.9; RM, paras. 5.59-5.62.

[89] CR 2026/2, p. 17, para. 15 (Reichler).

[90] *Ukraine* v. *Russia*, *2024 Judgment*, pp. 127, 128-147, 163-165, 167, 171-172, 173, 175, 181, 182-184, 188-189, 192-193, 195, 196, 201, 203- 204, paras. 82, 86-98, 99-111, 112-120, 121-131, 132-146, 211-215, 221, 238, 244, 250, 272, 276-288, 305, 306, 320-323, 334, 337, 358, 359, 364-368; CMM, paras. 5.53-5.56.

underlying expert reports and found them insufficiently clear[91]. Myanmar asks the Court to apply the same scrutiny to the evidence in this case.

19. The overlaying of a report cannot add evidential weight to the underlying document. Indeed, the overlaying report is a more remote source of that information than the underlying document and, as such, should as a matter of principle have less evidential weight than the underlying evidence. To the extent that the overlaying report expresses opinions about the underlying document, it is mere opinion evidence, which is no evidence at all.

20. For example, some reports of NGOs, such as Fortify Rights and Amnesty International, base their assertions on interviews with claimed eyewitnesses. However, a report written by an organization, recounting what that organization has been told by persons interviewed by it, is by definition mere hearsay[92].

21. There is no good reason why the Court should have to content itself with second-hand hearsay descriptions in reports of the FFM and NGOs of what interviewees are said to have said to those organizations. The Court should not give weight to such reports at all.

22. In so far as The Gambia seeks to rely on these reports as corroborating the existence of facts, it ignores that such reports, not being evidence themselves, can have corroborative value only if they are "additional to other sources of evidence"[93] proving those facts. Reports cannot be corroborated by other reports; two items of unreliable evidence do not add up to reliable evidence. This is all the more so in cases where it cannot be known if the two reports are in fact based on the same information — for instance, if the two reports are based on information given by the same interviewees. The Court has said that it "will treat with caution . . . materials emanating from a single source"[94]. It must also treat materials with caution if there is no way of knowing if the materials emanate from a single source.

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[91] *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment*, *I.C.J. Reports 2003*, p. 189, para. 58 (hereinafter "*Oil Platforms, 2003 Judgment*").

[92] CMM, para. 5.52; RM, paras. 6.10, 5.66-67.

[93] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 40, para. 62.

[94] *Croatia Genocide, 2015 Judgment*, p. 98, para. 292, quoting *Armed Activities*, *2005 Judgment,* p. 201, para. 61; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Judgment, I.C.J. Reports 2015 (II)*, p. 701, para. 83.

4. Unsigned and anonymous witness statements

23. Mr President, Members of the Court, The Gambia also relies on witness statements. Here, The Gambia does not just disregard the principle of evidence, it distorts them.

24. The Gambia argues that evidence submitted in accordance with the Court Rules is admissible and, for that reason, the Court should accept evidence contained in, for example, unsigned statements[95]. This confuses two questions: the question of whether unsigned witness statements are admissible in principle, and the question of whether any weight can be attributed to such statements. While the Court may accept such statements, it must not accord them any weight.

25. When assessing the evidential weight of unsigned witness statements, the Court must take into account the *form* and *circumstances* in which the statements are being made[96]. This calls for several observations.

26. First, with regard to the *form* of such statements. The Court has stated repeatedly that it "cannot accord evidential weight"[97] to statements which are not signed by the witness and give no indication that the witness is aware of its contents[98]. This point is made on the very same page of the *Croatia* Judgment relied upon by The Gambia to argue the contrary[99]. The findings in the *Croatia* Judgment clearly show that unsigned statements, while being admissible, cannot be accorded any evidential weight.

27. In the face of this clear precedent, what does The Gambia do? It relies on a mere passing reference by the Court to statements signed by those who took them to argue that the signature of interviewers (or their organizations) renders such statements reliable[100]. This ignores the main reason why the Court did not give any evidential weight to statements not signed by the persons apparently making them: that is, there is no evidence that the interviewees have ever even seen the contents of these statements[101].

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[95] RG, para. 4.14.

[96] *Croatia Genocide, 2015 Judgment*, pp. 77-78, para. 196.

[97] *Ibid.*, p. 78, para. 198.

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

[99] RG, para. 4.14.

[100] RG, para. 4.15.

[101] *Croatia Genocide, 2015 Judgment*, pp. 78, 89, 91, 104, 105, 106, 110, 111, paras. 198, 248, 256, 328, 333, 338, 343, 363, 370.

28. The Court's rejection of interview records signed by police[102] for the same reason logically extends to interview records signed by NGOs or other bodies: they cannot safely be afforded any weight.

29. Second, with regard to the *circumstances* in which statements are made. Anonymous statements do not allow the Court to determine the circumstances in which they were made, and thus do not allow evaluation of the weight to be given to them. Therefore, no weight can be given to such anonymous statements.

30. Where anonymous statements are prepared by multiple organizations, as in the present case, there is every possibility that the same person is giving statements to several different interviewers. Indeed, we know that different statements submitted by The Gambia, which appear to be multiple accounts, are in fact by one and the same person[103]. The Court therefore must not afford anonymous statements any weight. Such statements also cannot be used to corroborate each other or other non-probative evidence. But this is exactly what The Gambia asks the Court to do — to treat multiple unsigned, anonymous statements, containing opinion and hearsay, as mutually corroborative, despite each being inherently non-probative. The defects of these statements cannot be cured by quantity. The fact that there are several such statements does not add anything to their non-existent evidentiary weight.

31. Even where statements are named and signed, the Court must still scrutinize their evidential value diligently. In the *Oil Platforms* case, a Kuwaiti official's testimony was rejected because it was given a decade later and did not involve direct observation of the relevant facts[104], thus rendering it non-probative and unreliable. This kind of scrutiny must also apply in the present case.

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[102] *Ibid.*, pp. 78, 85, 105,106, paras. 198, 229, 333, 338.

[103] RM, para. 7.18 footnote 769; IIMM, Witness Statement No. IIMM0019922097, p. 5, para. 10. RG, Vol. IV, Annex 49; IIMM, Witness Statement No. IIMM0019629206, p. 6, para. 16. RG, Vol. IV, Annex 50; IIMM, Witness Statement No. IIMM0027992990, p. 4, para. 10. RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0019629265, p. 5, para. 10. RG, Vol. IV, Annex 53; IIMM, Witness Statement No. IIMM0027971404, p. 5, para. 15. RG, Vol. IV, Annex 55; IIMM, Witness Statement No. IIMM0027999848, p. 4, para. 10. RG, Vol. IV, Annex 59; IIMM, Witness Statement No. IIMM0027997604, p. 4, para. 10. RG, Vol. IV, Annex 60.

[104] *Oil Platforms*, p. 189, para. 58.

5. Witness evidence prepared for the purpose of the proceedings

32. Mr President, let me move on to evidence prepared for the purpose of the proceedings. The Court must treat such evidence with great caution, especially where the witnesses have an interest in the outcome of the proceedings[105].

33. The Gambia claims that "interested witnesses" can refer only to State officials from a party to the proceedings, and does not apply to private persons[106]. This is not supported by the Court's case law. In *Nicaragua* v. *Colombia*[107], the Court noted that the 11 affidavits relied on by Colombia were prepared specifically for the purpose of the case and were signed by "fishermen who may be considered as particularly interested in the outcome of these proceedings, factors that have a bearing on the weight and probative value of that evidence"[108]. The Court, consequently, found that these affidavits had no probative value[109].

6. Media articles and books

34. Mr President, I now turn to two other pieces of alleged evidence offered by The Gambia: media articles and books. I can be quite brief here, because the Court itself has held that these are not methods of proof "'capable of proving facts'"[110].

35. Again, however, The Gambia seizes on the potential corroborative value[111] of such media articles and books and attempts to use them to corroborate the existence of facts not proven by any other evidence. It therefore bears repeating that multiple documents *not capable* of proving facts according to the Court's jurisprudence cannot add up to be capable of proving facts by way of corroboration.

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[105] *Croatia Genocide, 2015 Judgment*, p. 78, para. 197; *Ukraine* v. *Russia*, pp. 153-154, para. 175; *Bosnia Genocide, 2007 Judgment*, p. 130, para. 213; *Armed Activities (Reparations)*, pp. 55, 96-97, 124-125, paras. 121, 254, 358; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*, p. 301, para. 66.

[106] RG, para. 4.13.

[107] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*.

[108] *Ibid.*, p. 349, para. 219.

[109] *Ibid.*, pp. 349-350, paras. 220-221.

[110] *Ukraine* v. *Russia*, p. 155, para. 178.

[111] *Ibid.*; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia*), *Judgment, I.C.J. Reports 2022 (I)*, p. 300.

7. Conclusion

36. Mr President, let me conclude. Questions of evidential weight lie at the heart of these proceedings, where a heightened standard of proof applies. The Gambia tries to downplay this, by asserting that the same methods of proof apply in all cases before the Court[112]. While this is correct in principle, it ignores a basic logical inevitability: a higher standard of proof *necessarily* demands evidence of a higher quality as the Court has explicitly acknowledged in its evidentiary reasoning in both the *Bosnia* and *Croatia Genocide* cases[113].

37. As the Court considers the evidence before it, Myanmar urges it to adhere firmly to the rigorous evidentiary standards that secure the integrity of its rulings. In a case of accusations of exceptional gravity, those standards permit no dilution: neither by quantities of poor evidence incapable of proving facts, nor by the layering of reports and opinion upon defective material. The Court is asked to judge the evidence for its substance, not its author or its presentation, and to have always firmly in mind the high standard of proof such accusations demand.

38. I am grateful for the Court's kind attention.

39. Mr President, I am in your hands as to whether you prefer a break now or after Dr Staker, who I respectfully ask you to call next. He will speak for around 40 minutes.

The PRESIDENT: I thank Ms Cordone for her statement. I propose that we take a break after Mr Staker, so I now give the floor to Mr Christopher Staker. You have the floor, Sir.

Mr STAKER:

III. FFM REPORTS

1. Introduction

1. Mr President, Madam Vice-President, Members of the Court, Ms Cordone has presented general principles regarding the evidential weight of different kinds of evidence. I now address the application of such principles more specifically to The Gambia's evidence in this case. There may be some repetition in my presentation of aspects of what Ms Cordone has said, but there is perhaps

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[112] RG, para. 5.22.

[113] See e.g. *Bosnia Genocide, 2007 Judgment*, p. 216, para. 417; *Croatia Genocide, 2015 Judgment*, pp. 89, 91, paras. 248-249, 256.

no harm in that in demonstrating how the general principles apply in the specific circumstances of this case.

2. Little or no evidential weight can be given to any of The Gambia's evidence to prove the facts central to its claim of genocide, in particular its claims of widespread atrocities committed during the operations of 2016 and 2017. Myanmar's detailed reasons are found in Chapters 6 and 7 of each of its two written pleadings. Chapter 6 of each deals with the evidential weight of reports of the FFM. Chapter 7 deals with that of the other evidence relied on by The Gambia.

3. It is noteworthy that The Gambia's Reply does not respond to many of Myanmar's points regarding evidential weight set out in its Counter-Memorial, presumably because The Gambia had no response that would withstand scrutiny. But perhaps recognizing this gap in its case, The Gambia has said something about evidential weight in oral argument[114]. However, as with so much of The Gambia's case, it is presented at a high level of generality, and does not engage with the detail of the case. The evidential weight of a document must be assessed in relation to each fact for which it is relied on as evidence. A document may have evidential weight in respect of one fact but not another. One cannot simply say that a particular document has evidential weight in the abstract, and then treat every statement made in that document as a proven fact without any further analysis.

4. I will begin with the evidential weight of the FFM reports[115]. This is Chapter 6 in both of Myanmar's written pleadings. There is a whole chapter on FFM reports because The Gambia places such heavy reliance on them. They are the evidential centrepiece of the case. The Application instituting proceedings says that FFM reports are "especially significant"[116], and over half of its

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[114] CR 2026/2, pp. 12-30, paras. 1-50 (Reichler).

[115] UN GA, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, Un doc. A/HRC/39/64, 12 September 2018 (hereinafter the "2018 FFM Report"), MG, Vol. II, Annex 39; UN GA, Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, Un doc. A/HRC/39/CRP.2, 17 September 2018 (hereinafter the "2018 FFM Detailed Findings"), MG, Vol. II, Annex 40; UN GA, Human Rights Council, Report of the independent international fact-finding mission on Myanmar, Un doc. A/HRC/42/50, 8 August 2019 (hereinafter the "2019 FFM Report"), MG, Vol. III, Annex 47; UN GA, Human Rights Council, Detailed findings of the Independent International Fact-Finding Mission on Myanmar, Un doc. A/HRC/42/CRP.5, 16 September 2019 (hereinafter the "2019 FFM Detailed Findings"), MG, Vol. III, Annex 49.

[116] AG, para. 10.

footnotes refer to them[117]. The Gambia's Memorial contains extensive referencing to FFM reports.[118] It systematically relies on "conclusions" and "findings" of the FFM as if this alone was sufficient to discharge its burden of proof to the requisite high standard.[119] Its Reply again references FFM reports extensively[120], and describes other evidence as significant for the very reason that it "corroborates" the FFM reports[121].

5. The Gambia has done the same again in oral argument. The FFM, they say, has "a key role"; its findings "are authoritative"[122]. Their case is "fully underpinned" by the FFM and what they call its "thorough investigations"[123]. Over the last four days, you have heard the constant refrain of recourse to the FFM — its "determinations", its "findings", its "conclusions". So, more than six years after the introduction of this case, the centre of gravity of The Gambia's evidentiary file is the same

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[117] CMM, para. 6.2.

[118] MG, footnotes 5-31, 35-36, 40-41, 44-51, 53-60, 62, 65-67, 73-74, 91, 99, 120, 128, 149, 155-156, 159, 161, 164-165, 167, 169-173, 176, 263, 269, 312, 324, 327-340, 345-346, 352-353, 356, 359-360, 363, 370, 387-389, 408-409, 411, 465-469, 472-473, 476-478, 489-490, 494, 501, 509, 512, 515, 517-527, 530, 534, 536-538, 542, 552-554, 560, 563-564-573, 585-586, 588, 591, 593-594, 607-608, 619-620, 622, 625, 630, 632-638, 651, 654-656, 658-660, 671-673, 688-690, 693, 696, 699, 702-703, 706-709, 727-728, 734, 749, 761-765, 769-770, 778, 782-783, 785, 787, 792-793, 795-796, 798-799, 801-804, 816-818, 828, 831-833, 836, 849-851, 855-856, 858, 870, 873, 880-881, 883, 885, 889-891, 897-898, 904, 906, 913-915, 917, 926-928, 933, 938, 944, 956-962, 979-980, 984-990, 995-996, 1002-1008, 1017-1018, 1020-1022, 1030, 1042, 1045, 1048, 1053-1055, 1059, 1062, 1064, 1066-1067, 1081, 1084, 1116-1119, 1122, 1126, 1128, 1131-1136, 1139-1140, 1142-1144, 1147, 1154-1160, 1162, 1166-1167, 1182-1185, 1194-1196, 1198-1206, 1217, 1221-1223, 1229-1233, 1235-1236, 1238, 1258, 1260, 1264-1267, 1269-1290, 1292, 1295, 1297-1299, 1301-1304, 1310, 1313-1315, 1323-1328, 1332, 1334, 1339-1341, 1350-1354, 1356, 1361-1362, 1364, 1371-1372, 1392, 1400, 1421, 1423-1424, 1426-1427, 1431-1437, 1439, 1448, 1471-1475, 1487-1488, 1490-1492, 1503-1505, 1510, 1520-1522, 1524, 1526, 1528-1529, 1531, 1534, 1537, 1543, 1550, 1552-1554, 1568, 1575-1576, 1585, 1587-1591, 1594-1603, 1606-1610, 1616-1624, 1626-1629, 1646-1650, 1655, 1657-1660, 1669, 1671, 1678, 1680-1682, 1691-1696, 1704, 1713-1715, 1721-1725, 1727-1734, 1748-1750, 1757-1761, 1765, 1767, 1770-1777, 1779-1780, 1784-1785, 1813-1815.

[119] MG, paras. 1.7, 1.9, 1.10, 1.11, 1.12, 1.13, 1.14, 1.16, 1.20, 1.21, 1.25, 1.33, 1.52, 1.53, 2.15, 3.2, 3.12, 3.20, 4.50, 5.3, 5.6, 5.10, 6.2, 6.7, 6.12, 6.39, 6.60, 6.61, 6.62, 6.63, 6.64, 6.67, 6.73, 6.76, 6.80, 6.85, 6.89, 7.4, 7.5, 7.6, 7.10, 7.17, 7.30, 7.37, 7.42, 7.56, 7.60, 7.61, 7.66, 7.71, 8.5, 8.25, 8.33, 8.53, 8.61, 8.69, 8.70, 8.83, 8.88, 8.91, 8.107, 8.119, 9.7, 9.8, 9.10, 9.24, 9.26, 9.42, 9.45, 9.57, 10.1,10.2, 10.3, 10.7, 10.8, 10.10, 10.15, 10.16, 10.20, 10.26, 10.31, 10.32, 10.33, 10.42, 10.55, 10.56, 10.59, 10.60, 10.61, 10.62, 10.63, 10.65, 10.67, 10.69, 10.72, 10.78, 11.1, 11.5, 11.7, 11.8, 11.11, 11.12, 11.13, 11.17, 11.29, 11.34, 11.40, 11.42, 11.44, 11.45, 11.46, 11.60, 11.70, 11.71, 11.76, 11.90, 11.95, 11.96, 11.103, 12.1, 12.2, 12.6, 12.7, 12.8, 12.9, 12.10, 12.15, 12.18, 12.19, 12.21, 12.26, 12.27, 12.28, 12.35, 12.36, 12.40, 12.41, 12.51, 12.53, 12.58, 12.59, 12.65, 12.66, 12.69, 12.71, 12.73, 12.76, 12.78, 12.79, 12.85, 12.86, 12.89, 12.92, 12.95, 12.96, 12.99, 12.100, 12.102, 12.104, 12.107, 12.111, 12.112, 12.129, 12.138, 12.139, 12.141, 12.142.

[120] RG, footnotes 569, 573, 574, 579, 580, 584, 588, 595, 613, 614, 624, 627, 630, 631, 650, 651, 654-658, 660, 661, 663, 670-676, 681-683, 694-698, 721, 722, 732, 735-746, 751, 752, 754, 760, 769, 778, 785, 799, 807, 809-814, 817-819, 822, 825-830, 832, 837-840, 844, 845, 847, 848, 851, 855, 857-860, 862, 868, 870, 875, 883-885, 887, 888, 892, 894, 898-900, 904, 905, 909, 910, 912, 913, 949, 986, 1000, 1011, 1057, 1060, 1069, 1075, 1080, 1092, 1093, 1097, 1098, 1103, 1106-1108, 1122, 1133, 1146, 1147, 1153, 1154, 1160, 1202-1205.

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

[122] CR 2026/1, p. 37, para. 40 (Sands).

[123] CR 2026/1, p. 39, para. 48 (Sands).

as the one it had when it introduced the Application. This is particularly telling as to the effort put in by The Gambia to ascertain the facts.

6. The Gambia seeks to ridicule the argument that its evidential centrepiece has no evidential weight in relation to the matters for which it predominantly relies on it. But there are principled reasons why it does not.

2. Background to the FFM and the IIMM

7. And before explaining why, let me give some background to the FFM, as well to the other body, the IIMM.

8. The FFM was one of many fact-finding missions and commissions of inquiry established by the Human Rights Council. The mandate of this one lasted some two and a half years, from 2017 to 2019. It consisted of three members and had a "core team" of staff, of about 15 people, none of whom appear to have had qualifications in forensic investigations or litigations[124]. It conducted interviews of claimed eyewitnesses in the camps in Bangladesh and of certain others, collected documents and produced its reports. Its report on which The Gambia places the greatest reliance[125] was released only a year and a half after the FFM was established.

9. The late Professor Cherif Bassiouni, called by the International Bar Association "a legendary figure in the field of international criminal law"[126], said of bodies such as the FFM that "a fact finding mission notwithstanding its name, is not necessarily a fact finding mission"[127], he said that such bodies have limited resources, that "[m]ore frequently than not, the reports produced are designed to please the influential Geneva-based nongovernmental organization (NGO) community

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[124] 2018 FFM Detailed Findings, para. 1, MG, Vol. II, Annex 40.

[125] 2018 FFM Detailed Findings.

[126] International Bar Association, "In memoriam: M Cherif Bassiouni" (undated), https://www.ibanet.org/article/64418c27-14b9-414b-b057-e41516876d6a, filed under cover of the letter of the Agent of Myanmar dated 9 January 2026, added to the case file by the decision of the Court communicated to the Parties on 13 January 2026.

[127] M. C. Bassiouni, "Appraising UN Justice-Related Fact-Finding Missions", *Washington University Journal of Law & Policy*, Vol. 5 (2001), pp. 35-50, at p. 35, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1550&context=law_journal_law_policy, CMM, Vol. II, Annex 31.

and certain governments", and that "other states feel less influential in the process, and, at times, they even feel targeted by the process and its outcomes"[128].

10. In 2018, the Human Rights Council then established the second body, the IIMM, with the stated mandate to collect evidence for use in national and international judicial proceedings. The fact that this second body was given this express mandate indicates that materials produced by the FFM were not considered suitable for use in judicial proceedings. The FFM thereafter ceased to exist, and its records were handed over to the IIMM.

11. The FFM reported that it interviewed many hundreds of witnesses, though not all spoke about northern Rakhine State. Curiously, the IIMM has declined to share the FFM's records of the interviews that the FFM conducted with claimed eyewitnesses, even in redacted form. When asked by counsel from Myanmar to make these FFM interview records available, the IIMM said that it did not have permission to share them[129]. Precisely whose permission has been withheld is unclear.

12. So, the intention was that in any judicial proceedings, it would be the work of the IIMM that would be used, rather than the work of the FFM, which was not suitable for such use. Yet, even though the IIMM was supposed to continue and deepen the FFM's work, it only provided 42 witness statements to the Parties in this case. It is unknown how many of the 42 people giving those witness statements were among the persons interviewed by the FMM back in 2017 and 2018.

13. Thus, more than seven years after the inception of its work, the IIMM could put forward only 42 potentially relevant witness statements. Of these, only 12 have been relied on by The Gambia in these proceedings. Can a finding of genocide be made on the basis of these 12 witness statements? In fact, a further 19 of the IIMM witness statements have been relied on by Myanmar in this case, on the basis that they are actually inconsistent with The Gambia's case. Can a case of genocide be decided on the basis of these 31 witness statements? Well, according to The Gambia, evidently not, because The Gambia still places central reliance on the FFM reports.

14. Mr President, Members of the Court, before proceeding, I must recall that Myanmar does not recognize the FFM or the IIMM, and has not co-operated with the work of either. It was under

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[128] *Ibid.*, at p. 40, https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1550&context=law_journal_law_policy, filed under cover of the letter of the Agent of Myanmar dated 9 January 2026, added to the case file by the decision of the Court communicated to the Parties on 13 January 2026.

[129] RM, para. 6.12.

no obligation to do so. And on behalf of Myanmar, I state here again what was already stated in Myanmar's written pleadings, that nothing said about either body in these proceedings implies any recognition of either of those bodies by Myanmar, or their mandates or their work. Myanmar does not positively rely on the material produced by these bodies, or accept that it has evidential weight. Rather, Myanmar must refer to such material because it is relied on by The Gambia. Myanmar refers to it to explain why evidential weight cannot be given to it, and why it does not assist The Gambia. Myanmar further maintains that in these adversarial proceedings, evidential weight should not be given to the product of a non-adversarial process, in which evidence is not being challenged or tested, in which Myanmar was not required to participate, and in which it did not participate[130]. And I explained earlier today why that is the case.

3. Evidential weight of FFM interview records

15. Mr President, Members of the Court, the 2018 FFM Detailed Findings, the main FFM report on which The Gambia relies, says that the FFM conducted interviews with 875 persons[131], of whom at least 500 spoke about events in northern Rakhine State[132]. Their report the following year, the 2019 FFM Detailed Findings, says that the FFM conducted a further 419 interviews[133], although it is not clear how many of these interviewees spoke of events during the operations of 2016 and 2017. Again, the FFM's interviewees are almost entirely anonymous, and not even The Gambia (nor the Court) knows their identities. The FFM's conclusions of fact were based largely on these interviews with unidentified and unknown persons.

16. We do not have all the FFM's records of these interviews because, as I said, the IIMM, which now has them, has not shared them. However, after the written pleadings closed in this case, the IIMM provided the Parties with a new witness statement prepared by the IIMM, given by a person previously interviewed by the FFM. This time, the IIMM also provided the FFM's interview note of

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[130] CMM, paras. 6.37, 7.36; RM, para. 7.8.

[131] 2018 FFM Detailed Findings, para. 19, MG, Vol. II, Annex 40.

[132] *Ibid.*, para. 20; Affidavit of Nicholas Koumjian, 17 November 2025, para. 53, filed under cover of the letter of the Agent of The Gambia dated 18 November 2025, maintained in the case file by the decision of the Court communicated to the Parties on 15 December 2025.

[133] 2019 FFM Detailed Findings, para. 32.

this person. As a result, we now have one single example of a written record prepared by the FFM of an interview with a claimed eyewitness. You will find this at tab 6.2 of your folder[134].

17. What you will see is this.

18. First of all, this document now confirms a guess made in Myanmar's written pleadings that the FFM did not take signed witness statements[135]. The document you will see at tab 6.2 is not a witness statement. If you look at the last two pages, you will see that it is not signed by the interviewee. Nothing indicates that he read it or had it read back to him, or that he adopted it. Nothing indicates that he was told that what he said might be used in judicial proceedings. I will shortly refer to various statements in the note expressing doubts about the interviewee's credibility. The existence of these notes in the document suggest that this document was never intended to be seen by the interviewee. In *Croatia*, the Court said unequivocally that it "cannot accord evidential weight to those statements which are neither signed nor confirmed"[136].

19. Second, the wording of this interview note is that of the interviewer rather than of the interviewee. It says, for instance: "The witness notes that", "Witness claims", "Witness made reference to", and so forth. You will see that, for instance, on the first page in the first substantive paragraph; at the second page in the fourth paragraph and the second last paragraph; and on the third page at the second and the fifth paragraph. In *Croatia*, the Court said that it would not give weight to interview records when the wording appeared to be that of police officers (i.e. the interviewer) rather than that of the witness[137].

20. For these reasons alone, according to the Court's established case law, no evidential weight could be given to this document. There is no reason to think that this document is atypical of all of the other interviews conducted by the FFM. There is no evidence that the FFM ever took formal signed witness statements. It follows that no evidential weight could be given to any of the FFM's records of interview, even if all of the others were before the Court, which they are not.

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[134] FFM, interview note of XI-008, filed under cover of the letter of the Agent of Myanmar dated 8 September 2025, added to the case file by the decision of the Court communicated to the Parties on 22 September 2025.

[135] RM, para. 6.10.

[136] RM, para. 6.12; *Croatia Genocide, 2015 Judgment*, p. 78, para. 198, last sentence.

[137] *Croatia Genocide, 2015 Judgment*, p. 78, para. 198.

21. Although I could stop there, there are also other reasons why no evidential weight could be given to the FFM interview notes.

22. First, this interview note has not been produced with the care to be expected of a witness statement or affidavit used in judicial proceedings. It indicates that the interview was held on a single day, 5 March 2018. We see that on the first page, about halfway down, with the entry "Interview Date". Although it gives the interview date, it does not indicate the start and finish times of the interview, so the interview may have lasted for much less than a day. That is likely because the staff of the FFM interviewed hundreds of witnesses in a short space of time[138]. The part of this note setting out the substance of the interview takes up less than three pages. It lacks detail, and some of its language is telegraphic. For instance, on the third page towards the bottom, you see that it says: "Post 25th plans? Likely to have future attacks if needed". This suggests that it was prepared under time pressure, without attention to detail. The note does not make clear to what extent the interviewee claims to speak of matters of personal knowledge, and to what extent hearsay or opinion, or even just gossip. On the last page at the bottom, we see that the interview record itself was created on 24 April 2018, which was over a month and a half after the date of the interview itself, which was on 5 March 2018. It says it was modified on 20 August 2018, some four months later, but we do not know how it was modified or by whom or why. On the first page, against the heading "Interview and Name", we see that the anonymized FFM interviewer was a single person, apparently a staff member of the FFM, since the three members of the FFM were not in Bangladesh at the time[139].

23. Although Myanmar does not accept that evidential weight can be given to IIMM witness statements, it is nonetheless instructive to compare this FFM interview note with the IIMM witness statement of the same person, which is found at tab 6.3 of your folder[140]. You will see at the bottom of page 2 and top of page 3 that the IIMM interview took place over five and a half days, with precise start and finish times recorded for each day of the interview. You will see in the footer of pages 2 and 3 that the entire statement is 46 pages long. If you look at the whole of this document — and

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[138] CMM, para. 6.40; 2018 FFM Detailed Findings, para. 23, MG, Vol. II, Annex 40.

[139] CMM, para. 6.10, footnote 688; RM, para. 6.20, footnote 711 and accompanying text; 2018 FFM Detailed Findings, para. 23, MG, Vol. II, Annex 40.

[140] IIMM, Witness Statement No. IIMM0028674762, 1 June 2025 (P4715), (filed under cover of the letter of the Agent of Myanmar dated 8 September 2025, added to the case file by the decision of the Court communicated to the Parties on 22 September 2025).

the whole of the document is in the case file — you will see that the document as a whole makes clear that much of what this person says is hearsay[141] or opinion[142]. It also makes clear that this person was a member of ARSA, and gives no indication that he ceased to be supportive of ARSA. This is significant, given the pervasive influence of ARSA in the camps in Bangladesh where he appears still to have been living when this statement was given. Again, if you look at the full statement, you will see that it even contains a statement that "[t]here is a high level *Shura* Group member [of ARSA] now responsible for all the Rohingya camps here in Bangladesh"[143]. Furthermore, this witness statement seeks to deny the massacre by ARSA of 105 Hindus in Kha Maung Seik on 25 August 2017[144], an incident that even The Gambia has not disputed.

24. This comparison between the FFM interview record at tab 6.2 of your folder and this IIMM witness statement at tab 6.3 makes all the more clear that the FFM document is not a document to which evidential weight could be given. Again, I repeat, nothing suggests that this FFM record is atypical of interviews conducted by the FFM generally.

25. There is also a further reason why this particular interview record lacks weight, namely that the FFM interviewer had doubts about the interviewee's credibility. In the document at tab 6.2, on the first page at the top, you see that it is said that the interviewee is an "alleged ARSA member", and it says that he may have been "evading questions regarding his ARSA role/relationship". On the second last page, just under halfway down the page, against the heading "Reliability of the source", we also see the interviewer's words: "It's at times diff[i]cult to tell whether witnesses like him are good, or well-rehearsed. I cannot discount that this witness may be well-rehearsed." On the last page, the interviewer's final note says he was evasive about some matters.

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[141] IIMM, Witness Statement No. IIMM0028674762, 1 June 2025 (P4715), paras. 57, 58, 61, 62, 78, 99, 108 *(c)*, 144, 176, 177, 178, 188 (and by implication paras. 189-192), 198, 203 (second and last sentences), 205 (second sentence), 206 (second and last sentences), 212, 214, 217, 220, 223, 224, 226, 227, 228 and 229 (filed under cover of the letter of the Agent of Myanmar dated 8 September 2025, added to the case file by the decision of the Court communicated to the Parties on 22 September 2025).

[142] *Ibid.*, paras. 177 (sixth sentence), 191 (second last sentence), 232.

[143] *Ibid.*, para. 146.

[144] *Ibid.*, para. 232.

26. What is remarkable is that the main FFM report on which The Gambia relies refers to this very interview note some 22 times[145], without giving any indication to the reader that there was any doubt about this person's credibility or reliability.

27. The Head of the IIMM himself recognizes that the work product of the FFM was not suitable for use in judicial proceedings. He says:

> "Given the limited timeframe of its operations, the focus and methodology of the FFM was necessarily different in nature from that of the [IIMM] . . . Rather than having a mandate to issue public reports and make recommendations to Member States, the [IIMM's] mandate is to collect, preserve and analyse evidence so as to facilitate criminal prosecutions."[146]

28. Thus, the mandate of the FFM was not to collect evidence for use in judicial proceedings. Its very small staff in any event lacked the expertise to do so, having no one qualified in forensic investigations or litigation. Its interview notes are not, and were not intended to be, suitable for use as evidence in judicial proceedings, and certainly not for a hearing on the merits involving the high standard of proof applicable in this case.

29. For this reason, no evidential weight could be given to the FFM's written records of the interviews it conducted.

4. Evidential weight of the FFM reports

30. From there, I move on to the evidential weight of the FFM reports themselves.

31. It is self-evident that the FFM reports are not primary documentation of any facts, or contemporaneous records of events. They are not statements of any facts within the personal knowledge of the members of the FFM. They are secondary sources. They give second-hand summaries of events spoken of by those who the FFM interviewed, and second-hand descriptions of other documents that the FFM considered. The reports then contain the FFM's opinions and conclusions based on this material.

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[145] 2018 FFM Detailed Findings: footnotes 1314, 1933, 2267. MG, Vol. II, Annex 40; footnotes 2288, 2301, 2308, 2310, 2317, 2324, 2327, 2330, 2366, 2368, 2369, 2373, 2509, 2517. CMM, Vol. VI, Annex 239; footnotes 1323, 1326, 1327, Annex G filed under cover of the letter of the Agent of Myanmar dated 9 January 2026, added to the case file by the decision of the Court communicated to the Parties on 13 January 2026; footnotes 1331, 1337, not included in the case file.

[146] Affidavit of Nicholas Koumjian, 17 November 2025, para. 53, filed with the letter of the Agent of The Gambia dated 18 November 2025, maintained in the case file by decision of the Court communicated to the Parties on 15 December 2025.

32. Obviously, a secondary source has no greater evidential value than the original source[147]. Being a secondary source, it will in fact have less value. Indeed, a secondary, tertiary or quaternary source of information should be given no weight at all, unless there are good reasons why it is impossible to produce the original source, or at least a document nearer to the original source. This is the "best evidence" rule[148].

33. To the extent that the FFM reports set out the FFM's conclusions and opinions, they cannot be given any evidentiary weight. As the Court has held, opinions are not evidence[149]. The Court must form its own conclusions and opinions, based on the evidence.

34. To the extent that the FFM reports are based on other publicly available documents, they can also be given no evidential weight. There is no reason why the other documents to which they refer could not themselves have been put before this Court, in which case this Court could examine them directly and form its own view of them.

35. To the extent that the FFM reports are based on interviews with claimed eyewitnesses, they can again be given no evidential weight. For the reasons I have given, no weight can be given to the one FFM interview note that the Parties have and which is now before the Court. It follows that no weight can be given to the hundreds of others that we do not even have. It follows that no evidential weight can be given to FFM reports giving second-hand descriptions of those documents to which no weight can be given.

36. The FFM reports are in any event not even reliable descriptions of the interview notes. The FFM reports do not indicate when facts stated in an interview note were hearsay, or explain each interviewee's claimed basis of knowledge for the facts for which their interview notes were cited, or note when the FFM had doubts about the credibility of an interviewee. There is in fact no indication that the FFM ever rejected the account of a single interviewee on the ground of lack of credibility. The FFM reports themselves just seem to accept the contents of interview notes at face value.

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[147] *Nicaragua* v. *United States*, p. 41, para. 63; *Oil Platforms*, p. 190, para. 60.

[148] RM, para. 5.88.

[149] *Nicaragua* v. *United States*, p. 42, para. 68; *Bosnia Genocide, 2007 Judgment*, p. 130, para. 212; *Croatia Genocide, 2015 Judgment*, p. 78, para. 197; CMM, paras. 5.31, 5.43, 5.44.

37. To the extent that the FFM reports are based on other documents that are not publicly available, again no evidential weight should be given to them in the absence of sufficient reasons why those other documents could not themselves have been produced.

38. In short, this Court cannot be told: "You have no need to consider the evidence or make findings of fact, because the relevant facts have already been found by a United Nations body based on evidence that you have not seen." A court of law must make its own findings of primary facts, based on the evidence presented to it, and must draw its own conclusions from the facts that it finds. Otherwise, it abdicates its core mission. This is what The Gambia asks you to do in the present case: to abdicate your judicial function — and Myanmar stands by that word: abdicate.

5. No valid comparison can be made with judgments of the ICTY

39. Mr President, Members of the Court, The Gambia seeks to avoid these difficulties by arguing that FFM reports should be treated like final trial judgments of the International Criminal Tribunal for the former Yugoslavia, the ICTY[150]. In both *Bosnia* and *Croatia*, the Court said it "should in principle" accept findings of fact in trial judgments of the ICTY as "highly persuasive", and that it should give "due weight" to "any evaluation by the Tribunal based on the facts", such as about the existence of a genocidal intent[151].

40. However, no possible valid comparison whatsoever can be drawn between ICTY judgments and FFM reports.

41. First, in both *Bosnia* and *Croatia*, the parties *agreed* that the Court should give such evidential weight to ICTY judgments[152]. That is not the case here, in relation to the FFM reports.

42. Second, the Court did not suggest in *Bosnia* and *Croatia* that it would accept findings of the ICTY unquestioningly. It made clear that it still "must itself make its *own* determination of the facts"[153].

43. Third, the ICTY and FFM were entities of an entirely different nature.

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[150] MG, paras. 4.75-4.76.

[151] *Bosnia Genocide, 2007 Judgment*, p. 134, para. 223; *Croatia Genocide, 2015 Judgment*, pp. 74-75, 136, paras. 182, 469.

[152] *Bosnia Genocide, 2007 Judgment*, pp. 131-132, para. 215; *Croatia Genocide*, *2015 Judgment*, pp. 74-75, paras. 182, 469.

[153] *Bosnia Genocide, 2007 Judgment*, p. 130, para. 212.

44. The ICTY was a judicial body, created by a Chapter VII resolution of the Security Council, with binding authority to require States to co-operate with it[154]. It had an adversarial judicial procedure complying with the International Covenant on Civil and Political Rights[155]. It applied a standard of proof of "beyond reasonable doubt"[156], comparable to that applicable in this case[157]. The accused were presumed innocent, and had the right to counsel, to cross-examine witnesses, to call witnesses of their own, and the right to pre-trial disclosure of the evidence against them[158]. Parties also had a right of appeal[159] and — even after final appeal — proceedings could be reopened if new facts were discovered[160]. Its judgments were given by professional judges elected by the General Assembly[161], who personally, individually, sat through the whole trial and personally heard all of the witness testimony, and of the challenges to it. Its proceedings were generally in public, and followed published rules, with the possibility of procedural challenges.

45. In contrast, the FFM was "of a non-judicial [character]"[162]. It had no published procedures. Its proceedings were not adversarial. There was no adversarial scrutiny of evidence, and no procedure for challenging its reports. It applied a low "reasonable grounds" standard of proof[163]. Claimed eyewitnesses were apparently interviewed by unidentified staff of the FFM rather than by all or one of its three members[164]. This means that eyewitness accounts in FFM reports are at least double hearsay. They state what the FFM members were told by an FFM staff member about what the staff member was told by interviewees.

46. There is also no comparison between the ICTY and the FFM in terms of resources[165]. At the time of the Court's judgments in *Bosnia* and *Croatia*, the mandate of the ICTY had already lasted

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[154] *Ibid.*, p. 133, para. 220.

[155] *Ibid.*

[156] *Ibid.*

[157] CMM, para. 5.17.

[158] *Bosnia Genocide, 2007 Judgment*, p. 133, para. 220.

[159] *Ibid.*, p. 134, para. 222.

[160] *Ibid.*

[161] Statute of the ICTY (original version), Article 13 (2), Report of the Secretary-General pursuant to paragraph 2 of Security Council resolution 808 (1993), UN doc. S/25704, 3 May 1993, p. 41, CMM, Vol. V, Annex 192.

[162] *Ibid.*, p. 7.

[163] 2018 FFM Detailed Findings, p. 7, para. 10, MG, Vol. II, Annex 40.

[164] *Ibid.*, pp. 7-8, para. 13, first dot point, and para. 14, first dot point.

[165] CMM, paras. 6.19, 6.48, 6.51.

14 and 22 years respectively[166], and it had hundreds of full-time professional staff, including qualified and experienced forensic investigators and litigators.

47. Also, full records of proceedings before the ICTY, including video recordings and written transcripts were kept, and are for the most part publicly accessible. Unlike in the case of the FFM, it is generally possible to look at the actual evidence on which the ICTY based its findings and its judgments and assess the reasons for accepting it or rejecting that evidence[167].

48. Most importantly, the Court was unequivocal in *Bosnia* that it would give weight only to final trial judgments of the ICTY, and not to other decisions — such as decisions of the prosecutor to include charges in an indictment, or decisions of a judge or chamber to confirm an indictment or to issue a warrant of arrest[168]. The Court said clearly that "claims made by the Prosecutor in the indictments are just that — allegations made by one party", and that "as a general proposition the inclusion of charges in an indictment cannot be given weight"[169]. The FFM expressly applied a standard of proof of whether "a competent prosecutorial body would have sufficient elements to . . . prepare a case for adjudication"[170]. This does not purport to be anything more than a decision of a prosecutor to bring certain charges. In fact, it is something less than that. It follows from *Bosnia* that the FFM reports have at their highest, the status of "allegations" which "cannot be given weight"[171].

6. Comparisons with *The fall of Srebrenica* do not assist

49. Mr President, Members of the Court, The Gambia also tries to draw analogies between the FFM reports and a report of the Secretary-General called *The fall of Srebrenica*[172], which was one of the items of evidence relied on by the applicant in the *Bosnia* case[173].

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[166] *Bosnia Genocide, 2007 Judgment*, p. 134, para. 221.

[167] See for instance *Bosnia Genocide, 2007 Judgment*, p. 129, para. 206: "On this matter, the Court observes that the Applicant has extensive documentation and other evidence available to it, especially from the readily accessible ICTY records. It has made very ample use of it."

[168] *Bosnia Genocide, 2007 Judgment*, pp. 132-133, paras. 217-219.

[169] *Ibid.*, p. 132, para. 217.

[170] 2018 FFM Detailed Findings, p. 351, para. 1386, MG, Vol. II, Annex 40.

[171] *Bosnia Genocide, 2007 Judgment*, p. 132, para. 217.

[172] UNGA, Report of the Secretary-General pursuant to General Assembly resolution 53/35, *The fall of Srebrenica*, UN doc. A/54/549, 15 November 1999 (hereinafter "*The fall of Srebrenica*"), CMM, Vol. V, Annex 198.

[173] MG, paras. 4.75-4.76; CR 2026/1, pp. 58-59, para. 62 (Reichler); CR 2026/2, p. 16, para. 13 (Reichler).

50. The Court said in *Bosnia* that it "gained substantial assistance from this report" of the Secretary General[174]. However, the Court in no way suggested that the entire contents of this report could be treated like a final trial judgment of the ICTY. In *Bosnia*, the Court relied on this report in relation to certain specific matters in which the United Nations itself was involved at the material time, and which were recorded in contemporaneous documents in the United Nations archives, on the basis of which the report was prepared[175]. The Court did not specifically rely on this report as evidence of any of the facts relating to the particular acts alleged to be genocide[176].

51. The FFM reports were not prepared by the Secretary-General, and do not relate to matters within the institutional knowledge or archives of the United Nations or the Human Rights Council. It is not clear what analogy The Gambia seeks to draw between the FFM reports and *The fall of Srebrenica*, or how it is said to assist The Gambia.

7. Conclusion

52. Mr President, Members of the Court, for these reasons, no evidential weight can be given to the FFM reports.

53. It is in fact surprising that The Gambia relies on them.

54. The United Nations, at very considerable expense, at the time of a liquidity crisis, has now established the IIMM with the express mandate of collecting and producing witness statements and other evidence for connection in use with judicial proceedings.

55. Despite this, The Gambia clings on to the FFM reports as its primary evidence in the case. Some 42 witness statements taken by the IIMM have now been provided by it to the Parties in this case. But The Gambia has relied on only 12 of them. Myanmar itself has produced 19 others, many more than even The Gambia itself. The Gambia continues to base its case on the FFM material, to which no evidential weight can be attached, because there is no better evidence that supports its claim of genocide.

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[174] *Bosnia Genocide, 2007 Judgment*, p. 137, para. 230.

[175] CMM, paras. 6.24-6.27.

[176] CMM, para. 6.28.

56. The Gambia seeks to deflect this criticism, saying that it does not know what Myanmar is talking about[177]. But the point is obvious. The IIMM "analytical reports" do not deal with the core events of 2016 and 2017, and there are in any event very few references in The Gambia's written pleadings to these IIMM reports. As to the IIMM witness statements, it is a plain fact that that The Gambia has relied on only 12 out of the 42 made available to it. It is a simple fact that it places limited reliance on IIMM material and makes the FFM reports the heart of its case — despite the fact that the FFM was not created for the purpose of producing evidence for use in judicial proceedings, while the IIMM purportedly was. The Gambia must acknowledge this simple truth: it has no better evidence than the FFM reports.

57. Mr President, Members of the Court, that concludes my presentation of Chapter 6 of Myanmar's written pleadings. I thank you for your careful attention.

58. Mr President, could I please invite you now to call on Ms Lawrie, who will address the background facts about ARSA.

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

The Court adjourned from 4.40 p.m. to 5 p.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Ms Leigh Lawrie. You have the floor, Madam.

Ms LAWRIE:

IV. ARAKAN ROHINGYA SALVATION ARMY ("ARSA")

1. Introduction

1. Thank you Mr President, Madam Vice-President, Members of the Court, it is an honour and a privilege to appear before you for the first time on behalf of Myanmar. The purpose of this presentation is to present the background to the Arakan Rohingya Salvation Army, also known by

[177] CR 2026/2, p. 27, para. 42 (Reichler).

its acronym "ARSA", which was declared a terrorist organization by Myanmar on 25 August 2017[178].

2. At the beginning of these proceedings, The Gambia virtually ignored ARSA. Its 70-page Application instituting these proceedings contains only four brief references to the group[179]. Its 510-page Memorial mentions ARSA in only 17 paragraphs, mostly in passing[180]. Annex 40 to its Memorial is an extract of a report of the FFM, a document on which The Gambia places the greatest reliance. Yet that extract omits 57 paragraphs covering topics such as the "organization, structure and resources" of ARSA; the "ARSA attacks on 9 October 2016"; the "ARSA attacks on 25 August 2017"; "Allegations of human rights abuses committed by ARSA"; and ARSA's "Burning of non-Rohingya villages"[181]. Myanmar's Counter-Memorial gives other examples where extracts of NGO reports annexed to the Memorial omit pages of those reports dealing with ARSA, and gives other examples where the Memorial fails to refer to reports which discuss ARSA atrocities[182]. So, while The Gambia argued on Wednesday that the FFM did not ignore ARSA, nor did the NGOs whose reports The Gambia cites to, The Gambia clearly tried to do so[183]. It is also clear during these oral hearings that The Gambia raises ARSA simply to try to dismiss it.

3. But ARSA cannot be ignored or dismissed if the Court is to have a complete understanding of what happened in northern Rakhine State in 2016 and 2017. ARSA is the reason why Myanmar conducted counter-terrorism operations in that region, during that period. ARSA is the reason why Myanmar implemented certain counter-terrorism measures, such as curfews and the confiscation of weapons. And ARSA and its continuing influence in the camps in Bangladesh is the reason why much of the evidence in this case must be approached with extreme caution. Myanmar explains all this in detail in Chapter 3 of each of its two written pleadings.

4. Faced with the evidence presented in Myanmar's Counter-Memorial, The Gambia's Reply devotes a little more attention to ARSA, but not much. It contends that ARSA's terrorist attacks in

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[178] CMM, para. 3.66.

[179] AG, paras. 48, fns. 88, 72, 73, 76.

[180] MG, paras. 1.25, 7.10, 8.5, 8.8, 11.82, 11.91, 11.94, 11.99, 11.100, 12.58, 12.59, 12.106, 12.109, 12.110, 12.112, 12.122, 13.15, fn. 1832.

[181] 2018 FFM Detailed Findings, paras. 55-59, 1014-1065, CMM, Vol. VI, Annex 239.

[182] CMM, paras. 3.9-3.11.

[183] CR 2026/4, p. 75, para. 61 (Suleman).

2017 were used as a "pretext"[184] by Myanmar to commit genocide[185]. It also attempts to downplay ARSA's capabilities and the gravity of its actions[186]. It gives no detailed consideration to ARSA's terrorist activities including in the lead up to the August 2017 attacks.

5. But what that evidence shows is that ARSA evolved into an organized, well-trained fighting force, capable of mobilizing the Bengali community and capable of planning and executing co-ordinated attacks at multiple locations in 2016 and 2017, to which Myanmar was inevitably required to respond.

6. My presentation will be divided into four parts. First, I will address the question — what is ARSA? Second, I will address The Gambia's "pretext" argument and show that, not only is it misleading, but it undermines its own case[187]. Third, I will address ARSA's influence in the camps in Bangladesh, the threat that it poses to those living there and the corrupting impact it has on this case. Finally, I will discuss the Kha Maung Seik massacre, a horrific incident, which exemplifies several recurring themes in this case.

2. What is ARSA?

7. Mr President, Members of the Court, what is ARSA? I pose this question in the present tense because it still exists and it is still active. The Gambia answers that ARSA is a "small, poorly organised militia"[188]. But this answer is contrary to the evidence.

8. ARSA began in 2012. The group has been known by different names such as Harakah al Yaqin. In March 2017, it changed its name to ARSA[189]. For simplicity, save when directly quoting from evidence, Mr Blom-Cooper and I will refer to it as "ARSA".

9. During the period of interest to our case, ARSA was led by a Bengali known as Ataullah[190]. Active recruitment of local leaders began in 2013, and hundreds of villagers in northern Rakhine

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

[185] RG, paras. 7.4, 7.14.

[186] RG, paras. 7.16-7.17, 9.41.

[187] RG, para. 7.3.

[188] RG, para. 7.16. See also RG, para. 9.41; Second Expert Report of Michael A. Newton, May 2024, para. 10, RG, Vol. IV, Annex 67.

[189] 2018 FFM Detailed Findings, para. 1012, MG, Vol. II, Annex 40.

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

State were trained from 2014 onwards[191]. The training given was relatively professional. It was delivered by Bengali veterans and experienced foreign fighters from Pakistan and Afghanistan and took more than two years to complete[192]. It included weapons use, guerrilla tactics and had a particular focus on manufacture and use of explosives and improvised explosive devices, or "IEDs". Pausing there — IED use is a feature of many of the ARSA attacks in 2016 and 2017, as Mr Blom-Cooper and I will describe in our later presentations.

10. By 2016, ARSA had evolved into a professional, well-organized and well-trained group[193]. A report of the International Crisis Group found that the main fighting force was made up of trained Muslim villagers in northern Rakhine State who had been organized into village-level cells[194]. This local support was vital. The International Crisis Group observed that it would not have been possible for ARSA to establish itself and make detailed preparations for attacks without the buy-in of local communities and leaders[195].

11. Pausing there — recognizing this local support does not mean that Myanmar equated all villagers, regardless of age or gender, as ARSA supporters and then, by extension, as terrorists who could be legitimately attacked and killed, as was argued by The Gambia on Wednesday[196]. Rather, local support refers to the way in which ARSA was structured at the village level and the way in which it would trigger "last-minute" mobilization (to use the wording of the FFM) from within the local community[197]. So before I move on, allow me to be completely clear. When Myanmar refers to "supporters", Myanmar — like the FFM — is referring to local villagers who, though not formal ARSA members, joined in ARSA's violence when called to do so. When Myanmar uses the word "supporters", it does not mean those who merely sympathized with ARSA or agreed with its aims. It means active, adult participants in terrorist activities. The phrase "men, women and children" is a reflection of the unfortunate fact that "youths", who in most societies would be counted as children

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[191] International Crisis Group, *New Muslim Insurgency*, p. 15, CMM, Vol. VII, Annex 296.

[192] *Ibid.*

[193] *Ibid.*, p. i.

[194] International Crisis Group, *New Muslim Insurgency*, p. 13, CMM, Vol. VII, Annex 296. See also International Crisis Group, *Myanmar's Rohingya Crisis Enters a Dangerous New Phase*, Asia Report No. 292, 7 December 2017 ("International Crisis Group, *Dangerous New Phase*"), p. 6, CMM, Vol. VII, Annex 297.

[195] International Crisis Group, *New Muslim Insurgency*, p. 17, CMM, Vol. VII, Annex 296.

[196] CR 2026/4, p. 63, paras. 13-15 (Suleman).

[197] 2018 FFM Detailed Findings, para. 1022, CMM, Vol. VI, Annex 239.

were, not uncommonly, in the rank and file of those confronting the military, thereby putting themselves in the way of harm and being indistinguishable from older persons, as can also be observed in other countries.

12. Returning to the assessment of ARSA. The International Crisis Group's assessment of ARSA does not stand alone. The FFM reached similar conclusions regarding ARSA's level of organization and capabilities[198].

13. The FFM expressly considered the perception that ARSA was "a poorly armed and poorly trained group"[199]. However, it concluded that ARSA met the definition of a "non-State armed organisation" because the group evidenced various characteristics, including a command structure, an ability to launch co-ordinated or simultaneous attacks across different locations in a tightly controlled environment, an ability to mobilize among the Bengali community, the organization of village cells, an ability to provide at least a core group with some military training and others with basic defence training and an ability to obtain some firearms and produce some improvised explosive devices and other handmade weapons[200].

14. Even the witness statements provided by the IIMM contradict The Gambia's depiction of ARSA[201]. As Dr Staker has explained, Myanmar does not accept that the IIMM material has any evidential weight. Despite this, the IIMM material, unlike the FFM material, is at least intended to be material for use in judicial proceedings. If The Gambia were to rely on anything, it would be expected to rely on the IIMM material rather than the FFM material. However, The Gambia places very little reliance on the IIMM material, for the very reason that it does not assist The Gambia's case.

15. Four witness statements of the IIMM are of relevance to the point that I am now addressing. All are from Bengali Muslims. All are avoided by The Gambia.

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[198] 2018 FFM Detailed Findings, paras. 1015, 1017, 1019, CMM, Vol. VI, Annex 239.

[199] *Ibid.*, paras. 55-56.

[200] *Ibid.*, paras. 56-57.

[201] IIMM, Witness Statement No. IIMM0028503937, paras. 36-52, RM, Vol. IV, Annex 149; IIMM, Witness Statement No. IIMM0019915259, paras. 69, 76, RM, Vol. IV, Annex 151; IIMM, Witness Statement No. IIMM0019628625, paras. 53-55, 66-68, RM, Vol. IV, Annex 131; and IIMM, Witness Statement, No. IIMM0028674762, paras. 122-187 (filed under cover of the letter of the Agent of Myanmar dated 8 September 2025, added to the case file by the decision of the Court communicated to the Parties on 22 September 2025).

16. I will focus on the statement of P4715 as this was provided to Parties after the written pleadings had closed. He describes in detail ARSA's senior leadership and governance structure, including the existence of the "*Shura* group"[202]. He explains that the *Shura* group was led by an individual based in Saudi Arabia and consisted of about 21 people. Ataullah, as Commander-in-Chief, was part of this group. Within the group was a smaller decision-making committee of 11 people, which was itself split into two sub-groups. One sub-group for fighting and soldiers and the other an executive decision-making group[203]. This sophisticated structure described by P4715 plainly contradicts The Gambia's claim that the group was "poorly" organized.

17. All this evidence, taken from various different sources, shows that Myanmar has not sought to "inflate[] 'ARSA' into something akin — in size and strength to an omnipotent and omnipresent guerilla force", as The Gambia with great exaggeration claims[204]. Rather, Myanmar simply presents the relevant available evidence.

18. If The Gambia wishes to make claims about ARSA's strength — or lack thereof — it might be expected that it would seek to substantiate them. But it appears that The Gambia is unable or unwilling to do that[205]. While assessing a terrorist group's strength in numbers is not straightforward, from a review of the available evidence, it is clear that, between October 2016 and August 2017, ARSA's membership and support base grew stronger[206]. Further, the evidence shows that there was a large-scale mobilization of supporters shortly before ARSA's August 2017 attacks[207].

19. Records from Myanmar's Ministry of Home Affairs assessed that 17,600 Bengalis were involved in ARSA's attacks, a figure which is supported by:

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[202] IIMM, Witness Statement, No. IIMM0028674762, paras. 122-167 (filed under cover of the letter of the Agent of Myanmar dated 8 September 2025, added to the case file by the decision of the Court communicated to the Parties on 22 September 2025).

[203] *Ibid.*, paras. 135-139.

[204] RG, para. 7.15.

[205] RG, para. 7.16.

[206] 2018 FFM Detailed Findings, para. 1020, CMM, Vol. VI, Annex 239; Fortify Rights and United States Holocaust Memorial Museum, *"They Tried to Kill Us All": Atrocity Crimes against the Rohingya Muslims in Rakhine State, Myanmar*, November 2017, pp. 6-7, CMM, Vol. VII, Annex 280.

[207] 2018 FFM Detailed Findings, paras. 1021-1022, CMM, Vol. VI, Annex 239; International Crisis Group, *Dangerous New Phase*, p. 11, CMM, Vol. VII, Annex 297; Amnesty International, *Destroy Everything*, p. 40, CMM, Vol. VI, Annex 269.

(1) The evidence of an ARSA member who estimated that, prior to the August 2017 attacks, there were 10,000 ARSA members in Maungdaw Township alone[208]; and

(2) Amnesty International's assessment that, by 25 August 2017, ARSA was able to mobilize "around several thousand" members and supporters[209].

20. Thus, the material before the Court indicates that by August 2017, ARSA had become a highly organized and well-established terrorist organization with a significant membership and extensive support base interwoven into the villages in northern Rakhine State. It had clear lines of command and used communication platforms such as WhatsApp to co-ordinate its activities[210]. It was this support base, comprising of ordinary villagers, which responded to Ataullah's call to arms on 24 August 2017, when he instructed cell leaders to mobilize all male villagers over the age of 15[211].

21. This sophisticated group also had a clear objective — to attack Myanmar's security apparatus with a view to gaining "complete control" over northern Rakhine State[212].

22. Even in the face of all this evidence, The Gambia's Reply contends that ARSA did not have sufficient resources to mount a true challenge to the Myanmar Defence Services[213]. But the attacks planned and perpetrated by ARSA in 2016 and 2017 show this argument to be false.

3. ARSA's role in events in 2016 and 2017 shows the "pretext" argument is false

23. Mr President, Members of the Court, this brings me to the second part of my presentation. The Gambia argues that ARSA's terrorist attacks were used as a "pretext" to "destroy the Rohingya". This "pretext" argument is predicated on an extremely narrow focus, that is the events leading up to ARSA's August 2017 attacks. This "pretext" argument simply airbrushes ARSA's 2016 attacks and their consequences from The Gambia's narrative. This airbrushing was particularly noticeable in

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[208] Fortify Rights, "First-hand Testimonies from August-September 'Clearance Operations' in Myanmar", August-September 2017 ("Fortify Rights Document"), No. 24, p. 41, CMM, Vol. VII, Annex 278.

[209] Amnesty International, *Destroy Everything*, p. 23, CMM, Vol. VI, Annex 269.

[210] International Crisis Group, *New Muslim Insurgency*, p. 14, CMM, Vol. VII, Annex 269; Fortify Rights Document, No. 24, pp. 38-41, RG, Vol. III, Annex 43; IIMM, Witness Statement No. IIMM0019915259, para. 76, RM, Vol. IV, Annex 151.

[211] 2018 FFM Detailed Findings, para. 1045, CMM, Vol. VI, Annex 239.

[212] CMM, para. 3.24. See also 2018 FFM Detailed Findings, paras. 1012-1013, MG, Vol. II, Annex 40.

[213] RG, para. 7.16.

The Gambia's speech dealing with the overview of the "clearance operations" given on Tuesday where — despite repeatedly stating that the "clearance operations" proceeded in two waves, the first wave of October 2016 was always skipped[214]. As a result, The Gambia is able to present a misleading impression of the evidence.

24. The Gambia's "pretext" argument suffers from at least four major flaws.

25. First, events in 2017 cannot be divorced from ARSA's attacks in 2016 and its activities leading up to the August 2017 attacks. Evidence about this period explains the seriousness of the terrorist threat which Myanmar faced in northern Rakhine State and its legitimate response to it. The Gambia's attempt to start the clock in 2017 is self-serving, apparently aimed at giving the false impression of unprovoked attacks against peaceful villages.

26. The plain fact is that northern Rakhine State was not at peace before August 2017. Instead, ARSA's major resort to violence began in 2016 when, on 9 October, it attacked three border guard police posts. These co-ordinated attacks hit posts in Kyee Kan Pyin, in Maungdaw Township[215], Nga Khu Ya, also in Maungdaw Township, and Koe Tan Kauk in Rathedaung Township[216]. The attacks involved over 400 armed Bengali Muslims[217]. Further clashes occurred between 10 and 12 October 2016, including one in which four soldiers were killed[218].

27. The International Crisis Group noted that these 2016 attacks "reflected an unprecedented level of planning"[219], and described them as "a major escalation of violence in Rakhine"[220]. Understandably, Myanmar responded by commencing counter-terrorism operations for short periods to restore stability and to protect the civilian population[221].

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[214] CR 2026/3, p. 12, paras 1, 2; p. 19, para. 26 (Loewenstein).

[215] 2018 FFM Detailed Findings, paras. 1031, 1036, CMM, Vol. VI, Annex 239.

[216] *Ibid.*, para. 1036; International Crisis Group, *New Muslim Insurgency*, p. 6, CMM, Vol. VII, Annex 296; International Crisis Group, *Dangerous New Phase*, pp. 8-9, CMM, Vol. VII, Annex 297.

[217] International Crisis Group, *New Muslim Insurgency*, p. 6, CMM, Vol. VII, Annex 296; A. Ware and C. Laoutides, *Myanmar's "Rohingya" Conflict* (2018), pp. 49-50, CMM, Vol. III, Annex 72.

[218] Myanmar News Agency, "Troops fight back violent armed attackers, kill four", *The Global New Light of Myanmar*, 11 October 2016, CMM, Vol. VIII, Annex 367; *Myawady*, "Tatmadaw attacked by 300 armed men, four soldiers killed", *The Global New Light of Myanmar*, 12 October 2016, CMM, Vol. VIII, Annex 368.

[219] International Crisis Group, *New Muslim Insurgency*, p. 6, CMM, Vol. VII, Annex 296.

[220] *Ibid.*

[221] CMM, para. 3.30. See also CMM, paras. 1.40-1.41.

28. ARSA's insurgency flared up again in November 2016. On 12 November, the military clashed with ARSA near Pwint Hpyu Chaung. Thereafter, several skirmishes occurred during which ARSA, supported by several hundred armed villagers, shot at troops[222]. Later that day, there were several IED incidents, including two attacks on government forces[223].

29. In terms of casualties from the 2016 attacks, the Government estimated at the time that 69 ARSA terrorists, seven Tatmadaw soldiers and 10 police officers were killed. It also estimated that five Tatmadaw soldiers and six police officers were injured. Two hundred and thirty-four Bengali were arrested[224].

30. The International Crisis Group described ARSA's offensive in 2016 as "qualitatively different from anything in recent decades"[225]. It observed that "this well-organised, apparently well-funded group" was "a game-changer in the Myanmar government's efforts to address the complex challenges in Rakhine State"[226]. The report concluded with the observation that "[a]ll indications are that [ARSA] is preparing further attacks on security forces and retains the capability to do so". Those observations proved correct.

31. Between November 2016 and August 2017, ARSA did not lie dormant. The evidence shows that the group consolidated its authority and undertook extensive preparations for — and carried out — further attacks[227]. To this end, it set up training camps, stockpiled weapons, sourced explosives and bomb-making material, terrorized and killed civilians from Bengali and non-Muslim communities alike and embarked on a recruitment campaign.

32. None of this evidence about ARSA's 2016 attacks and subsequent terrorist activities appears to be disputed by The Gambia. Instead, it is simply ignored. The only plausible explanation for avoiding this evidence is that it fatally undermines the "pretext" argument by explaining why

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[222] International Crisis Group, *New Muslim Insurgency*, pp. 9-10, CMM, Vol. VII, Annex 296; *Myawady*, "One officer, one soldier dead, several injured in fighting continuously erupts in Rakhine", *The Global New Light of Myanmar*, 13 November 2016, CMM, Vol. VIII, Annex 371.

[223] International Crisis Group, *New Muslim Insurgency*, p. 10, CMM, Vol. VII, Annex 296.

[224] 2018 FFM Detailed Findings, para. 1037, CMM, Vol. VI, Annex 239; *Myawady*, "Clashes continue in the northern Rakhine, 25 violent attackers dead", *The Global New Light of Myanmar*, 14 November 2016, CMM, Vol. VIII, Annex 373; *Myawady*, "14 violent attackers, 17 terrorist trainees arrested in Maungdaw", *The Global New Light of Myanmar*, 15 November 2016, CMM, Vol. VIII, Annex 374.

[225] International Crisis Group, *New Muslim Insurgency*, p. i, CMM, Vol. VII, Annex 296.

[226] *Ibid.*

[227] CMM, paras. 3.42-3.63.

Myanmar took certain steps in Rakhine State from October 2016 onwards. All these steps were responsive and legitimately directed at addressing a group which had already engaged in terrorism and was legitimately believed to be planning further terrorist acts in the future.

33. This brings me to the second major flaw in the "pretext" argument. By starting the Court's consideration of ARSA's actions in August 2017, The Gambia is able to falsely portray the measures taken by Myanmar after the October 2016 attacks in a sinister light[228]. They were described by The Gambia on Tuesday as "preparatory acts"[229]. However, when the events of 2016, which I have just described, are properly considered, this argument dissolves. From November 2016, Myanmar was not pre-planning a genocidal attack. Rather, it was taking steps to minimize the risk of, and to be prepared in the event of, any further ARSA violence. It is instructive to consider these measures in turn.

34. First, military build-up. Following October 2016 and prior to August 2017, there was a build-up in military capacity in northern Rakhine State to protect the civilian population from attack by ARSA and its supporters[230]. The Gambia dismisses this purpose out of hand, arguing Myanmar offers no proof in support[231]. But that is clearly not correct when it is properly considered in the context of the 2016 violence, which The Gambia ignores. Further, Myanmar denies arming ethnic Rakhine groups and militia for any nefarious purpose[232]. Rather, in the wake of the October 2016 attacks, the authorities publicly announced an initiative to recruit non-Bengali citizens to a new "regional" force and the recruits would "serve in their own village"[233].

35. Second, the confiscation of multi-purpose tools[234]. Contrary to The Gambia's assertion[235], the removal of items from villagers which had the potential to be used as weapons was a sensible

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[228] RG, paras. 7.23-7.30. See also para. 7.14.

[229] CR 2026/3, p. 12, para. 2 (Loewenstein).

[230] CMM, para. 13.110. See also International Crisis Group, *Dangerous New Phase*, p. 5, CMM, Vol. VII, Annex 297; Kyaw Thu Htet and Hmwe Kyu Zin (Myanmar News Agency), "Rakhine State security discussed at Pyithu Hluttaw", *The Global New Light of Myanmar*, 25 August 2017, p. 2, CMM, Vol. VIII, Annex 391; Ministry of the Office of the State Counsellor, Press Release on the Situation in Maungdaw, 11 August 2017, in *The Global New Light of Myanmar*, 12 August 2017, p. 3, CMM, Vol. III, Annex 104.

[231] RG, para. 7.24.

[232] RG, paras. 7.23, 7.26.

[233] Fortify Rights, *They Gave Them Long Swords*, 19 July 2018, p. 43, CMM, Vol. VII, Annex 279.

[234] RM, paras. 3.65-3.67.

[235] RG, para. 7.26.

precautionary measure. Any assertion that it was not is contradicted by other sources[236]. Bengali were allowed to keep small knives and the Government collected the larger weapons[237].

36. Third, the removal of fences. This prohibition was only on the type of material which could be used — a fact not mentioned by The Gambia[238]. There was no order to remove fences completely. IIMM witnesses also contradict the argument that this measure was taken to render the Bengali population more vulnerable[239]. These witnesses explain that villagers were asked to remove fences as "bad people" were able to hide behind them[240] and also to use them to launch "a sneak attack"[241]. Villagers were allowed to retain fencing around toilet facilities[242].

37. Fourth, curfews were imposed. This was a necessary and proportionate measure in the aftermath of the October 2016 violence[243]. Restrictions were not uniform but tailored to the security needs of particular areas at particular times[244]. The curfews did not apply to Bengali alone, but affected other ethnic communities[245].

38. Fifth, Myanmar did not use starvation to prepare Bengali for destruction, or at all[246]. At no point does The Gambia point to a single instance where any Bengali died of starvation by any Myanmar policy. The reality is that access to food was impacted by the security operations in northern Rakhine State triggered by ARSA's activities. The evidence shows that Myanmar ensured the supply of food to affected Bengali communities, when it was safe to do so[247]. Access to health care was also not deliberately restricted. Rather, as noted by the FFM, all communities in Rakhine

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

[237] Fortify Rights Document, No. 9, p. 11, RG, Vol. III, Annex 43.

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

[239] RG, para. 7.26.

[240] IIMM, Witness Statement No. IIMM0027992306, para. 105, RM, Vol. IV, Annex 137; IIMM, Witness Statement No. IIMM0028059653, para. 61, RM, Vol. IV, Annex 139.

[241] IIMM, Witness Statement No. IIMM0028050361, para. 62, RM, Vol. IV, Annex 140.

[242] IIMM, Witness Statement No. IIMM0027971404, para. 32, RG, Vol. IV, Annex 55.

[243] RM, paras. 3.75-3.82.

[244] Independent Rakhine Initiative, *Freedom of Movement in Rakhine State*, March 2020, pp. 32, 126-127, RM, Vol. V, Annex 129.

[245] Independent Rakhine Initiative, "Freedom of Movement in Rakhine State", March 2020, p. 127, MG, Vol. V, Annex 129; IIMM, Interview Screening Note of P3408, IIMM0028131404, Interviews, 21 and 28 March 2024, para. 5, RM, Vol. IV, Annex 144.

[246] RG, paras. 7.28-7.29, 9.51.

[247] Amnesty International, *Destroy Everything*, pp. 107-108, MG, Vol. IV, Annex 112.

State had inadequate access to health care simply due to a lack of development rather than anything more sinister[248].

39. Finally, and as Mr Blom-Cooper will demonstrate in more detail in due course, The Gambia provides no evidence to support the claim that Myanmar targeted leaders within the Bengali community[249]. Rather, the evidence shows that (1) ARSA targeted Bengali leaders (and other Bengali civilians) who it suspected of colluding with the Government[250]; and (2) Myanmar lawfully arrested and detained certain Bengali, including local leaders, on suspicion of being part of ARSA, an unsurprising act given ARSA's structure which involved village-level cells led by local leaders[251].

40. A third reason for dismissing the "pretext" argument is that it is founded on a misrepresentation of the scale of ARSA's 2017 attacks. The Gambia tries to downplay them by describing them as "[a]t most, ARSA's attacks on several police and border guard posts"[252]. This is not correct.

41. Following Ataullah's call to arms on 24 August 2017[253], in the early hours of 25 August, ARSA launched simultaneous co-ordinated attacks on some 30 border guard police posts, and one military headquarters in northern Rakhine State[254]. Thereafter, until 31 August 2017, a further 52 ARSA attacks were orchestrated against the security services in northern Rakhine State[255]. The Myanmar Institute for Peace and Security recorded 119 individual incidents involving ARSA, including armed clashes and IED explosions[256].

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[248] 2018 FFM Detailed Findings, para. 544, MG, Vol. II, Annex 40.

[249] RG, para. 7.23. See also RG, para. 9.73.

[250] CMM, paras. 3.6 (2), 9.180. See also 2018 FFM Detailed Findings, paras. 1052-1055, CMM, Vol. VI, Annex 239.

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

[252] RG, para. 7.14.

[253] CMM, para. 3.70.

[254] Ministry of Defence, Table of the Clash of the Police Outposts, the Military Columns and the Bengali Terrorists in Buthidaung-Maungdaw Region, 26 June 2020, pp. 1-5, Items 1-31, CMM, Vol. IV, Annex 149; 2018 FFM Detailed Findings, para. 1038, CMM, Vol. VI, Annex 239; Myanmar News Agency, "Extremist terrorists attack on police outposts in N-Rakhine", *The Global New Light of Myanmar*, 26 August 2017, pp. 1 and 3, CMM, Vol. VIII, Annex 392.

[255] Amnesty International, *Destroy Everything*, p. 39, CMM, Vol. VI, Annex 269.

[256] *Ibid.*

42. The FFM was able to "corroborate 17 separate attacks, including the attack against army base 552", and said that "there is credible information that an additional 17 attacks took place"[257]. Even taking this figure at face value, the contention that ARSA merely carried out "several" attacks in August 2017 cannot be maintained.

43. Amid this wave of ARSA violence, on 28 August 2017, Ataullah ordered his followers to burn down villages as part of the attacks[258].

44. ARSA then declared a temporary ceasefire on 10 September 2017[259]. The wording of the press release is revealing. As you will see on your screen, ARSA declared "a temporary cessation of offensive military operations in Maungdaw, Buthidaung and Rathedaung Townships for a one-month period" to allow humanitarian assistance[260]. ARSA also urged "the Burmese government to reciprocate"[261]. So, this is an acknowledgement by ARSA itself that it was involved in widescale "offensive military operations" against the Government and was sufficiently organized to state a willingness to engage in a ceasefire and to issue a press release about it. All of this contradicts The Gambia's narrative about ARSA and its capabilities.

45. Bringing this together, ARSA's attacks in 2017 were geographically widespread and deadly. As Mr Blom-Cooper and I will set out in our later presentations, these incidents generally involved ARSA terrorists and their supporters attacking in their hundreds. While it is accepted that not every attacker had a firearm, they were in the main all armed with some weapon and able to attack in considerable numbers. It is against this background that Myanmar's response must be considered. Any attempt to minimize ARSA's actions in 2017 should be rejected.

46. Finally, The Gambia's "pretext" argument is shown to be false and, thus, should be dismissed, because it undermines its own case. The Gambia's case theory in terms of the purported objective and planning of the "clearance operations" is grounded in statements made and actions

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[257] 2018 FFM Detailed Findings, para. 1039, CMM, Vol. VI, Annex 239.

[258] Amnesty International, *Destroy Everything*, p. 47, CMM, Vol. VI, Annex 269; International Crisis Group, *Dangerous New Phase*, p. 6, CMM, Vol. VII, Annex 297.

[259] 2018 FFM Detailed Findings, para. 1040, CMM, Vol. VI, Annex 239; Arakan Rohingya Salvation Army, ARSA Press Release, ARSA/PR/10/2017, 10 September 2017, CMM, Vol. VII, Annex 274.

[260] Arakan Rohingya Salvation Army, ARSA Press Release, ARSA/PR/10/2017, 10 September 2017, CMM, Vol. VII, Annex 274.

[261] *Ibid.*

taken by Myanmar after October 2016, in the period up to August 2017. This is evident from an analysis of Section II of Chapter 10 of The Gambia's Memorial, which deals with "Objectives and planning of the 'clearance operations'"[262], and Sections I and II of Chapter 7 of The Gambia's Reply, which deal with the same topics[263].

47. But the underlying acts relied on by The Gambia to prove the *actus reus* of genocide relate to crimes allegedly committed during the operations themselves in October and November 2016 and August 2017. In fact, as I will discuss in my second presentation, in 11 out of the 46 locations in which The Gambia claims that genocide was committed, the alleged acts occurred in October or November 2016 only[264]. This begs the following questions: what evidence does The Gambia rely on to prove the objective and planning for those 2016 crimes? How was the objective expressed prior to October 2016? What planning was undertaken? The answer to all these questions is that The Gambia relies on very little evidence. It appears it has failed to consider this period in any detail at all.

48. The Gambia refers to only two matters that predate October 2016. The first is a 2012 statement issued by the Rakhine Nationalities Development Party which, The Gambia says, likens the presence of "Rohingya" to a "terrorist attack"[265]. This is not correct. The statement simply calls the burning of houses by "Rohingya terrorists" a "terrorist attack"[266]. The second is an order issued on 9 June 2016 in Maungdaw Township prohibiting the use of zinc sheets as fences[267]. These two items are clearly insufficient and highlight a huge gap in The Gambia's case theory.

49. In relation to the part of its case theory it has tried to flesh out — that is, the claimed objective of the operations conducted from August 2017 — The Gambia relies on various statements

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[262] MG, paras. 10.26-10.52.

[263] RG, paras. 7.4-7.30.

[264] CMM, paras. 3.32, 9.88-9.93, 9.94-9.98, 9.99-9.102, 9.103-9.117, 9.125-9.134, 9.145-9.151, 9.152-9.9.163, 9.164-9.175, 9.184-9.193, 9.269-9.270; RM, paras. 9.101-9.103, 9.104-9.105, 9.106-9.107, 9.108-9.109, 9.112-9.113, 9.116-9.117, 9.118-9.119, 9.120-9.121, 9.126-9.127, 9.165-9.170.

[265] MG, para. 7.32.

[266] *About Arakan*, "Curfew imposed in Rakhine township amidst Rohingya terrorist attacks", 8 June 2012, MG, Vol. IX, Annex 241.

[267] MG, para. 10.42, citing to FFM, Report of the Detailed Findings (2018), para. 1124, MG, Vol. II, Annex 40.

made by Senior General Min Aung Hlaing, by soldiers and in statements of claimed victims[268]. But, as Professor Talmon will explain later, The Gambia's arguments are without any merit[269].

50. The Gambia's case theory is further undermined by the evidence which shows that the security forces did differentiate between civilians and terrorists; for example, by stating their intention was to identify "bad people" in villages, which was clearly a reference to ARSA and its supporters[270].

51. The reality is that The Gambia's case theory is completely confused and the "pretext" argument just adds to the confusion. While The Gambia wishes to skate over the 2016 violence it does still maintain that the genocidal violence started then, this was "the first wave". The question which arises is why did it stop for nine months? There is no allegation of massive killings or brutal violence between November 2016 and August 2017. The reason for this is simple. On each occasion that ARSA initiated violence, as soon as the ARSA threat was neutralized, the activities of the security forces stopped. Had their true intention been to destroy the Bengali, they would not have stopped.

52. In sum, the "pretext" argument is predicated on a series of misrepresentations, which result in The Gambia undermining its own case. The inevitable conclusion is that there is no compelling and coherent evidence that the purpose of the counter-terrorism operations was to destroy the Bengali population as such.

4. ARSA influence in camps in Bangladesh: "the night government"

53. I turn now to the third part of my presentation, in which I will demonstrate the impact of ARSA on the evidence which is before this Court. Much of The Gambia's evidence consists of witness statements or interview records taken from Bengali living in camps in Bangladesh. Bengali in camps in Bangladesh are also the almost exclusive source of the information about events during the 2016 and 2017 operations found in the reports of the FFM and other bodies on which The Gambia

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[268] RG, paras. 7.5-7.11.

[269] RM, paras. 3.10-3.13. See also CMM, chapter 11 and RM, chapter 11.

[270] Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK2251, p. 80, MG, Vol. X, Annex 336; Witness Statement No. 008, signed on 30 August 2020, para. 12, MG, Vol. X, Annex 345; IIMM, Witness Statement No. IIMM0019629206, para. 71, RG, Vol. IV, Annex 50; IIMM, Witness Statement No. IIMM0027992990, para. 145, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0027871404, para. 96, RG, Vol. IV, Annex 55.

relies. However, ARSA has had from the beginning, and, in fact, continues to exert, such an influence over camp residents in Bangladesh that their accounts cannot be accepted as credible and reliable[271].

54. The Gambia's response is to contend that "Myanmar offers no evidence that . . . witnesses feared or were intimidated by ARSA, or that their testimonies were so influenced"[272]. This is manifestly wrong: there is a wealth of evidence to this effect. Myanmar's written pleadings give clear examples of how a fear of ARSA has had an intimidatory effect on what witnesses are prepared to say about ARSA and has caused them to make false or misleading claims about the military[273]. The Gambia simply refuses to engage with this evidence.

55. Examination of multiple NGO and media sources shows that ARSA controls and influences life in the camps in Bangladesh[274]. In fact, in the camps, "the perceived influence of ARSA is so extensive that some dub them 'the night government'"[275].

56. But this "night government" is not a benevolent authority. Rather, ARSA is reportedly involved in widespread criminal activity within the camps, including murder, extortion and kidnapping[276]; reports corroborated in part by the UN Special Rapporteur on the situation of human rights in Myanmar[277]. A further source reports that "[b]oth Bangladesh police and Rohingya accuse the militant group ARSA of conducting a campaign of terror and crime in the refugee camps"[278] and "ARSA has become a name of terror … in the camp"[279]. In fact, in March 2025, Bangladeshi authorities arrested ARSA leader, Ataullah, on charges of murder, illegal entry, sabotage and militant activities.

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[271] CMM, paras. 3.120-3.145; RM, paras. 3.103-3.119.

[272] RG, para. 7.68.

[273] See e.g. CMM, paras. 3.125-3.145; RM, paras. 3.103-3.119.

[274] CMM, paras. 3.125-3.131, 3.133, 3.140-3.141; RM, paras. 3.117-3.119.

[275] V. Hölzl, "As Violence Soars in Refugee Camps Rohingya Women Speak Up", *New Humanitarian*, 2 August 2021, CMM, Vol. IX, Annex 445.

[276] T. Ripon, "Targeted Killings Spread Terror in Rohingya Refugee Camps", *The Diplomat*, 15 November 2022, CMM, Vol. IX, Annex 460; A. Rahman, "Separatist groups behind escalating violence in Rohingya Camps", *Dhaka Tribune*, 13 September 2024, RM, Vol. V, Annex 206; Siam Sarower Jamil, "Rohingyas find safe haven in rented houses", *Dhaka Tribune*, 13 September 2024, RM, Vol. V, Annex 206*bis*.

[277] UN Special Rapporteur on the situation of human rights in Myanmar, Tom Andrews, Mission to Bangladesh 13-19 December 2021, End of Mission Statement, 19 December 2021, CMM, Vol. VI, Annex 253.

[278] T. Ripon, "Targeted Killings Spread Terror in Rohingya Refugee Camps", *The Diplomat*, 15 November 2022, CMM, Vol. IX, Annex 460.

[279] *Ibid.*

57. ARSA's terror has directly impacted the testimony presented in this case. There is ample credible evidence that witnesses have been, and remain, fearful of ARSA. This fact acts as a potent deterrent to them giving a true and accurate account of ARSA's role in the attacks in 2016 and 2017. This chilling effect was noted by the FFM which described "a widespread reluctance of Rohingya to talk about ARSA and any alleged abuses committed by it"[280].

58. The FFM is not alone in raising this concern. The US State Department observed that "[t]he presence of ARSA in the refugee camps likely gave pause to some refugees who might otherwise identify ARSA as perpetrators. ARSA's involvement in the violence thus is likely under-reported"[281].

59. As this Court will come to learn, this chilling effect does not merely minimize ARSA's central role in the events of 2016 and 2017, it virtually erases mention of ARSA altogether.

60. Of note is that, while many camp residents have spoken to several organizations over the years about events in 2016 and 2017, there is virtually no reference by any of them to ARSA, even though ARSA instigated the violence in that period. Numerous examples of individuals failing to mention ARSA when mention might reasonably be expected are identified in Chapters 3, 8 and 9 of Myanmar's written pleadings[282]. Against this background, the failure to mention ARSA is inexplicable, unless that failure is due to manipulation by ARSA, a fear of, or loyalty to, ARSA or a combination of these factors. The credibility and reliability of such interviews is severely compromised by the failure of the interviewees to provide a full account of events which must necessarily include reference to ARSA's role.

61. The written pleadings also provide some examples of witnesses who have tried to explain — albeit briefly, given their fear — ARSA's control over the evidence that they are able to provide, or perhaps more accurately not provide. One such example is a 31-year-old Bengali who, in relation to abuses perpetrated by ARSA during 2016 and 2017, told Fortify Rights: "Many of these *al Yaqin* [ARSA] people are already here [in the Bangladesh camps]. But most people won't say

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[280] 2018 FFM Detailed Findings, para. 1051, CMM, Vol. VI, Annex 239.

[281] US Department of State, *Documentation of Atrocities in Northern Rakhine State*, August 2018, p. 19. MG, Vol. VII, Annex 194. See also Amnesty International, *Destroy Everything*, p. 14, CMM, Vol. VI, Annex 269.

[282] CMM, paras. 3.122, 8.55-8.62, 8.75-8.76, 8.103-8.104, 9.27, 9.36, 9.41, 9.47, 9.91, 9.97-9.98, 9.114, 9.121, 9.158, 9.219, 9.229, 9.260, 9.275, 9.292; RM, paras. 8.80, 8.94, 8.158, 9.24, 9.54, 9.63, 9.72, 9.92.

anything, because they will be killed here. The *al Yaqin* are here. Nobody will disclose these things because they are very afraid."[283]

62. Finally, The Gambia's own evidence supports the conclusion that ARSA is a real and present threat in the camps. Nicholas Koumjian, Head of the IIMM, notes "[t]he security concerns raised by many Rohingya witnesses also pertain to the inherently unstable — and at times, objectively dangerous — situation in the refugee camps in Bangladesh"[284]. He states that "[n]umerous witnesses have reported threats and concerns ranging from targeted killings by organised armed groups in the camps, to kidnappings for ransom or extortion"[285]. One of the main "organised armed groups" is ARSA. That is clear from the multiple NGO and media sources Myanmar references in its written pleadings.

5. The massacre at Kha Maung Seik

63. Mr President, Members of the Court, I now come to the fourth and final part of my presentation, which concerns the Kha Maung Seik massacre and its aftermath. This is perhaps the starkest demonstration that The Gambia's claim that Myanmar offers no evidence to show how fear and intimidation have influenced the testimonies of witnesses is simply wrong.

64. As can be seen from the written pleadings, Myanmar has submitted NGO reports[286], media reports[287], relevant extracts of the FFM report[288], two witness statements[289] and now a witness to give her evidence in person, all to provide this Court with a clear, concrete example of how ARSA

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[283] Fortify Rights, *They Gave Them Long Swords*, 19 July 2018, p. 75, CMM, Vol. VII, Annex 279. See also IIMM, Witness Statement No. IIMM0028050361, paras. 75-76, RM, Vol. IV, Annex 140.

[284] Affidavit of Nicholas Koumjian, Head of the Independent Investigative Mechanism for Myanmar, 15 November 2025, para. 48 (filed with the letter of the Agent of The Gambia dated 18 November 2025, maintained in the case file by the decision of the Court communicated to the Parties on 15 December 2025).

[285] *Ibid.*

[286] See e.g. Amnesty International, *Myanmar: New Evidence Reveals Rohingya Armed Group Massacred Scores in Rakhine State*, 22 May 2018, CMM, Vol. VI, Annex 268; Amnesty International, *Destroy Everything*, pp. 50-57, CMM, Vol. VI, Annex 269; International Crisis Group, *Dangerous New Phase*, p. 7, CMM, Vol. VII, Annex 297.

[287] See Myanmar News Agency, "Remains of Hindus found: Dead bodies found in the north-west Yebawkya village, Maungdaw Township, Northern Rakhine State", *The Global New Light of Myanmar*, 25 September 2017, pp. 1, 6, CMM, Vol. VIII, Annex 407; Myanmar News Agency, "17 more bodies of Hindu found in N. Rakhine State", *The Global New Light of Myanmar*, 26 September 2017, pp. 1, 6, CMM, Vol. VIII, Annex 408; The Global New Light of Myanmar and *Reuters*, "Slaughtered Hindus testament to brutality of ARSA terrorists", *The Global New Light of Myanmar*, 28 September 2017, pp. 1-2, CMM, Vol. VIII, Annex 409.

[288] 2018 FFM Detailed Findings, paras. 1059-1060, CMM, Vol. VI, Annex 239.

[289] Witness Statement of Ma Phaw Mi Lar, 1 November 2017, RM, Vol. III, Annex 97; Witness Statement of Ma Pu Jar, 1 November 2017, RM, Vol. III, Annex 98.

manipulates accounts of events through fear and intimidation. The Gambia has no answer to this evidence.

65. The appalling events in Kha Maung Seik village tract on 25 August 2017, and the experience of the survivors, draw together several themes covered in Myanmar's case, not just ARSA's control over, and manipulation of, the narrative. I will look at these in turn.

66. First, ARSA attacked several villages in Kha Maung Seik village tract on 25 August 2017. As you will see on the map on the screen, Kha Maung Seik is in the north of Maungdaw Township. The attack was part of the wave of attacks ordered by Ataullah the previous day. As such, the attack demonstrates ARSA's strength and capabilities, including its command structure and its ability to launch simultaneous attacks across different locations, all of which was facilitated by the use of encrypted communications platforms.

67. In this village tract, ARSA first struck a border guard police post, before attacking Hindu communities[290]. The attackers rounded up Hindu men, women and children. According to a report by Amnesty International, "the ARSA attackers killed the vast majority of the Hindus who had been rounded up — many, if not most, by slitting their throats — and abducted the rest"[291]. Those killed included children. At least 99 Hindus were killed according to Amnesty International[292].

68. The Gambia does not appear to dispute that this massacre occurred[293], and presents no evidence to contradict Myanmar's evidence. However, it carefully avoids any detailed discussion of this incident, referring to it as the "alleged killing by ARSA of several Hindus"[294].

69. Second, the attack on Kha Maung Seik is an example of how ARSA targeted non-Muslims, which "sowed fear among Hindus and other ethnic communities"[295]. In fact, a further six Hindus —

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[290] Amnesty International, *Destroy Everything*, pp. 50-51, CMM, Vol. VI, Annex 269; Myanmar Defence Services, No. 15 Mobile Operation Command Headquarters, Zwe Mhann Hone Operation, Daily operation report No. 240/2017, 27 August 2017, p. 2, para. (B) (1) *(b)*, CMM, Vol. IV, Annex 118; Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p. 1, RM, Vol. III, Annex 97.

[291] Amnesty International, *Destroy Everything*, p. 51, CMM, Vol. VI, Annex 269. See also Witness Statement of Ma Phaw Mi Lar, 1 November 2017, pp. 1-2, RM, Vol. III, Annex 97; Witness Statement of Ma Pu Jar, 1 November 2017, p. 1, RM, Vol. III, Annex 98.

[292] Amnesty International, *Destroy Everything*, p. 54, CMM, Vol. VI, Annex 269.

[293] RG, para. 9.45.

[294] RG, para. 9.45.

[295] Amnesty International, *New Evidence Reveals*, p. 1, CMM, Vol. VI, Annex 268.

two women, a man and three children — were killed by ARSA terrorists the following day at Myo Thu Gyi[296].

70. Third, ARSA's attack on Kha Maung Seik was a primary trigger for the response by Myanmar's security services. The security services did not *unilaterally* decide to move to that area as a "pretext to engage in a massive campaign of genocidal violence"[297]. Instead, on 25 August 2017, the Rakhine State Government informed the Union Government in the capital Nay Pyi Taw about the attack on Kha Maung Seik, and requested immediate rescue, as the local police were outnumbered[298]. In response, the Myanmar defence services arrived later that same day[299]. This incident, involving the killing of nearly 100 people by ARSA, exposes the absurdity of The Gambia's "pretext" argument.

71. Fourth, The Gambia's allegations concerning crimes committed by the Myanmar defence services, the border guard police and local Rakhine at Kha Maung Seik must be considered against both ARSA's attacks at the location, which I have already discussed, and ARSA's subsequent efforts to blame others for its abuses, which I will discuss shortly.

72. Three allegations are levelled by The Gambia: first, the killing of a male, said to have been witnessed by his wife[300]; second, the killing of "more than 100 people" including men, women and children by having their throats slit and some pregnant women having their stomachs cut open, said to have been witnessed by "Rashida" (a Bengali Muslim)[301]; and third, the throwing of children into a river, also said to have been witnessed by "Rashida"[302]. None of these allegations are credible or reliable.

73. In relation to the alleged killing of the male, save for the incident at Inn Din which I will discuss in my second presentation, Myanmar denies that soldiers engaged in extrajudicial killings.

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[296] Amnesty International, *Destroy Everything*, p. 57, CMM, Vol. VI, Annex 269.

[297] RG, para. 9.9.

[298] Rakhine State Government, Letter No. 887 3/6-1 to Office of the Union Government, Report on the urgent rescue, 25 August 2017, CMM, Vol. IV, Annex 109.

[299] Rakhine State Government, Letter No. 895 3/6-1 to Office of the Union Government, Report on the security situation of the residents and employees in the areas blocked and attacked in the violence incident in Maungdaw region, 25 August 2017, CMM, Vol. IV, Annex 112.

[300] MG, para. 8.26.

[301] MG, para. 8.30.

[302] MG, para. 8.69.

That said, even if this allegation could be proved, The Gambia's presentation of the evidence is deceptively incomplete. The description of this incident is taken from a report by Fortify Rights, but The Gambia does not include the full description in its Memorial. According to the report, when the male "was being tied up, he was told that he killed and cut people"[303]. This suggests that the person in question was suspected of being involved in the ARSA attack, rather than being targeted simply because he was Bengali.

74. As regards, "Rashida's" uncorroborated allegations, her description of the killing of "more than 100 people" bears an uncanny resemblance to the massacre of the Hindus perpetrated by ARSA. The same manner of death; the same number of people. As I am moving to explain, ARSA went to considerable effort to blame the military and ethnic Rakhine for its own crime, including by coercing the female Hindu survivors to give false accounts of what happened. "Rashida's" allegations have all the hallmarks of being a product of those efforts. Of note, is that "Rashida's" allegations comprise one of the sources referred to during The Gambia's presentation on sexual violence, and the assertion that Myanmar's military forces targeted females of reproductive age — including pregnant women — inflicting reproductive injury[304].

75. Fifth, and finally, ARSA's intimidation of the survivors of the Kha Maung Seik massacre provides a clear example of how ARSA manipulates witness testimony, in this case by "forcing the surviving women to appear on camera [in Bangladesh] implicating other perpetrators"[305], which was the conclusion reached by Amnesty International.

76. There were 16 survivors of the massacre: eight women and eight children. All were abducted and taken by ARSA to camps in Bangladesh. These women and their children were spared because they agreed to "convert" from Hinduism to Islam and to marry men selected by ARSA fighters[306].

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[303] Fortify Rights, *They Gave Them Long Swords*, 19 July 2018, p. 61, MG, Vol. IV, Annex 114.

[304] CR 2026/4, p. 23, para. 10 (Pasipanodya).

[305] Amnesty International, *New Evidence Reveals*, p. 13, CMM, Vol. VI, Annex 268. See also Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p. 2, RM, Vol. III, Annex 97.

[306] Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p. 1, RM, Vol. III, Annex 97; Witness Statement of Ma Pu Jar, 1 November 2017, p. 1, RM, Vol. III, Annex 98. See also Amnesty International, *Destroy Everything*, p. 52, CMM, Vol. VI, Annex 269.

77. Shortly after arriving in Bangladesh on 28 August 2017, the women were forced to make false statements to the media, claiming that the massacre had been carried out by ethnic Rakhine villagers and the Myanmar defence services. One of the survivors, Ma Phaw Mi Lar, explains in her November 2017 witness statement to the Myanmar investigation team:

> "The ARSA terrorists said, 'The media are coming later. When they come, tell them that it was Tatmadaw, the police and the Rakhine who killed you, Hindus. If you don't do as we say, we will kill you when the media go back.' Afterwards, while the terrorists brought the media to interview us, we told the media the way we were taught because we didn't want to be killed."[307]

78. The evidence of this survivor is corroborated by two others: Ma Pu Jar, whose contemporaneous witness statement is before the Court[308] and Bina Bala, who was interviewed by Amnesty International[309].

79. Contemporaneous video evidence of the survivors making such false statements because of ARSA's intimidation will be shown to you later in these hearings, alongside the evidence of one of the women shown in that video. You may be struck by the ease with which such summary false allegations were procured from these fearful witnesses.

80. ARSA's intimidation of, and attempts to control, the survivors did not cease following their rescue from the camp. The survivors told Amnesty International in an interview given in April 2018 that they continued to "receive threatening calls and messages when quoted by media outlets implicating ARSA or other Rohingya as the perpetrators"[310].

81. None of this evidence is directly challenged by The Gambia. Indeed, how can it be, given the wealth of evidence that exists?

82. In sum, what this demonstrates is that the Court cannot accept the evidence of residents of the camps in Bangladesh at face value and as credible and reliable. Evidence from multiple sources makes abundantly clear that ARSA effectively and deliberately uses coercion to control the narrative given about the events of 2016 and 2017 by those living in the camps. The Gambia's claim otherwise is simply wrong.

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[307] Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p. 2, RM, Vol. III, Annex 97.

[308] Witness Statement of Ma Pu Jar, 1 November 2017, p. 2, RM, Vol. III, Annex 98.

[309] Amnesty International, *Destroy Everything*, pp. 52-53, CMM, Vol. VI, Annex 269.

[310] *Ibid.*, p. 57.

6. Conclusion

83. Mr President, Members of the Court, I conclude with the following six points:

(1) By 2016, ARSA was a professional, well-organized and trained group.

(2) ARSA executed multiple simultaneous deadly attacks on State security locations in October 2016, November 2016 and August 2017.

(3) Myanmar was required to respond as ARSA attacked the country's security infrastructure and personnel, massacred civilians and threatened the stability and development of the entire area.

(4) There is no basis upon which it could be concluded that the security forces would have intervened but for the ARSA attacks.

(5) The criminal conduct of ARSA has continued within the camps in Bangladesh. There is a pervasive climate of fear of ARSA amongst camp residents who dare not speak out against the organization for fear of reprisals. This has affected the credibility and reliability of claimed eyewitness accounts given by those in the camps.

(6) The Kha Maung Seik massacre and its aftermath provides a paradigm case study for the Court as it draws together several recurring themes in this case: it demonstrates ARSA's ability to launch serious attacks on State apparatus and civilians in the same location; it is an example of Myanmar responding to ARSA's violence at the request of the local authorities who were under attack; it highlights the weakness of the evidence that The Gambia relies on to prove the commission of crimes by Myanmar Defence Services personnel; and it provides a concrete example of ARSA's control and manipulation of witness evidence through fear and intimidation.

84. Mr President, that concludes my presentation this afternoon. And it also concludes Myanmar's presentation for the day. Thank you for your kind attention.

The PRESIDENT: I thank Ms Lawrie, whose statement brings this sitting to a close. The oral proceedings in the case will resume on Monday 19 January at 10 a.m., when Myanmar will continue its first round of oral argument.

The sitting is closed.

The Court rose at 6 p.m.

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