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**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2026

Public sitting

held on Tuesday 20 January 2026, at 10 a.m., at the Peace Palace,

President Iwasawa presiding,

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

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le mardi 20 janvier 2026, à 10 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

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

COMPTE RENDU

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

 Registrar Gautier

Présents : M. Iwasawa, président
M^{me} Sebutinde, vice-présidente
MM. Tomka
Abraham
Nolte
M^{me} Charlesworth
MM. Brant
Gómez Robledo
M^{me} Cleveland
MM. Aurescu
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Hmoud, juges
M^{me} Pillay
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The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning to resume hearing the first round of oral argument of Myanmar. I now give the floor to Professor Stefan Talmon. You have the floor, Sir.

Mr TALMON:

I. ALLEGED HATE SPEECH AND PROPAGANDA

1. Mr President, Madam Vice-President, distinguished Members of the Court, good morning. My task this morning is to address The Gambia's argument on what it refers to as "Myanmar's anti-Rohingya hate speech and propaganda"¹. This presentation builds and expands on Chapter 11 of Myanmar's written pleadings².

2. Before addressing The Gambia's substantive argument, let me say that some of the statements we heard last week were truly abhorrent and the distortions of history disconcerting. This presentation is in no way trying to defend statements inciting discrimination or violence, let alone genocidal violence. But let me remind you, however, that what you have heard so far is only The Gambia's presentation and interpretation of these statements. In many cases, The Gambia's exposition does not reflect reality.

3. Let me just give you one example. One of The Gambia's arguments is that the utterances of Myanmar soldiers are an indicator of genocidal intent³. Mr President, Members of the Court, last week, you were presented on screen with seven statements which allegedly represented "utterances of soldiers posted online"⁴. However, the Reuters report that is adduced as evidence does not even mention the word "soldier"⁵. All statements are unattributed. One of the seven statements is not even included in the report. One of the statements was a comment on a news article on attacks on police stations by Bengali militants. There are many more such examples, I would refer you to Myanmar's written pleadings.

¹ CR 2026/2, p. 43 (Suleman). See also MG, Vol. I, paras.7.1-7.76; RG, Vol. I, paras. 6.1-6.38.

² CMM, Vol. I, paras. 11.1-11.161; RM, Vol. I, paras. 11.1-11.56.

³ CR 2026/2, p. 63, para. 76 (Suleman).

⁴ **Error! Main Document Only.** CR 2026/2, p. 63, para. 78 (Suleman) and The Gambia's judges' folder, tab 1, AS-26.

⁵ See MG, Vol. IX, Annex 287.

4. This example is only to show that when the Court deals with the statements put forward by The Gambia, it needs to focus very closely on the original statements themselves. The Court should take note of the fact that, in many cases, The Gambia does not put forward the statement itself but relies on secondary sources, reports and news articles. As explained by Ms Cordone last week, material of this nature is of no evidential value⁶.

5. Myanmar trusts that the Court, if it considers these statements at all relevant, will consult the full statements, rather than the snippets provided by The Gambia, and assess their meaning in the context of the ongoing terrorist attacks in October and November 2016, and August 2017. The Court should thereby be guided neither by The Gambia's nor the FFM's interpretation of the statements, but should form its own opinion on whether these statements were actually made, by whom they were made, in what context they were made and what they say.

6. With these introductory remarks, Mr President, let me move to the legal questions that the Court is faced with when examining The Gambia's argument on alleged hate speech and propaganda.

1. The relevance of The Gambia's hate speech argument for establishing genocidal intent

7. The first question to be addressed is whether The Gambia's hate speech and propaganda argument is at all relevant for establishing genocidal intent. Myanmar submits that it is not.

8. The Gambia says the Court must determine whether Myanmar's alleged use of hate speech and propaganda "constitutes an indicator of genocidal intent"⁷. In its presentation last week, The Gambia referred 13 times to "anti-Rohingya hate propaganda, and the hateful utterances of Myanmar soldiers" — speech acts it considers to be indicators of genocidal intent. It comes as no surprise that at the end of the presentation The Gambia concluded that such hate speech and utterances are "conclusive indicators of genocidal intent"⁸.

9. The Gambia's argument, however, is based on its flawed "indicators of genocidal intent" approach. As I showed the Court last week, The Gambia has asserted seven so-called indicators of

⁶ See CR 2026/8, pp. 23-27, 30 (Cordone).

⁷ CR 2026/2, p. 47, para. 20 (Suleman).

⁸ CR 2026/2, p. 64, para. 85 (Suleman).

genocidal intent. And as you can see “hate speech” and “tolerance of hate speech” are two of these indicators.

10. This approach has no basis in the Court’s case law. The Court follows an “inference from a pattern of conduct” approach. The Court first establishes a pattern of conduct from which genocidal intent is then inferred. So, there is no direct inference of genocidal intent from either hate speech itself or the tolerance of hate speech.

11. The only question therefore is whether hate speech and the toleration of hate speech could be relevant for establishing a pattern of conduct from which genocidal intent could be inferred. Myanmar submits that alleged hate speech and propaganda have no role to play in the establishment of a pattern of conduct, for the following reasons:

12. *First*, a pattern of conduct has been defined as “a consistent series of acts carried out over a specific period of time”⁹. The series of acts must be carried out “immediately before, during and after” the attacks on the protected group¹⁰. Many of the speech acts adduced by The Gambia do not meet that requirement for temporal reasons alone, some dating back as far as the 1980s¹¹.

13. *Second*, the two elements of genocide, the *actus reus* and the *mens rea* must be “linked”¹². It is the acts committed by the perpetrators of the attack on the protected group that must form the pattern of conduct from which the *mens rea* is inferred¹³. Extraneous factors such as hate speech and toleration of hate speech would inevitably raise the question of their relationship to the actual attacks and the question of causation.

14. *Third*, in the *Croatia* case, Croatia suggested 17 “factors”, which, individually or taken together, could indicate a pattern of conduct from which the only reasonable inference was an intent to destroy¹⁴. These factors included:

— the statements of public officials, including demonization of Croats and propaganda on the part of State-controlled media; and

⁹ *Croatia Genocide, 2015 Judgment*, p. 151, para. 510.

¹⁰ *Ibid.*, p. 151, para. 511.

¹¹ CR 2026/2, p. 50, para. 32 (Suleman).

¹² *Croatia Genocide, 2015 Judgment*, p. 62, para. 130.

¹³ See *Bosnia Genocide, 2007 Judgment*, p. 88, para. 242; and p. 131, para. 369; *Croatia Genocide, 2015 Judgment*, p. 120, para. 410; p. 122, para. 416.

¹⁴ *Croatia Genocide, 2015 Judgment*, pp. 120-121, para. 408.

— the use of ethnically derogatory language in the course of acts of killing, torture and rape¹⁵.

15. Both Croatia and Serbia put forward arguments on alleged “state-sponsored hate speech and propaganda in inciting genocide”¹⁶. Much of the argument made by The Gambia in the present case, including accusations of “dehumanization”¹⁷, resembles the argument made in the *Croatia* case; the only difference being that the alleged hate speech today is mainly made and disseminated online.

16. In the *Croatia* case, the Court did not use the two speech factors suggested by Croatia when establishing the existence of a pattern of conduct. As you can see on the screen, the Court rather used factors that concern

“the scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of [members of the protected group] and the nature, extent and degree of the injuries caused to the [targeted group]”¹⁸.

17. The Gambia’s hate speech and propaganda argument is thus irrelevant for establishing an alleged pattern to destroy the Bengali Muslim group in whole or in part by way of inference from a pattern of conduct¹⁹.

18. If hate speech and propaganda were to be used in order to convincingly show an intent to destroy the Bengali Muslim group as such, by reference to particular circumstances²⁰, something The Gambia has not attempted to do, hate speech and propaganda would merely be circumstantial evidence. In order to convincingly prove genocidal intent with regard to a particular circumstance through circumstantial evidence, The Gambia would have to show that the speech acts are related to the particular circumstance in question and that the only reasonable inference from these acts was genocidal intent. Considering the other intents mentioned by The Gambia itself in its presentation, such as an intent to incite hatred or violence against the Bengali Muslims²¹, or an intent to take “revenge”²², an intent to destroy would not be the only reasonable inference from these speech acts.

¹⁵ *Ibid.*, pp. 119-120, para. 408.

¹⁶ See *Croatia Genocide*, Memorial of Croatia, Vol. I, paras. 1.16, 2.50, 2.56-2.59, 8.22-8.26, and Vol. V, appendix 3; Rejoinder of Serbia, Vol. I, para. 25.

¹⁷ CR 2026/2, pp. 45-46, paras. 8-10; p. 50, para. 30; p. 53, para. 39; p. 56, para. 51 (Suleman).

¹⁸ *Croatia Genocide, 2015 Judgment*, p. 121, para. 413.

¹⁹ *Bosnia Genocide, 2007 Judgment*, p. 196-197, para. 373.

²⁰ *Ibid.*, p. 133, para. 373.

²¹ CR 2026/2, p. 44, paras. 2, 3 (Suleman).

²² CR 2026/2, p. 57, para. 54 (Suleman).

19. The Gambia's hate speech argument is thus irrelevant for establishing genocidal intent on the part of Myanmar with regard to the alleged commission of genocide.

2. The statements must be reflective of genocidal intent

20. Mr President, Members of the Court, even if the hate speech argument were relevant, The Gambia would have to prove in the first instance that the alleged speech acts are reflective of genocidal intent at all. The Gambia has not done so.

21. Genocide is a highly contextual issue and identifying genocidal intent requires careful assessment of the facts and their implications. The Gambia's case on genocide is advanced in the context of counter-terrorism operations, especially after the ARSA terrorist attacks in October and November 2016 and August 2017.

22. This is the essential context in which The Gambia's claim that certain statements are evidence of genocidal intent falls to be assessed. In these circumstances, the Court is required to undertake a particularly careful assessment of the facts, including The Gambia's alleged evidence of genocidal intent.

23. Let me say at the outset that The Gambia's approach to proving genocidal intent through statements is somewhat disingenuous. The Gambia focuses on snippets from statements, removed from their surrounding context, and integrated into The Gambia's own narrative of events. By presenting the statements in this way, The Gambia seeks to persuade the Court that they are evidencing intent to genocidal violence during the anti-terrorism operations or are, more generally, reflective of Myanmar's genocidal intent. None of this withstands scrutiny.

24. The Gambia's attempt to insinuate an orchestrated top-down campaign of genocide led by Myanmar's Senior General Min Aung Hlaing fails on the evidence. When read in their context and against the background of the counter-terrorism operations, the snippets from the General's statements contain no espousal of genocidal intent, let alone a call for genocide, or even simple violence.

25. Let me give you two examples. Last week, The Gambia showed you an extract from a statement by the Senior General, in which particular emphasis was put on the following lines: "The Bengali problem was a long-standing one which has become an unfinished job despite the efforts of

the previous governments to solve it. The government in office is taking great care in solving the problem.”²³

26. These lines were taken out of context and presented as if the Bengalis were a problem and that the phrase “to resolve the ‘unfinished job’” served as a justification for the alleged Government violence against the Bengalis²⁴. The Gambia does not provide any explanation for this distorted reading of the statement, other than to refer to a report by the FFM, which similarly gives no explanation. The speech was made seven days after the major ARSA terrorist attack on 25 August 2017, in which 29 people were killed, eight bridges were destroyed by explosives and some 2,707 houses from villages were burnt down. However, rather than calling for violence against the Bengalis, the Senior General said in the same statement:

“There must be cooperative efforts to ensure that the people in Rakhine State have peaceful living conditions. The local people for their part need to return home and try to develop their region. There are many losses and tragedies in the aftermath of the incidents. Cooperation is necessary to remedy them as quickly as possible while efforts must be made for regional development.”²⁵

Thus rather than calling for violence against the Bengalis, the General was calling for co-operation.

27. The second statement of the Senior General which The Gambia presented to you was equally distorted. The statement presented reads: “[T]he Bengali population exploded and the aliens tried to seize the land of local ethnics . . . Race cannot be swallowed by the ground but only by another race. All must be loyal to the State in serving their duties, so that such cases will never happen again.”²⁶

28. Please note the ellipsis. The Gambia took two unrelated snippets from the same statement which were 18 lines apart in order to create the wrong impression that the Senior General intimated that the Bengalis would “swallow up the Rakhine race” and that the State was “carrying out its ‘duties’ to make sure that such violence from the Rohingya does not happen again”²⁷. This is a gross misrepresentation. The relevant part of the statement read in full:

²³ **Error! Main Document Only.** CR 2026/2, pp. 48-49, para. 24 (Suleman).

²⁴ **Error! Main Document Only.** CR 2026/2, p. 49, para. 25 (Suleman). See also MG, Vol. I, para. 7.10.

²⁵ MG, Vol. VI, Annex 150.

²⁶ CR 2026/2, p. 49, para. 26 (Suleman).

²⁷ CR 2026/2, p. 49, para. 27 (Suleman).

“Area peace and stability and area control duties must be seriously carried out *from the immigration point of view*. In checking the *cases in which Bengalis trying to sneak into the country* through various means were seized involvement of some officials were found. Race cannot be swallowed by the ground but only by another race. All must be loyal to the State in serving their duties, so that *such cases* will never happen again. The 1982 Citizenship Law is not just for the Rakhine State crisis, it covers the whole country.”²⁸

29. The relevant part of the statement referred to illegal Bengali immigration into Rakhine State and the corruption by officials. The term “such cases” referred to cases in which Bengalis tried “to sneak into the country”, not to the seizure of the land of local ethnics by Bengalis. The statement that “all must be loyal to the State in serving their duties” referred to the corrupt officials who were involved in Bengalis illegally entering the country. As the last sentence makes clear, the statements, including “[r]ace cannot be swallowed by the ground but only by another race” was not especially directed at the Bengali Muslims in Rakhine State, but applied to the whole of Myanmar.

30. There is no evidence of genocidal intent in these or other statements by the Senior General. Even if viewed in isolation, as a matter of their ordinary meaning, none of the statements selectively relied on by The Gambia calls for the physical destruction of the group of the Bengali Muslims, in whole or in part, as such.

31. Mr President, once the statements of Senior General Min Aung Hlaing fall away, all that is left are alleged statements by a small number of low-ranking soldiers, regional party leaders, fringe politicians, Buddhist monks and posts on Facebook pages that were allegedly “*connected to the Myanmar military*”²⁹.

32. None of these statements qualifies as direct and public incitement to genocide or is reflective of a genocidal intent of its author. The Gambia tries to gloss over this deficiency by referring instead to “hate speech and anti-group propaganda” as an indicator of Myanmar’s alleged genocidal intent³⁰. I have already pointed out the flaws of the “indicator of genocidal intent” approach.

33. There is, however, also another flaw in The Gambia’s argument. There is a difference between hate speech in general, or inciting discrimination or violence, and incitement to commit

²⁸ MG, Vol. VI, Annex 152.

²⁹ CR 2026/2, p. 54, para. 42 (Suleman) (emphasis added).

³⁰ CR 2026/2, p. 47, para. 18 (Suleman).

genocide³¹. Incitement to commit genocide requires more than incitement to hatred or violence; it requires genocidal intent on the part of the instigator³². The Gambia has not proven any genocidal intent on the part of the authors of the alleged hate speech acts. Hate speech on its own, however defined, cannot establish genocidal intent. And, I may add, the same is true for erroneous opinions or deliberate misrepresentations of historical events³³.

34. While some of the statements presented by The Gambia may have expressed hatred or even incited violence, they did not call for the destruction of the Bengali Muslims as a group, either in whole or in part, as such. One post presented by The Gambia last week as part of a “several-year-long anti-Rohingya hate propaganda campaign”³⁴, entitled “Why did Hitler kill the Jews?”³⁵, was not even counted as “hate speech against Rohingya” by the IIMM, as neither “Rohingya nor Muslims” were mentioned in the post³⁶.

35. Thus, even if the hate speech argument was relevant for establishing genocidal intent on the part of Myanmar, which it is not, The Gambia would have to prove by conclusive evidence that the authors of the hate speech acts themselves had genocidal intent. It has not done so.

3. The statements must be attributable to Myanmar

36. Mr President, Members of the Court, let me move on to my next point. Even if The Gambia could prove that some of the alleged hate speech acts were reflective of a genocidal intent, it would still have to show that these acts are attributable to Myanmar.

37. In the *Bosnia and Croatia* cases, the Court required fully conclusive evidence in order to prove attribution of facts³⁷.

³¹ ICTR, *Nahimana et al. v. Prosecutor* ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007, para. 692; and para. 754.

³² *Croatia Genocide, 2015 Judgment*, p. 152, para. 517. See also ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, para. 560.

³³ See CMM, Vol. I, para. 11.28.

³⁴ CR 2026/2, p. 55, para. 49 (Suleman).

³⁵ CR 2026/2, pp. 56-57, para. 54 (Suleman) and The Gambia’s judges’ folder, tab 1, AS-16.

³⁶ See RG, Vol. II, Annex 5, p. 73, para. 196.

³⁷ *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

38. Acts of a State's military are generally attributable to the State³⁸. However, that does not absolve The Gambia from proving that the speech acts themselves are attributable to the military. In its presentation last week, The Gambia attributed a number of Facebook posts to the Myanmar military, the Tatmadaw, saying the "Tatmadaw posted", the "Tatmadaw disseminated", the "Tatmadaw shared". It also concluded: "all of these messages . . . came directly from the Tatmadaw"³⁹. However, this is not proven by fully conclusive evidence. The Gambia simply treats all pages on Facebook that were identified on the basis of some technical indicators as being "associated with" the Myanmar military⁴⁰, as forming part of a network that "was connected to the Myanmar military". Consequently, it treats all posts appearing on these pages as posts by the Tatmadaw⁴¹. Myanmar does not accept that there was such a connection⁴², but, more importantly, being connected to or associated with does not meet the requirements of attribution under international law.

39. Even if it could be proven that statements were posted or shared by the Tatmadaw on Facebook, this does not automatically demonstrate genocidal intent on the part of Myanmar. As the Court found in the *Croatia* case, "atrocities committed over many communities, over a lengthy period, focused on Bosnian Muslims" could not demonstrate genocidal intent⁴³. What was required was to show that the acts were part of an overall general plan. The Gambia would have to demonstrate that these posts were part of a premeditated concerted plan to destroy the Bengali Muslims, in whole or in part, as such. This The Gambia has not and could not do, as no such plan existed.

40. Similarly, there is no legal basis to attribute statements by a regional political party, leaders of a fringe nationalistic opposition party or Buddhist monks to the State of Myanmar.

41. Even if such statements by individuals, including individual soldiers, were attributable to the State, that would not, as of itself, establish genocidal intent on the part of the State. For a State to be held responsible for genocide, the State itself must have the intent to "destroy, in whole or in part,

³⁸ ARSIWA, Article 4.

³⁹ CR 2026/2, p. 59, para. 63 (Suleman).

⁴⁰ CR 2026/2, p. 54, para. 42 (Suleman) (emphasis added).

⁴¹ See RG, Vol. II, Annex 5, p. 29, para. 89.

⁴² RM, Vol. I, para. 11.37.

⁴³ *Bosnia Genocide, 2007 Judgment*, p. 196, para. 373; p. 198, para. 376.

a [protected] group as such”. This cannot be established simply by attributing to the State the genocidal intent of one or more individuals. As the Court held in the *Croatia* case, the genocidal intent of a State is to be sought in the State’s policy or is to be established indirectly by inference from a pattern of conduct⁴⁴. It is not to be established by way of attributing the genocidal intent of individuals to the State.

4. Conclusion

42. Mr President, let me conclude. The Gambia’s hate speech argument is irrelevant for establishing genocidal intent on the part of Myanmar because genocidal intent is not established on the basis of hate speech and toleration of hate speech as factors indicating genocidal intent, but through inference from a pattern of conduct. Both hate speech and its toleration, do not form part of the factors establishing the relevant pattern of conduct.

43. Even if the statements which The Gambia refers to as “anti-Rohingya hate speech and propaganda” were relevant for establishing genocidal intent, The Gambia would still have to prove by conclusive evidence that these speech acts are reflective of genocidal intent on the part of their author. It has not done so.

44. Even if some of the statements were reflective of genocidal intent — *quod non* — The Gambia would have to prove, by conclusive evidence, that the speech acts in question are attributable to Myanmar. Again, The Gambia has failed to do so.

45. Even if some statements by individuals reflecting genocidal intent could be attributed to Myanmar, the State’s genocidal intent cannot be established by way of attributing to the State the genocidal intent of one or more individuals.

46. Accordingly, The Gambia’s submissions on hate speech are so far removed from, and fall so short of proving genocidal intent, that they cannot be sustained.

47. This concludes my presentation. Mr President, Members of the Court, I thank you for your careful attention. May I now please invite you, Mr President, to call on Professor Miron.

⁴⁴ *Croatia Genocide, 2015 Judgment*, p. 65, para. 143; p. 67, para. 148.

The PRESIDENT: I thank Professor Talmon for his statement. J'invite maintenant la professeure Alina Miron à s'adresser à la Cour. Vous avez la parole, Madame.

M^{me} MIRON :

II. ALLÉGATIONS CONCERNANT LA VIOLATION DE L'OBLIGATION DE PUNIR ET LA DESTRUCTION DES PREUVES

1. Introduction : considérations transversales

1. Monsieur le président, Mesdames et Messieurs les juges, bonjour. Il m'incombe désormais de réfuter les allégations concernant l'obligation de punir le génocide⁴⁵. Mes arguments reprennent en grandes lignes ceux développés par le Myanmar au chapitre 12 de ses plaidoiries écrites. En substance, la Gambie considère que le Myanmar a failli à son obligation de punir le génocide parce qu'il n'aurait diligenté d'enquête sérieuse ni engagé de poursuites concernant les faits soumis à l'attention de la Cour⁴⁶. Il aurait par ailleurs tenté de dissimuler ou détruire des preuves relatives aux événements⁴⁷. Selon la Gambie, ces faits constitueraient des indicateurs à même d'établir une intention génocidaire⁴⁸ et fonderaient aussi un chef autonome de responsabilité pour violation de la convention.

2. Les allégations de manquement à l'obligation de punir ne valent pas preuve du *dolus specialis*

2. On peut écarter rapidement la première fonction et il convient de le faire d'une manière liminaire pour ne pas polluer le débat d'arguments fantaisistes⁴⁹. La Gambie ne montre en effet pas en quoi le défaut d'enquêtes sérieuses et la dissimulation des preuves — à les supposer établis, ce qui n'est pas le cas en l'espèce — participeraient en eux-mêmes à la destruction du groupe protégé, alors qu'ils ne font pas partie de l'*actus reus*. La Gambie ne démontre pas non plus en quoi ces faits seraient de nature à éclairer rétrospectivement l'intention spécifique de détruire un groupe protégé qui aurait animé l'État défendeur lors des moments critiques.

⁴⁵ Voir MG, chap. 11 ; RG, chap. 8 ; CR 2026/4, p. 4-18, par. 1-41 (Al Ameen) ; CR 2026/4, p. 45-60, par. 1-45 (d'Argent) ; CR 2026/4, p. 45-60, par. 1-45 (d'Argent).

⁴⁶ MG, par. 11.2-11.4.

⁴⁷ MG, par. 11.3, 12.93, 12.103.

⁴⁸ *Ibid.*, par. 12.92-12.103 ; RG, par. 8.1-8.2, 8.4.

⁴⁹ CMM, par. 12.4-12.5 ; DM, par. 12.5-12.6.

3. En fait de démonstration, nos collègues de l'autre côté de la barre se contentent d'affirmations péremptoires. Ainsi, M^{me} Al Ameen assure que « [l]a destruction et la dissimulation des preuves trahissent ... l'intention génocidaire du Myanmar ; cette destruction prolonge et consolide le génocide »⁵⁰. M. d'Argent avance lui un raisonnement circulaire : « l'impunité constitue un indice de *dolus specialis* ... [voilà une] proposition de bon sens ... que la Commission d'établissement des faits des Nations Unies a reprise à son compte ... comme le septième et dernier indice d'intention génocidaire »⁵¹.

4. Pourtant, cette construction n'a été validée par aucune jurisprudence internationale, pas même par celle invoquée par la Gambie ; à l'oral, cette jurisprudence s'est d'ailleurs réduite à peau de chagrin. À l'écrit, la Gambie avait mobilisé les jugements *Akayesu*⁵² et *Karemera*⁵³ du TPIR, lesquels ne concernaient nullement l'obligation de punir, mais la responsabilité du supérieur hiérarchique. À l'oral, il ne resta qu'une vague mention au jugement *Krstić* du TPIY, noyée dans une note de bas de page⁵⁴. Ce dernier arrêt est également sans pertinence. Le TPIY ne traitait pas de la destruction des preuves, mais de la mutilation des cadavres et de leur déplacement, lesquels, dans les circonstances de cette affaire-là, avaient contribué à prouver l'intention génocidaire du général Krstić durant la prise de Srebrenica.

5. Le Myanmar a examiné ces jurisprudences en détail dans son contre-mémoire⁵⁵. La Gambie n'a fait aucun effort pour y répondre dans sa réplique et à l'audience, et elle n'a fourni aucune justification supplémentaire de nature à fonder en droit sa construction juridique. Le lien entre, d'une part, le manquement allégué à l'obligation de punir et la destruction des preuves et, d'autre part, l'établissement du *dolus specialis* n'est donc pas établi. Loin de constituer « une preuve incontestable de l'intention génocidaire »⁵⁶ ou une « proposition de bon sens », le manquement à l'obligation de punir et la destruction des preuves sont sans pertinence pour le *dolus specialis*.

⁵⁰ CR 2026/4, p. 32, par. 3 (Al Ameen).

⁵¹ CR 2026/4, p. 46, par. 4 et 5 (d'Argent).

⁵² TPIR, *Akayesu*, ICTR-96-4-T, jugement, 2 septembre 1998, par. 479 cité dans MG, par. 12.93.

⁵³ TPIR, *Karemera et Ngirumpatse*, ICTR-98-44-T, Jugement portant condamnation, 2 février 2012, par. 1597 ; MG, par. 12.93.

⁵⁴ CR 2026/4, p. 45, par. 40, note 152 citant « *Procureur v. Radislav Krstić*, ICTY, IT-98-33-T, Trial Judgment (2 août 2001), par. 596 » (Al Ameen).

⁵⁵ CMM, par. 12.8-12.13.

⁵⁶ MG, par. 12.103.

3. L'obligation de punir et la préservation des preuves comme obligations autonomes en vertu de la convention

6. Ceci m'amène à la seconde fonction que la Gambie attribue à ces allégations : elles étayeraient la violation d'autres obligations matérielles de la convention, en particulier de l'obligation de punir et donc des articles premier, IV, V et VI de la convention, qui se trouve enfin à l'onglet n° 0 de votre dossier d'audiences⁵⁷. Et les conclusions (*submissions*) de la Gambie incluent ces chefs de responsabilité⁵⁸.

7. Cela étant, comme votre Cour l'a constaté dans l'affaire du *Génocide en Croatie*, l'obligation de punir ne peut être violée que si des actes de génocide ont été effectivement commis⁵⁹. La Gambie le reconnaît expressément dans ses écritures, encore que d'une manière confuse. On peut ainsi lire au paragraphe 9.101 de sa réplique :

« Il est possible de conclure que le Myanmar a manqué à l'obligation de punir le génocide indépendamment de toute constatation de responsabilité au regard de l'article III ... et sans que la Cour établisse l'intention spécifique du Myanmar. La seule chose qu'il convient d'établir pour conclure que le Myanmar a manqué à l'obligation de punir le génocide en violation des articles premier et IV est que des actes de génocide ont été commis, qu'ils lui soient ou non attribuables. Tel étant indéniablement le cas, la Cour devrait déterminer que l'impunité cautionnée par l'État dont jouissent au Myanmar les membres de la Tatmadaw ... outre qu'elle traduit clairement l'intention génocidaire du Myanmar, constitue une violation des articles premier et IV de la convention. »⁶⁰

8. En d'autres termes, avec ce chef de responsabilité, la Gambie invite la Cour à constater l'existence d'actes génocidaires par des membres de la Tatmadaw, mais sans constater leur attribution au Myanmar et surtout sans que le *dolus specialis* de l'État lui-même ou même des individus concernés n'ait été établi. La Gambie suggère que la simple occurrence d'actes matériels de l'article II pourrait déclencher l'obligation de répression, sans que leur auteur ne soit animé par une intention génocidaire.

9. Si tel est le sens à donner à ce raisonnement qui me semble un peu alambiqué, il faut rappeler que l'article IV de la convention exige la punition des personnes « ayant commis le génocide » ou l'un des actes supplémentaires de l'article III sur lequel je reviendrai cet après-midi, ce qui nécessite

⁵⁷ MG, par. 12.135-12.136. Voir aussi RG, par. 9.101.

⁵⁸ RG, p. 217, par. 1) D).

⁵⁹ *Génocide en Croatie, arrêt 2015*, p. 152, par. 518-519. Voir aussi CMM, par. 12.16 et DM, par. 12.5.

⁶⁰ RG, par. 9.101 (notes de bas de page omises).

l'établissement préalable de l'*actus reus* et du *dolus specialis* dans le chef des individus accusés de tels actes.

10. Pourtant, la Gambie n'explique pas comment la Cour pourrait retenir l'approche qu'elle propose, alors qu'elle n'a pas de compétence en matière de responsabilité pénale individuelle et que la Gambie elle-même attribue les actes matériels concernés aux membres des forces armées et de police du Myanmar. Ce raisonnement de la Gambie recèle beaucoup de contradictions, il me semble.

11. En toute hypothèse, si l'invocation de l'obligation de répression a pour objectif ultime de faire l'impasse sur la preuve du *dolus specialis* ou sur l'attribution éventuelle de certains actes au Myanmar⁶¹, il ne peut qu'échouer. En effet, alors que la Gambie n'a pu en apporter la preuve dans le cadre de sa démonstration relative à la commission d'un génocide, elle ne saurait s'en dispenser en invoquant une responsabilité complémentaire, mais distincte, pour défaut de répression.

12. Nos contradicteurs ont dû s'apercevoir de l'impasse, car à l'oral ils se contentèrent d'assurer que « la Gambie se rallie bien entendu à la jurisprudence de la Cour et elle convient que l'obligation de punir le génocide ne peut être violée en l'absence de génocide »⁶². Le ralliement est toutefois partiel, puisque, à rebours de M. d'Argent que je viens de citer, M^{me} Jones soutint jeudi que « the duty to investigate, which forms an essential part of the duty to punish, arises as soon as there are reasonable grounds to believe that genocidal acts have been committed »⁶³. Les deux propositions ne sont pas compatibles et nous attendons avec impatience de connaître la position exacte de la Gambie à ce sujet.

13. La Gambie n'étant pas parvenue à s'acquitter de sa charge de démontrer qu'un génocide a été commis, il n'y a tout simplement pas lieu d'examiner les allégations relatives à l'impunité et à la destruction d'éléments de preuve. C'est donc pour surplus de droit que je montrerai que le Myanmar n'a pas manqué à l'obligation de punir le génocide que lui impose la convention.

14. Au bénéfice de ces observations transversales, je traiterai d'abord de la nature et du champ d'application de l'obligation de réprimer le génocide (A). Je montrerai ensuite qu'en plus de manquer de pertinence, les allégations de destructions de preuves ne sont pas non plus établies (B). Et enfin,

⁶¹ Observations des Maldives, 28 février 2025, par. 2.

⁶² CR 2026/4, p. 46, par. 5 (d'Argent).

⁶³ CR 2026/6, p. 15-16, par. 15 (Jones).

les allégations relatives au défaut de coopération avec certains organes des Nations Unies ne méritent pas qu'on s'y attarde trop longuement, car elles sont entièrement dépourvues de pertinence dans le cadre de l'affaire dont la Cour est saisie. Mais, j'en dirai néanmoins quelques mots à la fin de mon discours (C).

A. Nature et champ d'application de l'obligation de punir le génocide

15. Monsieur le président, les deux Parties sont manifestement en désaccord sur la portée même de l'obligation de punir. En réalité, la Gambie esquivait largement cette question, pour avancer une conception absolue de l'obligation de punir. Or, rien dans la convention ne vient au soutien de sa position.

1) Une obligation de diligence applicable si les faits sont susceptibles d'entrer dans le champ de la convention

16. L'obligation de punir, comme l'obligation de prévenir⁶⁴, est une obligation de comportement et non de résultat, à l'opposé de ce qu'affirme la Gambie⁶⁵. Les parties à la convention ont l'obligation d'employer tous les moyens appropriés dont elles disposent pour punir les personnes responsables de génocide. Une obligation de résultat consiste à « aboutir à un résultat précis »⁶⁶, en l'occurrence la punition des auteurs d'un génocide. Si on était face à une obligation de résultat, elle serait enfreinte si le résultat atteint était différent de celui que l'État aurait dû assurer. En l'espèce, il faudrait que l'auteur individuel d'un génocide soit identifié, appréhendé, jugé, condamné et la peine exécutée pour que le résultat soit atteint. Or, à chacune de ces étapes, des circonstances particulières peuvent conduire à moduler l'étendue de l'obligation de l'État. Dès lors, la responsabilité d'une partie contractante n'est engagée que si celle-ci n'a manifestement pas mis en œuvre les moyens dont elle disposait à cet effet⁶⁷. C'est donc bien une obligation de comportement.

⁶⁴ *Génocide en Bosnie, arrêt 2007*, p. 221, par. 430.

⁶⁵ MG, par. 13.8, 13.9 ; CR 2026/6, p. 14-15, par. 13-14 (Jones).

⁶⁶ *Demande en interprétation de l'arrêt du 31 mars 2004 en l'affaire Avena et autres ressortissants mexicains (Mexique c. États-Unis d'Amérique) (Mexique c. États-Unis d'Amérique), arrêt, C.I.J. Recueil 2009*, p. 12, par. 27.

⁶⁷ CMM, par. 12.22 ; DM, par. 12.8.

17. Mais, au demeurant, la nature de l'obligation de punir est un débat théorique sans implication pratique en l'espèce, car la Gambie n'a pas prouvé qu'un génocide a été commis et encore moins identifié les auteurs à l'égard desquels le Myanmar devrait exercer son obligation de punir.

18. Ce qui est certain, c'est que l'obligation de punir n'est opposable à une partie que si les faits allégués sont susceptibles d'entrer dans le champ d'application de la convention. C'est une exigence liée au champ d'application *ratione materiae* de l'ensemble de la convention⁶⁸. Or la Gambie tend à opposer au Myanmar un défaut de répression des « crimes/atrocités commises contre les Rohingya »⁶⁹ d'une manière générale ou des « crimes de guerre »⁷⁰ qui, en particulier, auraient été commis durant les opérations antiterroristes de 2016 et de 2017. Il est cependant évident que ces qualifications ne relèvent pas de l'obligation de punir en vertu de la convention contre le génocide⁷¹.

19. Le fait que certains crimes aient pu rester impunis ne signifie pas qu'ils étaient constitutifs de génocide. Comme je l'ai dit, pour pouvoir opposer au Myanmar l'obligation de punir, la Gambie doit démontrer qu'un génocide a vraisemblablement été commis⁷². Cela exige au minimum un double niveau de précision : quant aux faits dont elle se prévaut et quant à la localisation géographique de ces faits — premier niveau de précision ; et, second niveau de précision, quant aux individus présumés avoir perpétré les actes de génocide allégués. Ces précisions minimales sont nécessaires pour déterminer si les faits et comportements visés sont susceptibles de relever de la convention. Or, comme l'ont montré mes collègues, les allégations de la Gambie manquent singulièrement de précision. Sur le front des faits, il est ainsi remarquable que la Gambie insiste sur la violation de l'obligation d'enquêter, notamment sur des faits présumés de génocide lors des opérations de 2016 — vous vous rappelez peut-être la « première vague » d'impunité qu'avait évoquée M. d'Argent⁷³.

⁶⁸ *Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie), arrêt, C.I.J. Recueil 2024 (I)* (ci-après, « *Application de la CIRFT, arrêt 2024* »), p. 119, par. 53, et p. 134, par. 106.

⁶⁹ Voir MG, par. 11.2, 11.4, 11.6, 11.13, 11.16, 11.22, 11.26, 11.29, 11.36, par. 11.52, 11.54. Voir également MG, par. 11.60, 11.79 ; RG, par. 8.10, 8.11, 8.23 ; CMM, par. 12.35-12.36 ; DM, par. 12.12. Voir aussi CR 2026/4, p. 32, par. 2 (Al Ameen) ; CR 2026/4, p. 35, par. 13 (Al Ameen) ; CR 2026/4, p. 47, par. 7 (d'Argent).

⁷⁰ MG, par. 11.11. Voir aussi CMM, par. 12.35-12.36.

⁷¹ DM, par. 12.8, point 1.

⁷² CMM, par. 12.14-12.16 ; DM, par. 16.27, point 2.

⁷³ CR 2026/4, p. 47, par. 9 (d'Argent).

Or, la Gambie n'étaye guère les faits concernés ni dans ses écritures ni à l'oral. Et ma collègue M^{me} Lawrie l'a suffisamment souligné hier⁷⁴.

20. Pour ce qui est de l'identification des auteurs, dans l'intitulé des chapitres correspondants de ses écritures⁷⁵ et au fil de ses plaidoiries⁷⁶, la Gambie se réfère d'une manière générale à « l'impunité de la Tatmadaw » en tant qu'institution de l'État, alors que l'obligation de punir concerne des individus spécifiquement identifiés. Pour autant que ses allégations concernent le fonctionnement de la Tatmadaw en général⁷⁷, elles ne sauraient évidemment pas relever du champ d'application de l'obligation de punir en vertu de la convention. Il en va de même des allégations répétées concernant le système de justice du Myanmar en général⁷⁸.

21. Certes, à un moment donné, la Gambie tente d'identifier certaines personnes dont les agissements engageraient l'obligation de punir. Elle emprunte à cette fin la liste des six commandants de l'armée qui a été établie par la FFM⁷⁹. Cela étant, elle semble utiliser ces cas d'une manière indicative⁸⁰ seulement. Dans ses conclusions, la Gambie ne demande pas à la Cour de prononcer une violation de l'obligation de punir en ce qui concerne ces personnes en particulier⁸¹.

22. La FFM, comme la Gambie, se focalise non pas sur les auteurs présumés, mais sur « ceux qui exerçaient un contrôle effectif sur eux »⁸². Les six commandants militaires ainsi identifiés⁸³ l'ont été au titre de la responsabilité du supérieur hiérarchique⁸⁴. Or, la Gambie ne démontre pas que l'obligation de punir est applicable à l'égard de ces commandants militaires en vertu de la convention de 1948.

⁷⁴ CR 2026/9, p. 53-71, par. 1-101 (Lawrie) ; CR 2026/10, p. 12-37, par. 102-257 (Lawrie).

⁷⁵ MG, chap. 11 et RG, chap. 8.

⁷⁶ MG, par. 11.7-11.15 et RG, par. 8.4-8.10 ; CR 2026/4, p. 45-60, par. 1-45 (d'Argent).

⁷⁷ MG, par. 11.4, 11.6-11.7 et RG, par. 8.2, 8.10, 8.14 ; CR 2026/4, p. 47, par. 6-7 (d'Argent) ; CR 2026/2, p. 24, par. 33 (Reichler).

⁷⁸ MG, par. 11.10-11.12 et RG, par. 8.11-8.17, 10.41 ; CR 2026/4, p. 47, par. 6-8 (d'Argent) ; *ibid.*, p. 57, par. 37 (d'Argent).

⁷⁹ MG, par. 11.8-11.9 et RG, par. 8.13 ; CR 2026/6, p. 19, par. 21 (Jones).

⁸⁰ MG, par. 11.7-11.10 et RG, par. 8.13.

⁸¹ RG, p. 217, par. 1) D).

⁸² 2018 FFM Detailed Findings, par. 1553 (dernière phrase) (MG, vol. II, annexe 40) ; MG, par. 10.2-10.8 ; RG, par. 8.13-8.14. Voir aussi CMM, par. 12.45.

⁸³ 2018 FFM Detailed Findings, par. 1554 (MG, vol. II, annexe 40).

⁸⁴ *Ibid.*, par. 1529-1530.

23. En effet, la responsabilité pénale du supérieur hiérarchique est un principe selon lequel celui-ci est, à titre individuel, pénalement responsable des infractions commises par ses subordonnés s'il savait ou s'il aurait dû savoir que ceux-ci commettaient, ou étaient susceptibles de commettre, de tels actes et que le commandant n'a pas pris les mesures de prévention ou de répression qui s'imposaient⁸⁵.

24. Or la Gambie ne démontre pas que les articles IV et VI de la convention, qui se réfèrent aux « personnes *ayant commis* le génocide ou l'un quelconque des autres actes énumérés à l'article III », exigent l'engagement de la responsabilité pénale du supérieur hiérarchique pour les faits de ses subordonnés. Les termes mêmes de ces dispositions n'engagent pas une partie contractante à punir un commandant militaire qui *n'a pas commis* les faits incriminés au motif qu'il n'a pas puni ceux qui les avaient *effectivement* commis⁸⁶.

25. Bien entendu, la responsabilité du supérieur hiérarchique est spécifiquement inscrite dans les statuts des tribunaux pénaux internationaux et de la Cour pénale internationale. Dans le cadre de ces régimes de responsabilité, elle s'applique donc selon les termes soigneusement pesés de leurs dispositions spécifiques⁸⁷, qui sont absents de la convention sur le génocide.

26. C'est là un autre des exemples de différence entre la manière dont la responsabilité individuelle pour génocide est prévue dans les textes de droit international pénal et la manière de concevoir la responsabilité d'un État en vertu de la convention. Sur ce point aussi la Gambie élude le débat, puisque dans sa réplique elle se contente de postuler que « [l]a responsabilité des supérieurs hiérarchiques est une forme de responsabilité de l'État qui relève de l'article IX de la convention »⁸⁸. Aucune référence ni démonstration ne suit cette phrase.

27. Dès lors, la Gambie n'a pas démontré que les faits qu'elle considère comment constitutifs d'un manquement à l'obligation de punir sont susceptibles d'entrer dans le champ d'application de la convention. Mesdames et Messieurs les juges, j'examinerai néanmoins — donc toujours pour surplus de droit — ses allégations concernant le défaut d'enquêtes sérieuses.

⁸⁵ Statut de Rome de la CPI. Voir aussi CMM, par. 12.45.

⁸⁶ DM, par. 12.36.

⁸⁷ Statut du TPIY, art. 7, par. 3 ; Statut du TPIR, art. 6, par. 3 ; Statut de Rome de la CPI, art. 28. Voir aussi CMM, par. 12.46.

⁸⁸ RG, par. 8.14.

2) *Obligations relatives aux enquêtes*

28. La convention ne contient qu'une référence générale, dans les articles I et IV, à l'obligation de punir, mais ne prévoit pas d'obligation spécifique d'enquêter ou de poursuivre. De même, l'article VI prévoit que « [l]es personnes accusées de génocide ou de l'un quelconque des autres actes énumérés à l'article III seront traduites devant les tribunaux compétents de l'État sur le territoire duquel l'acte a été commis ». Cette disposition ne contient pas non plus de référence aux enquêtes et poursuites.

29. Cela étant, le Myanmar convient que les enquêtes et les poursuites sont des préalables logiques à l'organisation d'un procès et au prononcé d'une peine et pourraient à ce titre être incluses dans l'obligation générale de punir⁸⁹. Il n'en reste pas moins que l'étendue de l'obligation d'enquêter comme celle de l'obligation de poursuivre ne sont pas précisées par la convention.

30. Mais ces deux obligations ne sauraient être déclenchées sans identification précise des personnes suspectées du crime de génocide ou de l'un des actes de l'article III. L'affaire relative à des *Questions concernant l'obligation de poursuivre ou d'extrader*, évoquée en audience par la Gambie⁹⁰, confirme cette compréhension. En l'espèce, en se prononçant sur l'obligation d'enquête préliminaire inscrite à l'article 6, paragraphe 2, de la convention contre la torture, la Cour a considéré que l'État devait s'en acquitter « aussitôt que le suspect é[ta]it identifié sur le territoire de l'État »⁹¹. Le déclenchement de l'obligation d'enquêter impose donc d'identifier *a minima* les personnes suspectées du crime en question.

31. Pour ce qui est des conditions dans lesquelles une telle obligation est déclenchée, force est de constater que la convention de 1948 est muette à ce sujet. C'est là une différence majeure avec l'affaire relative à l'*Application de la convention internationale pour la répression du financement du terrorisme et de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Ukraine c. Fédération de Russie)*. Dans l'arrêt du 31 janvier 2024, la Cour a examiné deux obligations connexes à l'aune des dispositions spécifiques de la convention pour la

⁸⁹ CMM, par. 12.22 ; DM, par. 12.13.

⁹⁰ CR 2026/6, p. 15, par. 13 (Jones).

⁹¹ *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal)*, arrêt, C.I.J. Recueil 2012 (II), p. 454, par. 86.

répression du financement du terrorisme, à savoir l'article 9, paragraphe 1 (pour ce qui est de l'obligation d'enquêter), et l'article 10, paragraphe 1 (pour ce qui est de l'obligation de poursuivre).

32. Ainsi, s'agissant de l'obligation d'enquêter, c'est en raison des termes spécifiques de ces dispositions que la Cour a jugé que :

« le niveau de preuve requis pour que naisse l'obligation d'enquêter ... est relativement peu élevé. ... [L'article 9, paragraphe 1] exige seulement qu'un État partie soit informé que l'auteur ou l'auteur "préssumé" d'une infraction ... pourrait se trouver sur son territoire. ... [L]es faits portés à la connaissance de l'État partie peuvent ... être de nature générale. »⁹²

33. Or, même dans une situation comme celle-là, où le droit conventionnel est peu exigeant, la Cour a exigé, elle, que des informations crédibles aient été portées à la connaissance de l'État requis. Elle a insisté qu'il n'y avait pas d'obligation d'enquête si rien ne venait étayer les allégations de violation de la convention relative au financement du terrorisme⁹³ et que ces allégations n'étaient pas suffisamment détaillées ou individualisées⁹⁴.

34. Comme le Myanmar l'a souligné dans ses écritures, il ne saurait y avoir d'obligation d'enquêter sans information crédible conduisant à croire qu'un génocide a été commis⁹⁵. Cela implique donc qu'il y ait un début de preuve de l'*actus reus* et du *dolus specialis*, dont le Myanmar ait été spécifiquement informé⁹⁶. Quoi qu'en disent la Gambie⁹⁷ ou les intervenants qui examinent cette question⁹⁸, le seuil des informations crédibles conduisant à croire qu'un génocide a été commis n'est pas trop élevé.

35. Dans l'affaire relative à des *Questions concernant l'obligation de poursuivre ou d'extrader*, la Cour a jugé que le Sénégal était dans l'obligation d'ouvrir des enquêtes préliminaires, à partir du moment où des plaintes avaient été déposées devant ses autorités⁹⁹ et que ces autorités

⁹² *Application de la CIRFT, arrêt 2024*, p. 133-134, par. 103.

⁹³ *Ibid.*, p. 134, par. 104.

⁹⁴ *Ibid.*, p. 134, par. 105-106.

⁹⁵ Voir *Génocide en Bosnie, arrêt 2007*, p. 132, par. 216 3) et *ibid.*, p. 133, par. 218 : « éléments permettant de soutenir raisonnablement ». Dans RG, par. 4.21, 4.30, 9.32.

⁹⁶ DM, par. 12.13.

⁹⁷ CR 2026/6, p. 15-16, par. 16-15 (Jones).

⁹⁸ Observations des Maldives, 28 février 2025, par. 84.

⁹⁹ *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 454, par. 87.

« ont eu des raisons de soupçonner M. Habré, qui se trouvait sur leur territoire, d'être responsable d'actes de torture »¹⁰⁰.

36. En notre espèce, il n'y a ni identification d'auteurs présumés — comme je l'ai dit —, ni plaintes de victimes, ni autres raisons de soupçonner des personnes en particulier d'avoir commis un génocide. Le rapport de la FFM ne remplit pas les exigences attendues pour déclencher l'obligation d'enquêter. Il se concentre sur une présomption de responsabilité du supérieur hiérarchique, qui ne relève pas des formes de responsabilité pour génocide en vertu de la convention de 1948. De la même manière, et contrairement à ce qu'allègue la Gambie¹⁰¹, l'inscription des six commandants sur les listes des sanctions adoptées par certains États occidentaux ne constitue pas une information assez crédible pour ouvrir une enquête. Ce ne sont que des mesures de type administratif, adoptées par des tiers sans un examen sérieux des faits¹⁰². Enfin, les études des cliniques universitaires dont se prévaut également la Gambie¹⁰³, sans doute faute de mieux, ne sauraient apporter d'indices fiables à l'appui d'une obligation d'enquêter.

37. La Gambie ne saurait se libérer de son obligation, en matière de charge de la preuve, en la transférant sur le compte du Myanmar. C'est pourtant ce qu'elle tente à nouveau de faire lorsqu'elle affirme que c'est au Myanmar de prouver qu'il a « enquêt[é], ... condemn[é] et ... sanctionn[é] les auteurs des crimes commis contre les Rohingya »¹⁰⁴. La Gambie n'a donc pas satisfait au critère d'établissement de la preuve applicable, puisqu'elle n'a pas établi que les autorités du Myanmar disposaient d'informations suffisamment crédibles portant à croire que du personnel militaire ayant participé aux opérations ait été animé d'une intention génocidaire. L'obligation de punir prévue par la convention ne trouve donc pas à s'appliquer¹⁰⁵.

38. Enfin, et d'une manière surabondante, je souligne que le Myanmar a diligenté des enquêtes sur les faits qui ont fait l'objet de la présente procédure. D'une manière générale, toutefois, « l'obligation d'enquêter sérieusement sur les faits allégués [se déroule] dans le respect des lois et

¹⁰⁰ *Ibid.*, par. 88.

¹⁰¹ RG, par. 8.13.

¹⁰² Voir CMM, par. 12.49-12.50.

¹⁰³ RG, par. 8.13.

¹⁰⁴ MG, par. 11.13.

¹⁰⁵ DM, par. 12.5, 12.12-12.13.

procédures auxquelles [l'État] a pour pratique de se conformer lorsque des informations sur la perpétration d'un crime grave sont portées à sa connaissance »¹⁰⁶.

39. Comme dans de nombreux autres États, le système de justice au Myanmar est dual : si les auteurs présumés sont des civils, les autorités chargées de mener des enquêtes et d'engager des poursuites sont la police nationale et le parquet général. Si les auteurs présumés sont des membres des forces armées du Myanmar, c'est le système de justice militaire qui est compétent¹⁰⁷.

40. La Gambie remet en cause ce système dans son ensemble¹⁰⁸. Cela étant, l'obligation de punir n'oblige pas un État à réformer son système de justice. Elle ne saurait donc être invoquée par la Gambie pour exiger que des enquêtes et des poursuites aient lieu dans un cadre qui déroge au cadre constitutionnel existant. L'organisation des services judiciaires et l'attribution des compétences aux différents organes relèvent de l'autonomie constitutionnelle des États. Et les nombreux arguments de la Gambie qui tendent à exiger des réformes au cadre existant, en se fondant sur l'obligation de punir, sont donc inopérants¹⁰⁹.

41. Au surplus, le Myanmar a créé plusieurs mécanismes complémentaires ayant pour mission d'éclairer les allégations de crimes dans l'État rakhine dans le cadre des opérations de 2016 et de 2017. Il s'agit premièrement de la commission d'enquête sur Maungdaw, créée en décembre 2016¹¹⁰, dont le rapport final a été publié le 8 août 2017¹¹¹. Aux termes de son enquête, cette commission a conclu qu'il n'y avait pas de preuve d'intention génocidaire. Elle notait par ailleurs que certains cas de violations des droits de l'homme et de torture étayés par des preuves avaient fait l'objet d'enquêtes. Certains ont également fait l'objet de poursuites judiciaires. Au sujet de l'utilisation disproportionnée de la force armée, ce rapport concluait que, si les faits étaient avérés, les intéressés devaient être traités conformément à la loi¹¹².

¹⁰⁶ *Application de la CIRFT, arrêt 2024*, p. 134, par. 105.

¹⁰⁷ CMM, par. 12.54, 12.112 ; DM, par. 12.67, note n° 1870.

¹⁰⁸ MG, par. 11.10 ; RG, par. 9.106 ; CR 2026/4, p. 47, par. 6-8 (d'Argent).

¹⁰⁹ CMM, par. 12.53-12.58 ; DM, par. 12.15.

¹¹⁰ CMM, par. 12.95-12.103 ; DM, par. 12.80-12.93.

¹¹¹ Résumé figurant dans MG, vol. VI, annexe 149.

¹¹² CMM, par. 12.98 ; DM, par. 12.91.

42. Le second mécanisme complémentaire mis en place est la commission d'enquête indépendante créée en juillet 2018 et chargée d'enquêter sur les allégations de violations des droits de l'homme et sur des questions connexes liées aux événements de 2016 et de 2017. Cette commission était composée de deux ressortissants du Myanmar et de deux experts internationaux. Elle a publié son rapport le 20 janvier 2020¹¹³. La Gambie met en cause son indépendance, sans apporter la preuve de ses accusations. Elle déforme par ailleurs les conclusions auxquelles la commission est parvenue — et je me permets de vous référer aux écritures du Myanmar, qui réfutent en détail les allégations de la Gambie¹¹⁴.

43. Enfin, à la suite du rapport final de la commission d'enquête indépendante, le président du Myanmar a créé un organe chargé des enquêtes et des poursuites pénales contre des civils et éventuellement des policiers soupçonnés d'avoir commis des crimes lors des événements de 2016 et de 2017. Cet organe se compose de représentants de la police et du bureau de l'*Attorney General*¹¹⁵. Et les différents rapports du Myanmar sur la mise en œuvre des mesures conservatoires rendent compte des activités de cet organe, qui ont été singulièrement entravées par la situation sécuritaire dans l'État rakhine¹¹⁶.

44. Les objections de la Gambie à son sujet portent sur l'absence de compétence de cet organe à l'égard des militaires. Elles sont également inopérantes pour les mêmes raisons que celles que je viens d'exposer : l'obligation d'enquêter doit s'exercer dans le cadre constitutionnel et procédural existant.

3) *Obligation de poursuivre et de juger*

45. J'en viens maintenant à l'obligation de poursuivre et de juger. Comme précédemment, il me paraît important de commencer par clarifier la nature et l'étendue de cette obligation, avant de répondre aux allégations de la Gambie selon lesquelles les poursuites engagées par le Myanmar n'ont

¹¹³ Republic of the Union of Myanmar, Independent Commission of Enquiry Final Report, Press Release (20 January 2020) (MG, vol. VI, annexe 166) ; Independent Commission of Enquiry, Executive Summary, 21 janvier 2020 (MG, vol. VI, annexe 167).

¹¹⁴ CMM, par. 12.103-12.108 ; DM ; par. 12.94-12.106.

¹¹⁵ CMM, par. 12.110-12.112 ; DM, par. 12.107.

¹¹⁶ Voir, par exemple, premier rapport sur l'exécution des mesures conservatoires, par. 95-102 ; deuxième rapport sur l'exécution des mesures conservatoires, par. 45-50 ; quatrième rapport sur l'exécution des mesures conservatoires, par. 33-44 ; cinquième rapport sur l'exécution des mesures conservatoires, par. 40-45 ; septième rapport sur l'exécution des mesures conservatoires, par. 26-30.

pas été sérieuses. Je précise d'emblée que ces poursuites n'ont pas été engagées pour des actes de génocide, puisqu'il n'y avait pas de preuves permettant d'étayer une telle accusation. Ces discussions d'ordre factuel sont donc nécessairement pour surplus de droit.

i) Pouvoir d'appréciation des autorités nationales

46. Comme la Cour l'a précisé dans les affaires relatives au *Mandat d'arrêt* et à l'*Application de la CIRFT (Ukraine c. Fédération de Russie)* de 2024, même les clauses spécifiques d'*aut dedere aut judicare* n'engendrent pas

« une obligation absolue de poursuivre ... Les autorités compétentes des États parties ... conservent la responsabilité de déterminer s'il convient d'engager des poursuites en fonction des éléments de preuve disponibles et selon les règles de droit applicables »¹¹⁷.

47. Dans ces deux arrêts, la Cour a insisté sur le pouvoir d'appréciation de l'État saisi. Dès lors, l'obligation de poursuivre

« a été conçue de manière à laisser [aux autorités nationales compétentes] le soin de décider s'il y a lieu ou non d'engager des poursuites, dans le respect de l'indépendance du système judiciaire respectif des États parties. ... Il en découle que les autorités compétentes saisies gardent la maîtrise du déclenchement des poursuites, en fonction des preuves à leur disposition et des règles pertinentes de la procédure pénale. »¹¹⁸

48. En outre, le standard de preuve requis pour engager des poursuites est nécessairement plus élevé que celui valable pour déclencher des enquêtes. Il reflète par ailleurs la gravité de l'accusation. Ainsi, au sujet du financement du terrorisme, l'arrêt de 2024 insiste sur le fait que « la décision de saisir les autorités compétentes à des fins de poursuites est une décision lourde de conséquences qui requiert, à tout le moins, qu'il existe des motifs raisonnables de soupçonner qu'une infraction a été commise »¹¹⁹.

49. La Gambie ignore complètement ce pouvoir d'appréciation des autorités nationales. Elle tente de lui substituer l'appréciation de la FFM, voire les opinions d'ONG, de journalistes ou d'universitaires. Comme mes collègues l'ont montré au fil de leurs plaidoiries, les éléments sur lesquels la Gambie s'appuie sont très loin de constituer des motifs raisonnables de soupçonner qu'une

¹¹⁷ *Application de la CIRFT, arrêt 2024*, p. 138, par. 118, renvoyant à *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 455, par. 91.

¹¹⁸ *Ibid.*, p. 137, par. 117, renvoyant à *Questions concernant l'obligation de poursuivre ou d'extrader (Belgique c. Sénégal), arrêt, C.I.J. Recueil 2012 (II)*, p. 455, par. 90.

¹¹⁹ *Ibid.*, p. 138, par. 119.

infraction a été commise, encore moins des « preuves accablantes de la commission d’actes de génocide »¹²⁰, comme l’affirme la Gambie.

50. C’est toujours en niant le pouvoir d’appréciation de l’État que la Gambie peut affirmer que l’absence de poursuites constitue en elle-même une preuve de violation de l’obligation de punir, alors qu’elle relève de l’exercice du pouvoir d’apprécier les preuves et de qualifier les faits de l’État saisi¹²¹.

ii) Application du cadre pénal existant

51. La Gambie commet une autre erreur d’analyse lorsqu’elle considère que les poursuites engagées doivent l’être sur le fondement d’une législation spéciale relative au génocide. Je reviendrai sur ce point dans l’après-midi, lorsque j’examinerai la prétendue obligation d’adopter une législation spéciale. Mais, à ce stade, je signale toutefois que la Cour a expressément reconnu dans l’affaire *Ukraine c. Fédération de Russie* que l’obligation de poursuivre s’exerce dans le cadre du droit existant¹²². Dès lors, les parties contractantes peuvent s’appuyer sur les dispositions générales de leur droit pénal, et notamment celles portant sur des crimes tels que le meurtre, les atteintes à l’intégrité physique ou le viol¹²³.

52. Il en va de même des dispositions relatives à la procédure pénale¹²⁴. Dès lors, sont complètement inopérants les arguments de la Gambie selon lesquels les poursuites devant les tribunaux militaires sont par principe insuffisantes parce qu’elles ne seraient pas soumises à un contrôle civil¹²⁵¹²⁶, et, dès lors, cet argument doit être abandonné.

53. C’est ainsi à l’organe public chargé de l’instruction qu’il appartient de déterminer s’il existe suffisamment d’éléments de preuve contre une personne pour justifier que des poursuites soient engagées à son encontre. Contrairement à ce que prétend la Gambie¹²⁷, ce n’est pas à la FFM

¹²⁰ RG, par. 8.9.

¹²¹ CMM, par. 12.25-12.26.

¹²² *Application de la CIRFT, arrêt 2024*, p. 137-138, par. 117-118.

¹²³ CMM, par. 12.28.

¹²⁴ Voir *supra*, par. 44.

¹²⁵ RG, par. 8.11-8.13.

¹²⁶ CMM, par. 12.52-12.55, et DM, par. 12.28-12.32.

¹²⁷ RG, par. 8.13 et 8.19.

de décider si le Myanmar doit poursuivre certaines personnes¹²⁸. Qui plus est, la Cour elle-même n'est pas en mesure de déterminer s'il existe des « motifs raisonnables de croire » que les personnes nommément désignées doivent être poursuivies pour des actes de génocide¹²⁹.

54. Enfin, et toujours surabondamment, le Myanmar a engagé des poursuites contre certains membres de ses forces armées pour des faits qui ont été commis pendant les opérations antiterroristes¹³⁰, et certains ont été condamnés à des peines d'emprisonnement¹³¹. Du reste, la Gambie le reconnaît¹³², tout en minimisant ces exemples car elle estime les peines insatisfaisantes.

55. Les travaux de l'organe chargé des enquêtes et des poursuites pénales que j'ai mentionnés tout à l'heure¹³³ ont conduit à la mise en accusation et, dans certains cas, à la condamnation de civils impliqués dans des crimes commis en 2016 et 2017, que ce soit des membres de l'ARSA, des civils rakhine ou des policiers. Plusieurs raisons expliquent pourquoi les travaux de cet organe sont actuellement entravés. L'absence de preuves et de plaintes formelles ainsi que la situation sécuritaire dans l'État rakhine, qui a rendu difficile tout travail d'enquête supplémentaire *in situ*, expliquent pourquoi d'autres poursuites n'ont pas été engagées depuis¹³⁴.

B. Allégations relatives à la destruction de preuves

56. Monsieur le président, j'en arrive maintenant aux allégations de destruction des preuves, qui auraient été réalisées dans le but d'empêcher qu'une enquête et des poursuites pour génocide soient engagées. Ces actes constitueraient, selon la Gambie, à la fois une preuve du *dolus specialis*¹³⁵ — je l'ai dit — et une violation de l'obligation de punir¹³⁶.

57. La semaine dernière, les conseils de la Gambie ont fait d'un rapport public de l'IIMM du 29 septembre 2025 la pièce maîtresse de leur démonstration en la matière. Ce rapport ne fait pas

¹²⁸ Voir CMM, par. 12.44.

¹²⁹ CMM, par. 12.39-12.42.

¹³⁰ Voir, par exemple, les premier, deuxième, troisième et quatrième rapports sur l'exécution des mesures conservatoires, respectivement aux par. 103, 52-56, 32-38 et 45-53. Voir aussi CMM, par. 12.65-12.66, et DM, par. 12.19.

¹³¹ Voir DM, par. 12.67.

¹³² MG, par. 11.18, et RG, par. 8.6-8.8.

¹³³ *Supra*, par. 43.

¹³⁴ Voir, par exemple, les troisième, quatrième, cinquième, sixième et septième rapports sur l'exécution des mesures conservatoires, respectivement aux par. 30-31, 42-44, 43-44, 24-25 et 28-29.

¹³⁵ RG, par. 8.41.

¹³⁶ MG., par. 11.44-11.55 et 12.99-12.100.

partie des pièces du dossier et la Cour en avait expressément refusé l'introduction. La Gambie l'a quand même introduit en le considérant comme une publication facilement accessible et en faisant prévaloir ainsi une disposition du Règlement sur une décision expresse contraire de la Cour. Et, dans sa grande sagesse, la Cour a permis à la Gambie de continuer à s'y référer. Je note toutefois que la Gambie elle-même a interprété la décision initiale de la Cour comme étant fondée sur le fait que ce rapport n'était pas nécessaire au débat. Tout comme la Cour, le Myanmar considère que ce rapport n'est en effet pas nécessaire au débat. Je ne m'y attarderai donc pas davantage durant ma présentation de ce matin.

58. En examinant les allégations de destruction de preuves avancées par la Gambie la semaine dernière, je commencerai avec l'évocation macabre de multiples fosses communes et les accusations sordides de mutilation des cadavres par calcination ou acide. Quelles sont les preuves apportées par la Gambie au sujet de la mutilation¹³⁷ ? En tout et pour tout, un article d'Associated Press, qui a l'honneur d'être qualifié de « rapport public » et d'être reproduit dans un onglet à part de votre dossier des juges¹³⁸. Associated Press prétend avoir examiné des vidéos de téléphones portables horodatées, des images satellitaires et procédé à des interviews. La Gambie s'y fie aveuglément. A-t-elle au moins essayé de retrouver la trace de ces éléments sous-jacents, qui ne sont pas au dossier ? Rien n'est moins sûr.

59. Venons-en, à présent, aux allégations relatives aux corps calcinés et aux fosses communes. Le Myanmar ne conteste pas la possibilité de leur existence, loin de là¹³⁹. Encore faut-il, cependant, les replacer dans leur contexte local. En effet, il ne suffit pas, comme s'y emploient les conseils de la Gambie, d'invoquer abstraitement les règles du droit international humanitaire pour conclure, sans autre démonstration, à la destruction délibérée de preuves et à l'existence d'une intention génocidaire¹⁴⁰. D'une part, il n'est pas contesté que les opérations ont entraîné des pertes de vies humaines parmi les Bengalis. Il est cependant nécessaire de distinguer les pertes civiles et les pertes subies par des membres de l'ARSA dans le cadre des hostilités — M. Blom-Cooper et M^{me} Lawrie

¹³⁷ RG, par. 8.33-8.34 ; CR 2026/4, p. 33-34, par. 7-11 et 14 (Al Ameen).

¹³⁸ CR 2026/4, p. 34-35, par. 11 (Al Ameen), et onglet n° 6 du dossier de plaidoiries de la Gambie.

¹³⁹ CR 2026/4, p. 35, par. 14 (Al Ameen) ; CMM, par. 8.43.

¹⁴⁰ CR 2026/4, p. 36, par. 14 (Al Ameen).

ont examiné hier cet aspect¹⁴¹. D'autre part, l'inhumation rapide des corps, y compris dans des fosses communes, ne relève pas de l'anomalie dans un pays et à une saison où la température moyenne est d'environ 30 °C. L'absence d'inhumation peut conduire à des contaminations de sources d'eau, entre autres¹⁴². Quant à l'incinération des corps, elle constitue une pratique largement répandue, même si elle ne correspond pas nécessairement au rite musulman.

60. Il va de soi que de telles pratiques peuvent heurter, en temps de paix, notamment, la conception que nous avons du respect dû aux morts. Mais elles ne sauraient être appréciées selon les mêmes critères en période de confrontation armée, et encore moins sans tenir compte du contexte local dans lequel elles s'inscrivent. C'est d'autant plus vrai que l'inhumation dans des fosses communes n'a pas été le fait exclusif des forces armées ou des forces de police du Myanmar. Des villageois bengalis y auraient également procédé, du moins si l'on en croit le rapport de la FFM de 2018¹⁴³. La Gambie cherche visiblement à masquer cette information, vu que la page 188 du rapport de la FFM qui en fait mention a été supprimée de l'annexe 40 de son mémoire, alors que les pages 187 et 189 — la précédente et la suivante — y sont toutes les deux.

61. Enfin, les allégations de destructions systématiques de « villages rohingya », comme dit la Gambie, par le feu ou par les bulldozers. La Gambie considère qu'elles apporteraient la preuve du *dolus specialis* à un double titre : en tant qu'« indicateur génocidaire »¹⁴⁴ et comme pratique de destruction des preuves pour « effacer le crime »¹⁴⁵. Le récit fait par la Gambie souffre des mêmes déficiences probatoires que l'ensemble de son dossier. Mes collègues l'ont suffisamment souligné et je peux être télégraphique. Ce récit soulève de nombreuses interrogations.

1) En quoi ces faits pourraient-ils constituer des preuves d'un génocide ? En eux-mêmes, ils ne relèvent ni de l'*actus reus* ni du *dolus specialis*. La Gambie ne le discute même pas.

¹⁴¹ CR 2026/9, p. 12-34, par. 1-103 (Blom-Cooper) ; CR 2026/9, p. 53-71, par. 1-101 (Lawrie) ; CR 2026/10, p. 12-37, par. 102-257 (Lawrie).

¹⁴² IIMM, Screening of Mechanism Person Code No. P5513, admis au dossier de l'affaire par décision de la Cour communiquée aux Parties du 17 décembre 2025 (onglet n° 8 du dossier de plaidoiries de la Gambie), par. 40.

¹⁴³ 2018 FFM Detailed Findings, par. 794-795 ; RG, vol. I, annexe 1.

¹⁴⁴ CR 2026/3, p. 24, par. 46, et p. 30, par. 68 (Lowenstein).

¹⁴⁵ CR 2026/4, p. 32, par. 3 (Al Ameen).

- 2) Alors qu'elle affirme que les destructions de villages ont accompagné systématiquement les opérations de 2016 et de 2017¹⁴⁶, dans la présentation de ses preuves — aussi déficientes soient-elles — la Gambie ne fait pas de distinction entre des localités où des opérations militaires ont eu lieu et celles qui en ont été exemptes. Ainsi, le projet Ocelli, auquel elle fait référence à l'écrit et en plaidoirie¹⁴⁷, contient des éléments se rapportant à des localités où il n'y a pas eu d'affrontements. Quels crimes aurait-on cachés dans des localités où il n'y a aucune allégation d'actes génocidaires ?
- 3) La Gambie mélange pêle-mêle les allégations relatives aux faits durant les opérations de 2016 et de 2017 et celles relatives à des faits postérieurs. Le Myanmar accepte que des destructions d'habitations ont eu lieu durant les opérations antiterroristes¹⁴⁸, mais celles-ci visaient des objectifs militaires légitimes¹⁴⁹. D'autres destructions ont été du fait de l'ARSA. Elles ont eu lieu soit dans des villages rakhine¹⁵⁰ soit dans des villages bengalis où les membres de l'ARSA ont volontairement mis le feu à certaines habitations. D'autres habitations ont été détruites durant des confrontations avec les forces régulières du Myanmar¹⁵¹.
- 4) Contrairement à ce qu'affirme la Gambie, les destructions sont loin d'être généralisées¹⁵² — et M. Sam Blom-Cooper reviendra sur ce point tout à l'heure. Je rappelle néanmoins que, en dépit de sa tendance à la généralisation, également présente dans ses allégations, des *centaines* de villages bengalis du nord de l'État rakhine n'ont pas été affectés¹⁵³.

62. Le dernier point que je souhaite aborder en relation avec les allégations de destruction de preuve concerne des faits qui auraient eu lieu ultérieurement aux opérations antiterroristes. En effet, la Gambie fait une large place à la prétendue mise à feu « du canton de Buthidaung en mai 2020 »¹⁵⁴, où vivaient des Bengalis avant 2017.

¹⁴⁶ CR 2026/3, p. 24, par. 48 (Loewenstein).

¹⁴⁷ CR 2026/4, p. 41, par. 32 (Al Ameen).

¹⁴⁸ CMM, par. 8.114, 13.198-13.208 ; DM, par. 13.163-13.174.

¹⁴⁹ DM, par. 12.111.

¹⁵⁰ CMM, par. 3.79, 8.33, 8.37, 8.49-8.50, 13.200 ; DM, par. 3.38 ; CR 2026/9, p. 12-34, par. 1-103 (Blom-Cooper).

¹⁵¹ CMM, par. 8.49, 8.114, 9.197 ; DM, par. 12.111 ; CR 2026/9, p. 12-34, par. 1-103 (Blom-Cooper).

¹⁵² CMM, par. 13.201-13.206.

¹⁵³ DM, par. 12.112.

¹⁵⁴ RG, par. 8.37, où il est fait référence à MG, par. 11.48.

63. Ces allégations sont également pertinentes pour la mise en œuvre de l'ordonnance en indication de mesures conservatoires et, à ce titre, elle mérite un examen particulier. Le deuxième rapport du Myanmar le réfute complètement¹⁵⁵.

64. Sans revenir sur les détails qui y sont fournis, j'insiste à nouveau sur la désinvolture de la Gambie en matière probatoire. Ses allégations à ce sujet reposent entièrement sur un compte rendu oral de la haute-commissaire aux droits de l'homme¹⁵⁶. Comme expliqué dans le deuxième rapport, le Myanmar a procédé à des vérifications d'images satellites et de données de détection des incendies de la NASA pour l'ensemble du canton de Buthidaung, pendant la période de décembre 2019 à juillet 2020. Elles n'ont révélé aucun signe visible que des villages y auraient été incendiés pendant la période considérée. Pourtant, la Gambie persiste à affirmer que les conclusions hâtives de la haute-commissaire étaient nécessairement justes, bien qu'anonymes, en rejetant d'un revers de la main toute preuve disculpante parce qu'elle émane du Myanmar¹⁵⁷.

C. Allégations relatives au défaut de coopération

65. Monsieur le président, j'en arrive enfin aux allégations concernant le défaut de coopération du Myanmar avec certains organes des Nations Unies, en particulier avec la FFM, l'IIMM et avec le rapporteur spécial sur la situation des droits de l'homme¹⁵⁸. Les deux Parties conviennent que la convention contre le génocide ne contient pas d'obligation de coopération avec ces organes non juridictionnels¹⁵⁹. Ceci distingue nettement la présente affaire de celle du *Génocide en Bosnie*, où la Cour a considéré que la Serbie avait failli à son obligation de coopérer avec le TPIY implicitement incluse dans l'article VI de la convention¹⁶⁰, lequel renvoie aux organes juridictionnels. Du reste, votre Cour a, dans son ordonnance, refusé d'indiquer la mesure conservatoire sollicitée par la Gambie

¹⁵⁵ Deuxième rapport sur l'exécution des mesures conservatoires, par. 85-92 ; voir aussi DM, par. 12.111-12.113.

¹⁵⁶ MG, par. 11.48, invoquant UN Human Rights Council, Oral update on the human rights situation of Rohingya people (S-27/1), Statement by Michelle Bachelet, High Commissioner for Human Rights, 30 juin 2020, MG, vol. III, annexe 81.

¹⁵⁷ RG, par. 8.37-8.38 ; CR 2026/4, p. 39, par. 25-26 (Al Ameen).

¹⁵⁸ MG, par. 11.49, 11.51 ; RG, par. 8.18-8.19.

¹⁵⁹ CMM, par. 12.83-12.84 ; RG, par. 8.18.

¹⁶⁰ *Génocide en Bosnie, arrêt 2007*, p. 227-229, par. 443-450.

tendant à prescrire au Myanmar de donner accès et d'apporter son concours aux organes d'établissement des faits de l'ONU¹⁶¹.

66. Consciente de l'absence de toute obligation conventionnelle de coopérer avec ces organes, la Gambie change d'optique dans sa réplique et durant les audiences, pour y voir une « preuve » de l'impunité de la Tatmadaw¹⁶². Voici un nouvel exemple du raisonnement circulaire qui pollue les thèses de la Gambie. Elle pose comme prémisse ce qu'il lui faut démontrer — à savoir la commission d'un génocide par la Tatmadaw et l'absence de répression de celui-ci. Mais faute de preuves en ce sens — directes ou indirectes —, la Gambie se perd en conjectures dépourvues de logique.

67. Le Myanmar a expliqué que son refus de reconnaître le mandat de la FFM et de l'IIMM était motivé par ses doutes concernant son impartialité¹⁶³. Ce n'est pas surprenant que la Gambie ne fasse pas crédit aux préoccupations du Myanmar quant aux méthodes d'enquête sur lesquelles repose le travail de ces organes. Mes collègues ont toutefois démontré à quel point elles sont défaillantes, et je n'y reviens pas. J'insiste sur un point, pour conclure : le Myanmar a le droit de les contester et a le droit d'en contester les conclusions sans que cela ne soit constitutif d'une « preuve » du *dolus specialis* ou d'une violation de l'obligation de punir.

68. Monsieur le président, ceci conclut ma présentation de ce matin. Je remercie la Cour pour son attention et je vous prie, Monsieur le président, de bien vouloir donner la parole à M. Sam Blom-Cooper — mais sans doute après une pause, si vous l'estimez nécessaire.

Le PRÉSIDENT : Je remercie la professeure Miron. 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 11.30 a.m. to 11.50 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Mr Sam Blom-Cooper. You have the floor, Sir.

¹⁶¹ *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020*, p. 8, par. 12, alinéa f) de la citation, et p. 30, par. 86.

¹⁶² RG, par. 8.18 ; CR 2026/4, p. 42-43, par. 35-36 (Al Ameen).

¹⁶³ DM, par. 6.5-6.6, 7.8, 12.41-12.46.

Mr BLOM-COOPER:

III. GENOCIDE HAS NOT BEEN ESTABLISHED

1. Introduction

1. Mr President, distinguished Members of the Court, good morning. I will present to you now the reasons why The Gambia has failed to prove that:

- (1) acts have been committed that constitute the *actus reus* of genocide; or
- (2) any such acts were committed with the requisite *dolus specialis* (or specific intent) physically or biologically to destroy the claimed group as such.

2. The “*actus reus*” of genocide has not been proved

2. I turn first to the failure of The Gambia to prove the *actus reus* of genocide.

3. Each of the five paragraphs of Article II of the Convention set out the *actus reus* of an act that can be an act of genocide. Only acts of one of these five kinds can be genocide within the meaning of the Convention. As The Gambia does not rely on paragraph (e) of Article II, it is only necessary to consider paragraphs (a) to (d).

4. Professor Miron has already set out the applicable law last week and that is the springboard for my submissions this morning. There are, however, three points in particular that I would recall at the outset.

5. *First*, in addition to the overarching *dolus specialis* for genocide, each of the acts specified in each of the paragraphs in Article II also has its own individual mental element, which must be satisfied for an act to fall within that particular paragraph¹⁶⁴. This is acknowledged by The Gambia¹⁶⁵. This element must be proven by “fully conclusive”¹⁶⁶ evidence, evidence beyond a reasonable doubt¹⁶⁷.

¹⁶⁴ *Bosnia Genocide, 2007 Judgment*, p. 121, para. 186; see also *Croatia Genocide, 2015 Judgment*, pp. 68-69, para. 156.

¹⁶⁵ MG, paras. 4.11 and 4.14.

¹⁶⁶ *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

⁴ CR 2026/8, pp. 13-14, para. 12 (Talmon).

6. When I refer to the *actus reus* of genocide, I mean the physical element and individual elements within a particular paragraph of Article II. When I refer to the *mens rea* of genocide, I mean the overarching genocidal intent referred to in the *chapeau* to Article II.

7. *Second*, for an act to fall within one of the paragraphs of Article II, the act must be such as to contribute to, or to be capable of contributing to, the physical or biological destruction of the protected group in question. Thus, for instance, killings of members of a protected group will not satisfy the *actus reus* of genocide under Article II (a) unless the killings are part of a broader campaign that is capable of bringing about the destruction of the protected group as such¹⁶⁸. This is because all of the paragraphs of Article II are forms of a crime of deliberate destruction of the human group. The *actus reus* of such a crime cannot be satisfied by acts which are incapable of bringing about the destruction of the group as such, and which do not contribute to such destruction¹⁶⁹.

8. *Third*, I also recall what has already been said about the evidential weight of the material relied on by The Gambia¹⁷⁰. It is not of sufficient weight to prove the specific facts that The Gambia is required to prove¹⁷¹. The Gambia's claimed eyewitness evidence — overwhelmingly in the form of anonymous summary hearsay reports — emanates from residents in camps in Bangladesh and cannot be taken at face value and considered reliable, in view of ARSA's influence in those camps and the reasons given by Ms Lawrie and Dr Staker¹⁷². *Prima facie unreliability* also arises from the fact that so many claimed eyewitness accounts strikingly and systematically omit any mention of ARSA, despite the overwhelming evidence of ARSA's widespread presence and activities and the fact that the operations in 2016 and 2017 took place in locations proximate to where ARSA was active¹⁷³.

¹⁶⁸ CR 2026/7, pp. 57-60, paras. 58-69 (Miron).

¹⁶⁹ CMM, paras. 4.54-4.62, 4.64, 4.68-4.69 and 4.73-4.77; RM, paras. 4.72-4.85, 4.87, 4.100-4.101; CR 2026/7, pp. 45, 56-59, paras. 18, 57, 62, 66 (Miron).

¹⁷⁰ CR 2026/8, pp. 31-46, paras. 1-58 (Staker); CR 2026/10, pp. 37-52, paras. 1-69 (Staker).

¹⁷¹ CR 2026/8, pp. 13-14, paras. 9-12 (Talmon); *Ukraine v. Russian Federation, 2024 Judgment*, p. 127, para. 81; *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

¹⁷² CMM paras. 3.120-3.145, 7.80, 7.142 and 7.211; RM, paras. 3.103-3.119; UN Human Rights Council, Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/39/CRP.2, 17 September 2018 ("2018 FFM Detailed Findings"), para. 1051, CMM, Vol. VI, Annex 239; Fortify Rights, *They Gave Them Long Swords*, 19 July 2018, p. 75, CMM, Vol. VII, Annex 279; CR 2026/8, pp. 60-63, paras. 53-62 (Lawrie); CR 2026/9, pp. 36-45, paras. 9-38 (Staker).

¹⁷³ 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; CR 2026/9, pp. 12-34, paras. 1-103 (Blom-Cooper), pp. 53-70, paras. 1-101 (Lawrie); CR 2026/10, pp. 12-37, paras. 102-256 (Lawrie).

9. Moreover, The Gambia's evidence also lacks weight due to the pervasive anonymity of the ultimate sources of information, and the fact that the FFM reports and other reports relied upon were not the product of a court, or court-like process. It is another truly extraordinary feature of this case that not even the Applicant, let alone Myanmar or the Court, know the identities of the vast majority of the witnesses in this case.

10. Having made those preliminary remarks, I turn now to deal specifically with the events of 2016 and 2017.

A. Article II (a): Killing members of the group

11. I begin with paragraph (a) of Article II, which refers to "killing members of the group". As with all of the acts specified in Article II, the *objective* of the offence forms an integral element. It is thus the act not merely of "killing" to which Article II (a) refers, but "killing *members of the group*" that must be established.

12. Thus, for an act to constitute "killing" within Article II (a), the killing must be intentional¹⁷⁴: namely, causing death with an intention to kill¹⁷⁵.

13. In the *Croatia* case, this Court held that the term "killing" in Article II (a) does not apply to civilian deaths occurring as a result of the use of force exclusively directed against military targets, if the civilian deaths were not caused deliberately¹⁷⁶. Analogously, it will not apply to the death of armed persons engaged in committing a terrorist attack, in the course of a necessary military or security operation; or to civilian deaths during such operations, if such operations were exclusively directed at legitimate targets, and the civilian casualties were not caused deliberately¹⁷⁷.

14. Throughout its case, The Gambia makes no attempt to quantify how many of those who allegedly died in the operations in 2016 and 2017 were actively participating in the violence; how many were collateral victims and civilian casualties whose deaths were unintentional consequences of the operations; and how many were allegedly intentionally killed by the security forces despite

¹⁷⁴ *Bosnia Genocide, 2007 Judgment*, p. 121, para. 186; *Croatia Genocide, 2015 Judgment*, pp. 68-69, 138, paras. 156, 474.

¹⁷⁵ *Croatia Genocide, 2015 Judgment*, p. 69, para. 156; CR 2026/7, p. 57, para. 60 (Miron).

¹⁷⁶ *Croatia Genocide, 2015 Judgment*, p. 138, paras. 474-475.

¹⁷⁷ CMM, para. 4.53; RM, para. 4.64.

the forces knowing that they were uninvolved. It is only the last of these three categories that could even potentially fall within Article II (a).

15. Instead, The Gambia merely refers to the FFM's unverified "death toll" figures¹⁷⁸ and the vague and generalized claim that the operations in August 2017 "directly resulted in more than 10,000 deaths"¹⁷⁹, based only on a "reasonable grounds" standard of proof, not "fully conclusive"¹⁸⁰ established fact¹⁸¹.

16. This bare statement provides no indication as to the proportion it is said were killed intentionally, despite knowledge that they were not participating in the violence. The Gambia provides no indication whatsoever of how many are said to have been killed in 2016 at all. Even if the figure for August 2017 were assumed to be correct and reliable, The Gambia does not show, let alone prove, that any of this number were not actively participating in the violence on the side of ARSA, or were not collateral casualties tragically caught up in the intense clashes between Myanmar security forces and ARSA. The evidence presented by The Gambia, even if taken at face value, therefore does not establish any killings within the meaning of Article II (a) of the Convention.

17. However, even if The Gambia could prove that a significant part of the alleged death toll amounted to *intentional* killings, which it has not, those killings would only fall within Article II (a) if, collectively, they were such as to contribute to the physical or biological destruction of the group, or were capable of bringing about its physical destruction in whole or in part¹⁸². While there is no specific numeric threshold in respect of killings within Article II (a), given the estimated size of the Bengali population in northern Rakhine State prior to August 2017 was approximately 1.4 million¹⁸³, The Gambia's estimated number of deaths would have been insufficient to contribute to the physical

¹⁷⁸ CR 2026/3, p. 38, para. 24 (Pasipanodya), p. 50, para. 35 (Ho), pp. 64, 66, paras. 28, 34 (Ngum); CR 2026/5, pp. 13-14, paras. 8, 12 (Loewenstein); CR 2026/4, p. 13, para. 5 (Ho); CR 2026/5, pp. 13-14, paras. 5, 8, 12 (Loewenstein), pp. 25-26, 27, paras. 15, 20 (Sands).

¹⁷⁹ MG, para. 12.2, referring to 2018 FFM Detailed Findings, para. 1395, MG, Vol. II, Annex 40. See also RG, paras. 3.19 and 9.11.

¹⁸⁰ *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

¹⁸¹ MG, para. 12.2; 2018 FFM Detailed Findings, para. 10, MG, Vol. II, Annex 40.

¹⁸² CMM paras. 4.54-4.62; *Croatia Genocide, 2015 Judgment*, p. 69, para. 157.

¹⁸³ CMM, para. 13.151.

or biological destruction of the group, and would have been incapable of bringing about its physical destruction¹⁸⁴.

B. Article II (b): Causing serious bodily or mental harm

18. I turn next to paragraph (b) of Article II, which refers to “causing serious bodily or mental harm to members of the group”. Like paragraph (a), paragraph (b) applies only to *intentionally* causing serious bodily or mental harm¹⁸⁵. Thus, this provision does not extend to bodily or mental harm inflicted by combatants on each other in the course of battle in armed conflict. Nor does it extend to serious harm inflicted upon insurgents or terrorists in battle or during law enforcement operations. Nor does it extend to unintentional collateral casualties in the course of such operations.

19. In an attempt to advance its claims under Article II (b), The Gambia suggests that “reliable estimates indicate that over 100,000 Rohingya suffered serious bodily harm”¹⁸⁶ during the operations. Upon examination, it turns out that this headline figure is a highly unscientific extrapolation from “tick-box” survey data, drawn from 23 townships around Myanmar (not merely Maungdaw, Buthidaung and Rathedaung), over an unknown time frame, with multiple recorded events possibly all speaking to a single victim¹⁸⁷, potentially nothing to do with events in this case. There is not even clear evidence as to which perpetrators might have been responsible in respect of which offences. In short, it is devoid of evidential value¹⁸⁸.

20. The Gambia also places reliance on what is termed “mental health data” taken from a publication by Fortify Rights¹⁸⁹, which provides no indication as to whether recorded symptoms said to be “*indicative*” of emotional distress come close to the threshold requirement under Article II (b) of amounting to “*serious*” mental harm. Nor are details given of who or what may even have been responsible for causing such “*indicative*” symptoms. It is unclear, and unstated, how such reported

¹⁸⁴ CMM, paras. 13.45, 13.151.

¹⁸⁵ *Bosnia Genocide, 2007 Judgment*, p. 121, para. 186.

¹⁸⁶ RG, para. 9.15, citing RG, para. 3.19 and M. Habib *et al.*, *Forced Migration of Rohingya: The Untold Experience* (Ontario International Development Agency 2018), p. 68, RG, Vol. III, Annex 34.

¹⁸⁷ M. Habib *et al.*, *Forced Migration of Rohingya: The Untold Experience* (Ontario International Development Agency 2018), pp. 25, 68, RG, Vol. III, Annex 34.

¹⁸⁸ RM, para. 13.65.

¹⁸⁹ RG, para. 9.15, citing Fortify Rights, “The Torture In My Mind”: The Right to Mental Health for Rohingya Survivors of Genocide in Myanmar and Bangladesh, December 2020 (“Fortify Rights, Torture In My Mind”), p. 10, RM, Vol. V, Annex 163.

information proves that the Myanmar security forces inflicted “*serious*” mental harm within the meaning of Article II (*b*) of the Convention and on a scale that was capable of contributing to the physical or biological destruction of any purported group, as such.¹⁹⁰

C. Article II (*c*): Deliberately inflicting conditions of life

21. I move on next to paragraph (*c*) of Article II, which refers to “deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”.

22. As with all other punishable acts, Article II (*c*) applies only to “conditions of life” that are inflicted on the *group* (as opposed to individuals), and the conditions of life must be *capable* of bringing about the destruction of the group¹⁹¹.

23. Once more, the general deficiencies in The Gambia’s evidence apply here¹⁹². While there is no dispute that there was fire damage in a number of villages in northern Rakhine State, The Gambia fails to establish that the security forces of Myanmar were responsible for all of the fire damage it alleges, or even most of it. Nor is it accepted that The Gambia has established that that fire damage occurred at a time when each village was still inhabited.

24. Evidence produced by UNOSAT, particularly fire detection data in the extracted box, suggests that most fire damage was caused *after* the military operations had ended on 5 September 2017. This data must be viewed alongside extensive evidence of Bengalis¹⁹³ engaging in fire setting, as well as members of the ethnic Rakhine¹⁹⁴ community around this time.

25. The Gambia has asserted that “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, [and] systematic expulsion from homes”, are also all measures recognized by this Court as falling within Article II (*c*), and that this has been established¹⁹⁵. Contrary to The Gambia’s submissions, these are *not* measures that fall within Article II (*c*) per se.

¹⁹⁰ *Croatia Genocide, 2015 Judgment*, p. 70, para. 157.

¹⁹¹ CMM, paras. 4.67-4.71. CR 2026/7, p. 59, paras. 64-65 (Miron).

¹⁹² See CMM, paras. 6.68-6.69, 7.231-7.236; RM, paras. 6.7-6.12, 6.17-6.31, 7.1-7.166; CR 2026/8, pp. 31-46, paras. 1-58 (Staker); CR 2026/9, pp. 35-53, paras. 1-69 (Staker).

¹⁹³ E.g. Myanmar National Human Rights Commission, Field Visit Report by the Commission’s team on the terrorist attack incidents in Maungdaw and Buthidaung Townships in Rakhine State, 2 October 2017, pp. 5-7, RM, Vol. III, Annex 62; Sworn Statement of Maw Go Lar Mauk, confirming his account given on 2 November 2017 (24 February 2023) (corrected translation), p. 2, RM, Vol. III, Annex 106. See further footnote 132 below.

¹⁹⁴ 2018 FFM Detailed Findings, para. 969, CMM Vol. VI, Annex 239.

¹⁹⁵ RG, para. 9.19.

26. *First*, in the *Croatia* case this Court made clear that for measures to fall within Article II (c), they must be measures “whereby the perpetrator ultimately seeks the death of the members of the group”¹⁹⁶. The Gambia fails to show, *at all*, how any of these particular measures had, as its ultimate goal, the death of any person, let alone members of the group generally.

27. *Second*, restrictions on — or deprivation of — food must be more than “occasional denials of food supplies” but must be “of a systematic or general nature”¹⁹⁷, “calculated to bring about the physical destruction in whole or in part” of the group¹⁹⁸. It is perhaps telling that The Gambia elected to remove the very section of the FFM dedicated to the subject “[a]ccess to food and malnutrition”¹⁹⁹ from its Annex of the Memorial. It does not support its case.

28. The Gambia simply does not establish that any deliberate restrictions on food, even if they occurred (*which they did not*), were either systematic or of a general nature, or calculated to bring about the physical destruction of members of the Bengali population. To the contrary, the available evidence shows that Myanmar ensured ongoing access to food despite the temporary disruption caused by ARSA’s attacks²⁰⁰. This point also bears upon the Court’s consideration of the *dolus specialis* to which I will turn later.

29. *Third*, The Gambia fails to identify any evidence of deliberate deprivation of medical care, let alone any restriction on medical care that comes close to meeting the threshold within Article II (c). Again, The Gambia cannot discharge its burden in this regard because there is no evidence of any deprivation of medical care that was “of a systematic or general nature”²⁰¹. As the FFM noted,

“[t]he availability of functioning health facilities and services in Rakhine State for *all* communities is low, with an average of five health workers per 10,000 inhabitants . . . [A]ll communities in Rakhine State have inadequate access to healthcare, and that under-development and poor transportation make access to healthcare difficult for all, especially those living in remote areas.”²⁰²

¹⁹⁶ *Croatia Genocide, 2015 Judgment*, p. 70, para. 161.

¹⁹⁷ *Ibid.*, p. 110, para. 366.

¹⁹⁸ *Ibid.*, p. 111, para. 367.

¹⁹⁹ 2018 FFM Detailed Findings, pp. 129-130, CMM, Vol. VI, Annex 239.

²⁰⁰ CMM, paras. 10.185, 10.199-10.206, 10.212, 10.232-10.245, 13.115-13.116; RM, paras. 3.88-3.96, 10.101, 10.114(2). CR 2026/8, p. 56, para. 38 (Lawrie).

²⁰¹ *Croatia Genocide, 2015 Judgment*, p. 111, paras. 370-371.

²⁰² 2018 FFM Detailed Findings, para. 544, MG, Vol. II, Annex 40.

Such limitations on access to health care as may have existed, were not calculated to target the Bengali group.

30. *Fourth*, turning to the issue of forced displacement, it is to be recalled that this Court’s jurisprudence determined that “the forced displacement of a population does not, as such, constitute the *actus reus* of genocide within the meaning of Article II (c)”²⁰³. No one disputes that there was a large movement of Bengalis from Rakhine State to Bangladesh but this was not the product of deliberate policy or intent to systematically displace the population into Bangladesh, but rather the inevitable consequence of confronting ARSA violence. In any event, The Gambia does not show that the movement of part of the population to Bangladesh occurred “in circumstances calculated to result in the total or partial physical destruction of the group”²⁰⁴.

31. *Fifth*, while The Gambia claims that Bengalis were subject to “extensive restrictions on movements”²⁰⁵, this collides with the Court’s finding that “restrictions on freedom of movement may undermine the social bond between members of the group, and hence lead to the destruction of the group’s cultural identity”; such restrictions nevertheless “cannot be regarded as calculated to bring about the group’s physical destruction, which is the sole criterion in Article II (c) of the Convention”²⁰⁶. The Court found this to be so in the *Croatia* case, even where restrictions were found to be part of the “creation of a climate of coercion and terror”²⁰⁷.

32. So far as The Gambia’s remaining claims of “extensive restrictions on . . . citizenship, on marriage and births . . . education . . . and livelihoods”²⁰⁸ are concerned, The Gambia has not addressed how *any* of these alleged acts constitute measures calculated to bring about the physical or biological destruction of the Bengali population as such. To the contrary, the evidence shows that Bengalis have readily been able to marry, procreate and earn a living in northern Rakhine State²⁰⁹. An illuminating adminicle of evidence in this regard is to be found within The Gambia’s own

²⁰³ *Croatia Genocide, 2015 Judgment*, p. 113, para. 376; see also *Bosnia Genocide, 2007 Judgment*, p. 123, para. 190; *Croatia Genocide, 2015 Judgment*, pp. 70-72, 126-127, 150-151, paras. 161-163, 435, 510.

²⁰⁴ *Croatia Genocide, 2015 Judgment*, p. 114, para. 376.

²⁰⁵ RG, para. 9.17.

²⁰⁶ *Croatia Genocide, 2015 Judgment*, p. 114, para. 380, emphasis added.

²⁰⁷ *Ibid.*, p. 114, para. 380.

²⁰⁸ RG, para. 9.17.

²⁰⁹ CMM, paras. 10.111, 10.123, 10.137-10.141; RM, paras. 10.65, 10.72, 10.87.

evidence such that, 51 of 55 (i.e. 93 per cent) of The Gambia's signed witness statements originate from married persons, and that 50 out of 55 (i.e. 91 per cent) are parents to children, with on average five each²¹⁰.

33. Finally, The Gambia claims that the IDP camps in Rakhine State constitute "forcible confinement in inhospitable internment camps"²¹¹. This is plainly incorrect, as Dr Staker has demonstrated²¹². There is no evidence of any restrictions on freedom of movement, access to commercial life, food, water or healthcare that threatens the physical or biological destruction of those living in the IDP camps²¹³.

D. Article II (d): Imposing measures intended to prevent births within the group

34. I now proceed to paragraph (d) of Article II, which refers to "imposing measures intended to prevent births within the group". According to The Gambia, the *actus reus* of this paragraph is satisfied by what is alleged to be a high prevalence of rape and other brutal forms of sexual violence²¹⁴. The Gambia claims that such acts impaired the willingness and ability of alleged victims to procreate, both because it affected their possibility of marriage, and because the trauma has led them not to procreate²¹⁵.

35. Put shortly, this argument fails for the same reasons it was rejected in the *Croatia* case²¹⁶, in that there was no evidence "that the acts of sexual violence were perpetrated in order to prevent births within the group"²¹⁷.

36. In *Croatia*, the Court additionally noted that for acts to fall within Article II (d),

"it is necessary that the circumstances of the commission of those acts, and their consequences, are such that the capacity of members of the group to procreate is affected. Likewise, the systematic nature of such acts has to be considered in

²¹⁰ CMM, para. 10.138.

²¹¹ RG, para. 9.20.

²¹² CR 2026/10, pp. 57-58, paras. 93-94 (Staker). See also CMM, paras. 10.179-10.221; RM, paras. 10.91-10.102, 13.141-13.142.

²¹³ RM, paras. 10.98-10.102; 13.140-13.142.

²¹⁴ MG, para. 12.21.

²¹⁵ MG, paras. 12.22-12.23.

²¹⁶ CMM paras. 4.72-4.78; *Croatia Genocide, 2015 Judgment*, p. 117, paras. 398-400.

²¹⁷ *Croatia Genocide, 2015 Judgment*, p. 117, paras. 398-399.

determining whether they are capable of constituting the *actus reus* of genocide within the meaning of Article II (*d*) of the Convention.”²¹⁸

37. In considering the “consequences” of such acts, notwithstanding the seriousness of such criminality, The Gambia’s evidence does not show that any of the alleged acts of rape and sexual violence committed during Myanmar’s military operations have *in fact* prevented meaningful numbers from finding spouses or procreating.

38. Despite The Gambia’s repeated claims that sexual violence was “pervasive”, “massive” or “voluminous”²¹⁹, the underlying evidence does not justify the use of these adjectives. The Gambia claims that the number of victims of such violence is of the order of *hundreds*, out of a population of 1.4 million²²⁰. Even if proven in its entirety, this figure would still represent a very small fraction of the protected group.

39. In any event, The Gambia does not specify exactly *when* or *where* these particular alleged incidents are said to have taken place, or the evidential basis for the assertion. Nor does The Gambia establish by evidence any causal nexus between any alleged incident of sexual violence and the prevention of any births. The Gambia just *presumes*, and then asserts, without justification, that any and all incidents of sexual assault bore such an intention, and had such a result. This plainly is not sufficient. If it were, it would mean that every sexual assault would per se constitute the *actus reus* of genocide under Article II (*d*) of the Convention, which is obviously not the case.

E. Conclusion

40. Mr President, Members of the Court, for the reasons I have given, The Gambia’s evidence is not capable of proving, to the very high standard of proof that must be met, that acts were committed that satisfy the *actus reus* of any of paragraphs (*a*) to (*d*) of Article II.

²¹⁸ *Croatia Genocide, 2015 Judgment*, p. 73, para. 166.

²¹⁹ CMM, paras. 1.10 bullet point 10, 1.28, 1.49, 1.53, 5.4, 7.2, 7.76, 8.104, 9.1, 9.7, 10.1, 12.3, 12.22, 12.67, 12.74, 12.110; RG, paras. 1.8, 1.17, 7.3, 7.12, 7.32-7.34, 7.42, 7.44, 7.66, 7.147, 9.14, 9.21, 9.24, 9.30, 9.33, 9.38-9.39, 9.63-9.64, 9.114.

²²⁰ RG, para. 3.19; CMM, 13.141.

3. *Dolus specialis*: the mens rea of genocide has not been proved

A. Introduction

41. I turn now to the second matter that The Gambia must prove to establish the commission of genocide, namely the existence of the *dolus specialis* (or genocidal intent). Even if it could prove that any of the acts specified in Article II were committed, that of itself would not prove that the acts in question were committed with the specific intent for genocide set out in the *chapeau* of Article II: namely the intent physically or biologically to destroy the group in question²²¹.

42. This is absolutely clear from the *Bosnia* and *Croatia* cases. In both cases, there were multiple instances where the Court found that genocide had not been committed, notwithstanding that acts, satisfying the *actus reus* of the various paragraphs of Article II, had been established. The Court found that acts of genocide had not been established and proved because it had not been proved that any of the acts had been committed with genocidal intent.²²²

43. In this case, too, The Gambia fails to prove that any acts were committed with a genocidal intent.

B. There is no direct evidence of a genocidal intent

44. First, there is no direct evidence of a genocidal intent attributable to Myanmar. This point can be dealt with briefly. In more than 850 pages of its written pleadings, and some 8,000 pages of annexed documents, The Gambia presents no direct evidence of any State plan, policy or instruction to carry out genocide. Even three purported defector soldiers who claim they participated in the military operations²²³ do not suggest that they, or their fellow soldiers, ever acted with an intent, or pursuant to orders or a plan, to destroy the Bengali population as such.

45. In an attempt to address this lack of direct evidence, The Gambia distorts the meaning of the words of Senior General Min Aung Hlaing regarding an “unfinished job” and seeks to imbue them with a genocidal interpretation. Professor Talmon has already addressed you on the full context

²²¹ *Croatia Genocide, 2015 Judgment*, p. 63, para. 136; CR 2026/7, p. 44, paras. 14-15 (Miron).

²²² *Bosnia Genocide, 2007 Judgment*, pp. 154-155, 175, 179, 181-182, 190, 198, paras. 276-277, 319, 328, 334, 354, 376; *Croatia Genocide, 2015 Judgment*, pp. 128, 150, 151, paras. 439-440, 507, 514-515.

²²³ CMM, 13.81; Interview of Zaw Naing Tun, 15 August 2020, MG, Vol. V, Annex 141; Interview of Myo Win Tun, 15 August 2020, MG, Vol. V, Annex 142; IIMM, Screening Note of P5513 (IIMM0028728637), (filed under cover of the letter of the Agent of The Gambia dated 6 December 2025, added to the case file by the decision of the Court communicated to the Parties on 17 December 2025).

and meaning of these words. Consideration of that speech in full, given on 2 September 2017, dispels any sensible notion of genocidal intent. While counter-terrorism operations remained ongoing, his words acknowledged the suffering of displaced Bengali people and expressed a desire for their return:

“The local people for their part need to return home and try to develop their region. There are many losses and tragedies in the aftermath of the incidents. Cooperation is necessary to remedy them as quickly as possible while efforts must be made for regional development.”²²⁴

C. The circumstances do not establish genocidal intent

46. Mr President, Members of the Court, in the absence of any direct evidence of *dolus specialis*, the Court is once again called upon to engage in a careful and rigorous exercise of examining what reasonable inferences may be drawn from the totality of the circumstances which you find established.

47. Professor Talmon has already addressed the Court on how this task is to be approached and how a genocidal intent may be established. The submissions that I make proceed in accordance with that methodology.

48. This approach requires the Court to *first* examine whether genocidal acts alleged to have been committed during an attack on a protected group have been established by way of conclusive evidence.²²⁵ Due to the evidential deficiencies affecting all of The Gambia’s evidence that it relies upon, as explained in Myanmar’s other presentations, The Gambia falls at this first hurdle. Put shortly, it fails to discharge the burden of establishing the underlying acts from which any inference of genocidal intent may be inferred.

49. If, however, acts falling within Article II are found proven by way of “fully conclusive” evidence, the Court proceeds to the *second step* of assessing whether those acts form part of a pattern of conduct²²⁶. That is to say, “a consistent series of acts carried out over a specific period of time”²²⁷. Only if fully convinced as to the existence of a pattern of conduct, does the Court move to a *third*

²²⁴ Senior General Min Aung Hlaing, “Entire government institutions and people must defend the country with strong patriotism”, 2 September 2017, MG, Vol. VI, Annex 150.

²²⁵ *Bosnia Genocide, 2007 Judgment*, para. 277.

²²⁶ *Croatia Genocide, 2015 Judgment*, p. 119, para. 407. **Error! Main Document Only.**

²²⁷ *Ibid.*, p. 151, para. 510.

step and examine whether genocidal intent can reasonably be inferred from an established pattern of conduct²²⁸.

D. Pattern of conduct

50. Mr President, it is to this *second* step that I now turn and the issue of whether The Gambia has proven a pattern of conduct from which a genocidal intent may reasonably be inferred.

51. Notwithstanding that The Gambia bears the burden of proof, Myanmar submits that there are 11 features of the evidence, taken as a whole, that point away from the existence of any such pattern of conduct.

E. ARSA and the counter-terrorism operations

52. The *first* feature of the evidence to be considered is the existence of activities of ARSA in the region, and the context in which the operations of 2016 and 2017 took place.

53. The evidence shows that ARSA conducted carefully planned and highly co-ordinated attacks against the Myanmar State, and civilians, in October and November 2016 and then again in August 2017, in at least 50 locations across Maungdaw, Buthidaung and Rathedaung²²⁹. These ARSA attacks involved hundreds, indeed thousands, of participants in the deadly violence and widespread destruction²³⁰.

54. As Ms Lawrie demonstrated, by 2016 ARSA had evolved into a professional, well-organized group²³¹. Its objective was to gain “complete control” over northern Rakhine State²³². IIMM witness testimony confirms the extensive capabilities of ARSA, its recruitment, its training and the sophisticated co-ordination of action between regiments²³³, and to the widespread

²²⁸ *Bosnia Genocide, 2007 Judgment*, pp. 196-197, para. 373.

²²⁹ CMM, para. 13.92.

²³⁰ Amnesty International, *Destroy Everything*, p. 23, CMM, Vol. VI, Annex 269; International Crisis Group, Myanmar’s Rohingya Crisis Enters a Dangerous New Phase, Asia Report No. 292, 7 December 2017 (hereinafter “International Crisis Group, Dangerous New Phase”), pp. 6, 11, CMM, Vol. VII, Annex 297.

²³¹ International Crisis Group, Myanmar: A New Muslim Insurgency in Rakhine State, Asia Report No 283, 15 December 2016 (hereinafter “International Crisis Group, New Muslim Insurgency”), p. 12, CMM, Vol. VII, Annex 296; CR 2026/8, pp. 48-49, paras. 5, 9-10 (Lawrie).

²³² CMM, para. 3.24. See also 2018 FFM Detailed Findings, paras. 1012-1013, MG, Vol. II, Annex 40.

²³³ IIMM, Witness Statement No. IIMM0028503937, paras. 30-74 and 100-102, 111-114, 116, 122, 127-128, RM, Vol. IV, Annex 149; IIMM, Witness Statement No. IIMM0028674762 (P4715), paras. 101-220 (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).

manufacture, distribution and use of explosive devices²³⁴. In short, ARSA was a serious threat. It was both necessary and justified to deploy military force to confront such a threat when it commenced its attacks.

55. Accordingly, Myanmar disseminated Rules of Engagement, which are accepted as being consistent with internationally recognized standards²³⁵, to its command headquarters and on pocket cards to its personnel, in advance of conducting the operations²³⁶. Such a step, to place limits on the use of military force, is manifestly at odds with an intent on the part of the State to destroy the protected group.

56. The critical context regarding ARSA is now fully before the Court²³⁷. To the extent that a pattern of conduct is established, it was one of responsive steps taken to the threat posed by ARSA and its mobilized supporters.

F. Timing and duration of the counter-terrorism operations

57. This *second* feature of the evidence concerns the timing of the counter-terrorism operations in October 2016 and November 2016 and August 2017, not just in terms of *when* they commenced but also their *duration*.

58. *First*, the operations in October 2016 only began *after* there had been a series of co-ordinated ARSA attacks upon security personnel and infrastructure²³⁸ in Maungdaw and Rathedaung Townships. Even though the attacks marked “a major escalation of violence in Rakhine and reflected an unprecedented level of planning” and caused widespread fear, particularly amongst Rakhine villagers, with 3,000 fleeing their homes²³⁹, Myanmar’s use of force lasted *three* days (10-12 October 2016). If a genocidal intent had existed at the time of the October 2016 attacks, as The Gambia contends, there is no reason why the operations would not have continued.

²³⁴ IIMM, Weapons Report, paras. 51-53, 55, RM, Vol. IV, Annex 145; IIMM, Witness Statement No. IIMM0028674762 (P4715), paras. 172-177 (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).

²³⁵ RG, para. 7.13; Second expert report of Michael A. Newton, May 2024, para. 6, RG, Vol. IV, Annex 67.

²³⁶ CMM, paras. 3.85-3.86, 13.92; RM, paras. 3.18, 13.102; Distribution of Rules of Engagement (ROE) cards, CMM, Vol. V, Annex 151; Rules of Engagement for Counter-terrorism Operations against AA and ARSA, paras. 15, 18 and 19, CMM, Vol. V, Annex 152.

²³⁷ CMM, Chapters 3, 8 and 9; RM, Chapters 3, 8 and 9; CR 2026/8, pp. 46-68, paras. 1-83 (Lawrie).

²³⁸ CMM, paras. 3.26-3.3.29; RM, paras. 3.16, 3.22.

²³⁹ International Crisis Group, New Muslim Insurgency, p. 6, CMM, Vol. VII, Annex 296.

59. *Second*, there was thereafter no further significant deployment of military force until *after* ARSA's next attacks in Maungdaw Township had begun on 12 November 2016, involving the killing of soldiers²⁴⁰. That was considered by the International Crisis Group to be a "further serious escalation"²⁴¹. Again, however, the security operations that followed were tightly circumscribed, lasting just *two days* (12-13 November 2016). Again, if a genocidal intent had existed at the time of the November 2016 attacks, there is no reason why the operations would not have continued beyond the two days in November and extended beyond just 11 locations in 2016.

60. *Third*, the ARSA attacks that commenced on 25 August 2017 were far more serious than the previous attacks. On this occasion, ARSA's campaign of violence extended to more than 50 locations, and involved many killings of non-Muslim civilians²⁴², not least at Kha Maung Seik²⁴³. Despite this, the significant military operations in response to those attacks lasted just *seven days* (25-31 August 2017) and were formally ended on 5 September 2017²⁴⁴.

61. The Gambia's claim that the timing of the counter-terrorism operations was in the hands of the Myanmar military is untenable. The timing of the counter-terrorism operations was self-evidently dictated by ARSA. ARSA decided for itself when it could conduct its attack, and its attacks inevitably led to an immediate response by the security forces. Myanmar can hardly have been expected to have sat on its hands as ARSA and its supporters rampaged across northern Rakhine State. It is, in fact, obvious that ARSA attacks of August 2017 were timed to commence just hours after the release of the Kofi Annan Commission's final report on 24 August 2017²⁴⁵, in order to derail that State-initiated peace plan.

62. Thus, The Gambia's argument appears to be that Myanmar conducted operations for three days in October 2016 with an intent physically or biologically to destroy the Bengali population, then did so again for a further two days in November 2016 with the same intent, and then waited nine

²⁴⁰ 2018 FFM Detailed Findings, para. 1037, CMM, Vol. VI, Annex 239.

²⁴¹ International Crisis Group, *New Muslim Insurgency*, p. 9, CMM, Vol. VII, Annex 296.

²⁴² CMM, paras. 3.67-3.88.

²⁴³ CMM, paras. 3.108-3.119; Amnesty International, *Destroy Everything*, pp. 50-57, CMM, Vol. VI, Annex 269.

²⁴⁴ 2018 FFM Detailed Findings, para. 969 (fn. 2189), CMM, Vol. VI, Annex 239.

²⁴⁵ 2018 FFM Detailed Findings, para. 1044, CMM, Vol. VI, Annex 239.

months until August to conduct operations again for a further seven days with the same genocidal intent, at the end of which some 600,000 Bengalis continued to reside in Rakhine State²⁴⁶.

63. The only reasonable inference to draw is that the pattern of conduct reveals an intent to neutralize the threat from ARSA on each of the specific occasions on which there were attacks by ARSA and to do so proportionately.

64. Since early September 2017, the threat from ARSA to civilians and to State security personnel has diminished, and accordingly there have been no comparable military operations. The Gambia makes not a single allegation, and has not adduced any evidence, of any killings or other serious acts of violence which it claims amount to demonstrations of genocidal intent by the Myanmar security services against Bengalis since that date, more than eight years ago. The Gambia has no explanation for how or why violent expression of its alleged genocidal intent, said to be underpinned by a “deep-seated hatred”²⁴⁷, simply evaporated after seven days in late August 2017.

G. Measures preceding the counter-terrorism operations

65. I now turn to the *third* feature of the evidence which demonstrates there was no pattern of conduct from which genocidal intent could reasonably be inferred. It concerns security measures undertaken in northern Rakhine State after the 2016 ARSA attacks.

66. Following those attacks, it was widely known that further ARSA violence was being planned. As the International Crisis Group then stated: “[a]ll indications are that HaY [ARSA] is preparing further attacks on security forces and retains the capability to do so”²⁴⁸. Those views of course proved to be prescient in light of the events in August 2017. Accordingly, following the 2016 attacks, certain measures were implemented, which included: (1) requiring residents to remove fences from their homes; (2) confiscating items that could be used as weapons, such as large knives; and (3) imposing curfews, which applied to Bengali and non-Bengali residents alike²⁴⁹.

²⁴⁶ United Nations and Partners, Humanitarian Response Plan, January-December 2019, December 2018, MG, Vol. III, Annex 43, p. 10; MG, para. 1.14.

²⁴⁷ RG, para. 9.62.

²⁴⁸ International Crisis Group, New Muslim Insurgency, p. 21, CMM, Vol. VII, Annex 296.

²⁴⁹ CMM, paras. 13.109-13.116; RM, paras. 3.65-3.82, 13.109-13.113.

67. Ms Lawrie has already addressed the justification for such measures, and I need not repeat her analysis here²⁵⁰. The Gambia fails to address the fact that fence removal orders were only as to the type of fencing material that could be removed, not removal of fencing altogether²⁵¹. Similarly, only large knives and weapons that could be used for an offensive purpose were confiscated, and this happened in only a relatively small number of cases²⁵². And, as noted, the imposition of curfews was imposed on all communities alike, not just Bengalis²⁵³.

68. In short, it was plainly necessary, reasonable and proportionate to impose such measures in light of what had happened in the 2016 attacks and what was understood to be the risk of future violence. The Gambia argues that such measures were key preparatory steps to the commission of genocide but does not then explain why such measures were not imposed prior to the October 2016 military operations which it contends also amounted to acts of genocide.

69. To these alleged preparatory genocidal measures The Gambia falsely suggests that Myanmar used starvation as a means of weakening the population and preparing it for destruction²⁵⁴. This is, again, a claim without evidential support and, simply wrong, for the reasons given by Ms Lawrie²⁵⁵. In fact, the available evidence positively shows that Myanmar ensured supply of food to affected Bengali communities, as security considerations would allow²⁵⁶.

70. For present purposes, to the extent that a pattern existed at all in respect of such security measures, the obvious inference to be drawn is that they were focused on security and protection in view of impending ARSA violence.

H. Geographical profile of counter-terrorism operations

71. The *fourth* feature of the evidence relates to the geographical profile of the counter-terrorism operations. Earlier I presented details of the short duration of the operations as leading compellingly to the conclusion that the operations were directed against ARSA. Similarly,

²⁵⁰ CR 2026/8, pp. 53-56, paras. 25-37 (Lawrie).

²⁵¹ CR 2026/8, p. 56, para. 36 (Lawrie).

²⁵² CMM, para. 13.187.

²⁵³ CR 2026/8, p. 56, para. 37 (Lawrie).

²⁵⁴ RG, para. 9.51.

²⁵⁵ RM, paras. 3.88-3.102; RM, paras. 13.114-13.115; CR 2026/8, pp. 56-57, para. 38 (Lawrie).

²⁵⁶ Amnesty International, *Destroy Everything*, pp. 107-108, MG, Vol. IV, Annex 112.

the correlation that exists between the locations where ARSA was active and the locations where operations took place also leads compellingly to the same conclusion.

72. It is beyond doubt that a tight geographical nexus exists between ARSA activity and responsive military operations. As Ms Lawrie and I have set out in detail in respect of all 46 specific locations where genocidal violence is alleged, *without exception* military operations were conducted only at, or in direct proximity to, locations where ARSA had attacked or was known to be active.

73. There are vast swathes of Maungdaw, Buthidaung and Rathedaung Townships, which are home to residents of the hundreds of remaining 463 communities of Bengalis, which were not subject to the deployment of military force, for the simple reason that they were locations in which ARSA and its supporters were not active and, accordingly, did not pose a security threat. While the residents of some of these settlements may have decided to leave for Bangladesh, the residents of many others did not.

74. A graphic example of this geographical correlation can be seen on the map, which shows the localized nature of all 10 counter-terrorism operations in 2016, which were tightly confined to an area of central Maungdaw Township comparable in size to that of the area stretching between The Hague and Rotterdam. As explained by Ms Lawrie, Dar Paing Sar Yar in Buthidaung Township involved an isolated allegation of criminality unconnected to the military operations.

75. Contrary to this contention, the FFM claims that the counter-terrorism operations were also initiated in “numerous” locations across northern Rakhine State that were not in the vicinity of an ARSA attack. This is demonstrably wrong. Far from there being “numerous” such locations, the FFM in fact points to only *one* solitary example, namely Sin Oe Pyin²⁵⁷. As discussed in my presentation concerning the village of Maung Nu yesterday²⁵⁸, this village, and the immediate vicinity, was in fact the scene of intense armed confrontations between Myanmar defence services and hundreds of ARSA fighters²⁵⁹. The Gambia’s own witness (P5513) corroborates Myanmar’s

²⁵⁷ 2018 FFM Detailed Findings, para. 968, CMM, Vol. VI, Annex 239.

²⁵⁸ CR 2026/9, pp. 28-32, paras. 70-95 (Blom-Cooper).

²⁵⁹ CMM, paras. 8.98, 9.85, 9.237, 9.240, 13.120-13.121.

records that noted that between 300 and 500 armed fighters confronted the military and surrounded the village²⁶⁰. The attackers then burned 82 houses²⁶¹.

76. In an attempt to address this obvious defect in the FFM analysis, the Reply of The Gambia identifies five additional villages where it alleges that operations took place *despite* there being no ARSA attacks²⁶². However, as demonstrated by Ms Lawrie²⁶³, there was indeed ARSA activity in all of these locations. Furthermore, it turns out that across all of these *five* villages there is only one alleged victim of sexual assault²⁶⁴ and one individual believed to have died in a fire in unclear circumstances²⁶⁵. That is the totality of the material upon which The Gambia invites a finding of a consistent pattern of conduct involving extreme brutality in these five additional villages.

77. To the extent that any pattern of conduct is shown to have existed in these 46 locations where violence is alleged, there is a clear geographical nexus between the deployment of military force in those locations and the presence and activities of ARSA, which draws the inference that the intent of Myanmar was to confront terrorism and not to destroy members of the protected group.

I. Scale and number of alleged crimes

78. The *fifth* feature of the evidence concerns the scale and number of acts of alleged violence on the part of Myanmar's security services.

79. In the *Croatia* case, the Court considered this feature to be relevant as to whether a pattern of conduct was established. Having found that the alleged targeted population of Croats stood at between 1.7 and 1.8 million²⁶⁶, the Court stated:

“[I]t is also relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group. In this connection, Croatia put forward a figure of 12,500 Croat deaths, which is contested by Serbia. The Court notes that, even assuming that this figure is correct — an issue on which it will

²⁶⁰ IIMM, Screening Note of P5513 (IIMM0028728637), para. 23 (filed under cover of the letter of the Agent of The Gambia dated 6 December 2025, added to the case file by decision of the Court communicated to the Parties on 17 December 2025).

²⁶¹ CR 2026/9, pp. 28-33, paras. 70-95 (Blom-Cooper).

²⁶² RG, paras. 7.49-7.52.

²⁶³ CR 2026/10, pp. 21-22, 34-36, paras. 156-162, 238-249; RM, paras. 8.34-8.64.

²⁶⁴ RM, paras. 8.40-8.41.

²⁶⁵ RM, para. 8.55.

²⁶⁶ CMM, para. 13.151; *Croatia Genocide, 2015 Judgment*, pp. 118-119, para. 406.

make no ruling — the number of victims alleged by Croatia is small in relation to the size of the targeted part of the group.

The Court concludes from the foregoing that Croatia has failed to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group.”²⁶⁷

80. While The Gambia alleges that Myanmar killed large numbers during the counter-terrorism operations, this contention is simply not proven to the requisite standard. The Gambia does not begin to grapple with the question of the extent to which any such alleged killings were *intentional* killings of uninvolved civilians, which fall within Article II (a), as opposed to the killings of those actively involved in the violence, or unintentional collateral casualties, which do not.

81. Instead, The Gambia uncritically adopts, and presents as conclusive, the FFM’s “reasonable grounds” *estimate* of “more than 10,000 deaths” as having been a direct result of military operations in August 2017. Even the FFM, from which The Gambia’s unverified figure is drawn, acknowledges its inherent unreliability²⁶⁸. Similarly, The Gambia adopts the same erroneous approach in respect of the number of fatalities at Min Gyi, Chut Pyin, Maung Nu and elsewhere.

82. By contrast, the total figure of “520 people killed” (comprising 376 ARSA fighters, 131 “ethnic/Hindu/Bengali people” and 13 “members of [the] security force[s]”)²⁶⁹, as recorded by Myanmar, is dismissed by the FFM because it does not conform with its own estimate²⁷⁰.

83. In any event, even if The Gambia’s contended raw figure of 10,000 deaths was proven, and even if every one of those deaths was an intentional killing such as to come within Article II (a), this number would be “small in relation to the size of the targeted part of the group”²⁷¹, to follow the language of the Court in the *Croatia* case. The alleged targeted group of Bengalis in this case stood at approximately 1.4 million²⁷². The disputed figure of some 10,000 fatalities constitutes some 0.7 per cent of the total, which is about the same — in fact slightly less — than that considered in *Croatia*.

²⁶⁷ *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

²⁶⁸ CMM, paras. 13.127-13.131.

²⁶⁹ 2018 FFM Detailed Findings, para. 1005, including footnote 2262, MG, Vol. II, Annex 40.

²⁷⁰ *Ibid.*, para. 1005, MG, Vol. II, Annex 40.

²⁷¹ *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

²⁷² CMM, para. 13.151 including footnote 2431.

84. There is no reason for concluding that Myanmar's security forces did not have the opportunity to kill a larger number, if that had been its intent²⁷³. The pattern of conduct, to the extent that one is established, does not draw an inference of genocidal intent but rather of deploying military force proportionately to confront the nature and scale of ARSA-led violence, and the threat posed.

J. Other opportunities to destroy

85. The *sixth* feature of the evidence *does* reveal a pattern of conduct: namely that Myanmar security forces had, and did not avail themselves of, opportunities to destroy the Bengali population, which was considered as a relevant factor in both the *Bosnia* and *Croatia* cases²⁷⁴.

86. In particular, at the time of the military operations of 2016 and 2017, there were 126,000 Bengalis living in IDP camps in Rakhine State²⁷⁵. There is no evidence that any of them were subjected to any military operations or any form of violence at all. The operations were instead confined to locations in northern Rakhine State where ARSA was active. As Dr Staker has demonstrated, there is also no evidence that conditions within those camps were such as to lead to the physical or biological destruction of those living there²⁷⁶.

87. Furthermore, during the movement of Bengalis from Rakhine State to Bangladesh in 2016 and 2017, Myanmar soldiers not merely eschewed opportunities to destroy members of this population, but in fact manifested a clear intention *not* to harm those who did not pose a threat.

88. The evidence indicates that hundreds of thousands of Bengalis left their villages and began their journeys on foot, often in very large numbers, and over the course of several days. They were highly visible and frequently encountered personnel of the Myanmar defence services and the police. Armed personnel, time and time again, did not attack or harm these Bengali civilians when they had ample opportunity to do so. In fact, the contrary. Testimony from multiple IIMM witnesses reveals that the military would ask them why they were leaving; or tell them not to leave Myanmar; or direct

²⁷³ *Bosnia Genocide, 2007 Judgment*, pp. 126-127, para. 199; *Croatia Genocide, 2015 Judgment*, pp. 126-127, paras. 431-437; RM, paras. 13.142-13.154.

²⁷⁴ *Bosnia Genocide, 2007 Judgment*, pp. 126-127, para. 199; *Croatia Genocide, 2015 Judgment*, pp. 126-127, paras. 431-437.

²⁷⁵ 2019 FFM Detailed Findings, para. 111, MG, Vol. III, Annex 49.

²⁷⁶ CR 2026/10, p. 57, para. 93 (Staker).

them where to go; or photograph them in groups; or tell them they could go where they wished; or, they simply ignored them²⁷⁷.

K. Nature and scale of sexual violence

89. The *seventh* feature of the evidence concerns the alleged nature and scale of sexual violence. Myanmar denies that sexual violence took place in the manner or on the scale alleged, and this has not been proved by The Gambia.

90. Even if the Court were to accept uncritically The Gambia's unsubstantiated claims that *hundreds*²⁷⁸ of women and girls over a 10-month period were subject to serious sexual assault, notwithstanding the gravity of such criminality, it would represent a very small fraction of the overall population of 1.4 million Bengalis then resident in northern Rakhine State, and it could not establish a pattern of conduct from which an inference of genocidal intent could reasonably be inferred.

L. Arrests and detentions

91. The *eighth* feature of the evidence concerns the operation of municipal criminal justice. Myanmar accepts that, following the 2016 military operations, there were numerous arrests, detentions and prosecutions of Bengalis, mostly men, allegedly involved in ARSA's attacks²⁷⁹. This was not indiscriminate targeting of any and all Bengalis, but only those reasonably suspected of involvement in ARSA's violence²⁸⁰. The Gambia suggests that such arrests and detentions are somehow indicative of a genocidal intent. In fact, to the contrary, they are precisely what would be expected of any responsible State following terrorist attacks of the kind committed by ARSA.

²⁷⁷ RM, paras. 13.144-13.145; See for example: (1) P1496, IIMM, Witness Statement No. IIMM0019628625, para. 120, RM, Vol. IV, Annex 131; (2) P2892, IIMM, Witness Statement No. IIMM0028048879, paras. 80-82, RM, Vol. IV, Annex 141; (3) P2499, IIMM, Witness Statement No. IIMM0027999848, paras. 101-102, RG, Vol. IV, Annex 59; (4) P1548, IIMM, Witness Statement No. IIMM0027997604, paras. 120-126, RG, Vol. IV, Annex 60; (5) P1492, IIMM, Witness Statement No. IIMM0027995869, paras. 130-131, RM, Vol. IV, Annex 138; (6) P1495, IIMM, Witness Statement No. IIMM0027992867, para. 99, RM, Vol. IV, Annex 136; (7) P0806, IIMM, Witness Statement No. IIMM0019627993, para. 76, RM, Vol. IV, Annex 129; (8) P2334, IIMM, Witness Statement No. IIMM0027971404, paras. 118, 132, RG, Vol. IV, Annex 55; (9) P2101, IIMM, Witness Statement No. IIMM0019915259, para. 142, RM, Vol. IV, Annex 151; (10) P1622, IIMM, Witness Statement No. IIMM0019922078, paras. 69, 71, RM, Vol. IV, Annex 133; (11) P1547, IIMM, Witness Statement No. IIMM0019629302, paras. 77-81, RM, Vol. IV, Annex 134.

²⁷⁸ RG, 3.19.

²⁷⁹ IIMM, Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations, 15 May 2024, para. 8, RG, Vol. II, Annex 10.

²⁸⁰ CMM, paras. 3.34, 8.60, 9.104, 9.115-9.116, 9.142-9.143, 9.150, 9.160-9.162, 9.185, 9.218-9.219, 9.230-9.231, 9.244, 9.253, 9.275, 9.287, 11.152-11.153, 13.156-13.161, 13.170-13.171.

92. The Gambia relies upon a generalized and erroneous assertion from the FFM that “*in many cases*, the arrests were without legal or factual basis”²⁸¹. Upon examination, this contention appears not only to be based on a very small and ill-defined data-set but is wholly dependent on suspected ARSA members being truthful reporters about their treatment during arrest and detention. Even if it could be proved that isolated instances of ill-treatment occurred in detention, The Gambia has not proved — and Myanmar denies — that there was any pattern of conduct involving widespread, grave ill-treatment as alleged.

93. In a similar vein, The Gambia also claims that juveniles were subject to serious bodily and mental harm in detention, and that this is indicative of a genocidal intent²⁸². This sweeping assertion is, upon analysis, based upon a *single* uncorroborated complaint by a *single* anonymous teenage detainee²⁸³. How a single incident could be said to form part of a pattern of conduct is a question that answers itself.

94. By contrast, the treatment of suspected ARSA members within Myanmar’s criminal justice system is instructive. The IIMM noted the case of 416 defendants implicated in ARSA’s October and November 2016 attacks. At the conclusion of the trial, 25 defendants were acquitted and released. Those convicted were sentenced to three years’ imprisonment with hard labour²⁸⁴. Such resort to criminal justice processing, with the concomitant time, effort and expenditure of resources, cannot be sensibly explained within The Gambia’s narrative on genocidal intent. It discloses a pattern of conduct diametrically at odds with an intent to destroy.

M. Targeting of leaders

95. I turn to a *ninth* feature of the evidence concerning the alleged targeting of Bengali community leaders. This was partly addressed by Ms Lawrie in her presentation on ARSA and its structure²⁸⁵. In short, The Gambia claims that there was a deliberate targeting of Bengali leaders²⁸⁶

²⁸¹ RG, para. 9.69.

²⁸² RG, para. 9.71.

²⁸³ RM, para. 13.148; IIMM, Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations, 15 May 2024, para. 27, RG, Vol. II, Annex 10.

²⁸⁴ IIMM, Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations, 15 May 2024, paras. 28-30, RG, Vol. II, Annex 10.

²⁸⁵ CR 2026/8, p. 57, para. 39 (Lawrie).

²⁸⁶ MG, paras. 10.36-10.40.

and that “Myanmar systematically detained, tortured and killed — often in public view — Rohingya community leaders, including religious leaders, throughout northern Rakhine State”²⁸⁷. This expansive claim is not only incorrect and lacks any credible evidential foundation. It rests on the most tenuous, anonymous, summary hearsay evidence that does not indicate who or what the source was nor when, where or how any such alleged incidents are said to have taken place²⁸⁸. It is little more than an assertion, from which no pattern of conduct can be said to arise — nor from which an inference of genocidal intent could reasonably be inferred.

96. The Gambia provides no answer in its presentations to the fact that “wealthy, educated and influential men” were indeed occasionally subject to arrest, not due to a genocidal intent but, according to the FFM, “in an effort to locate ARSA members or gather information about their activities”²⁸⁹. The arrests of community leaders were a necessary consequence of the fact that ARSA members and supporters were often led by local Islamic clerics and scholars, or other local influential men, who were responsible for the organization and control of recruits to ARSA’s cause²⁹⁰.

N. Attacks on cultural and religious objects

97. The *tenth* feature of the evidence concerns the alleged destruction of madrasas and mosques, which was initially claimed by The Gambia to manifest a genocidal intent on the part of Myanmar. In reality, The Gambia’s own scant reference to this issue, and the paucity of supporting evidence²⁹¹, is telling.

98. In short, it is impossible to discern from the underlying anonymous questionnaires²⁹² on which The Gambia relies whether any more than two of each of these such structures were in fact damaged across the entirety of northern Rakhine State. That is the totality of it. The evidence reveals

²⁸⁷ MG, para. 12.63.

²⁸⁸ CMM, paras. 13.165-13.173; RM, paras. 13.152-13.155.

²⁸⁹ CMM, para. 13.170; 2018 FFM Detailed Findings, para. 1102, MG, Vol. II, Annex 40.

²⁹⁰ CMM, para. 13.171; International Crisis Group, *New Muslim Insurgency*, Asia Report No. 283, 15 December 2016, p. 13, CMM, Vol. VII, Annex 296; 2018 FFM Detailed Findings, p. 244, paras. 1017 and 1024, CMM, Vol. VI, Annex 239; RM, para. 8.161 citing IIMM, Witness Statement No. IIMM0019628625, paras. 52-54, RM, Vol. IV, Annex 131.

²⁹¹ MG, paras. 1.29, 10.63, 12.18; RG, para. 4.50, 8.34 footnote 1005, 9.74.

²⁹² Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State: Factual Findings & Legal Analysis Report*, December 2018, p. 45, MG, Vol. IV, Annex 121; 2018 FFM Detailed Findings, para. 960, CMM, Vol. VI, Annex 239.

no pattern of conduct involving attacks upon cultural or religious objects affiliated with the protected group.

O. Alleged destruction by fire

99. Mr President, I come now to the *eleventh* and final feature of the evidence, which concerns the allegations of a pattern of conduct involving destruction of property by fire. The Gambia alleges that villages were systematically burned by the Myanmar defence services during the counter-terrorism operations.

100. While it is accepted that Myanmar bears responsibility for some of the damage caused to structures during the conduct of military operations, it is far from being the case that it was solely responsible for such damage more broadly²⁹³. There is a wealth of evidence²⁹⁴ that ARSA and its supporters engaged in arson attacks in villages across northern Rakhine State during this period, including those of Mro, Hindu, Rakhine and Bengali settlements alike. It is no coincidence that, at the height of the August 2017 events, the leader of ARSA broadcast to thousands of its supporters instructing them to burn down villages throughout Rakhine State²⁹⁵. Similarly, the FFM noted that ethnic Rakhine, as a group, were also involved in the systematic burning of villages²⁹⁶.

101. Set against this background, The Gambia's claim of widespread fire setting by Myanmar defence services proceeds on two principal false bases: *first*, it simply assumes that all damage caused by fire must necessarily have been caused by the Myanmar authorities, and only to Bengali-inhabited settlements and, *second*, it appears to categorize each village that has suffered any form of fire damage as having been subjected to a "clearance operation" even if the evidence shows that most of the fire-damage occurred *after* the counter-terrorism operations had ended on 5 September 2017²⁹⁷.

²⁹³ CMM, paras. 13.198-13.200, 13.202; RM, paras 3.22, 8.45, 8.114, 8.164, 9.25, 9.95-9.96, 9.175-9.176, 12.110(1), 12.111-12.112.

²⁹⁴ E.g. Witness Statement of Captain Phyo XXXXX, 19 October 2017, pp. 2-3, RM, Vol. III, Annex 88; Witness Statement of U Zaw Htoo, 25 October 2017, p. 2, RM, Vol. III, Annex 94, Witness Statement of Ma Phaw Mi Lar, 1 November 2017, p. 2, RM, Vol. III, Annex 97. See further CMM, paras. 3.79-3.81, 8.33-8.38, 8.49-8.51, 8.73(6), 8.93, 9.177, 9.187, 9.197-9.199, 13.200; RM, paras 3.22, 9.25, 9.175-9.176, 12.111, 13.166-13.167.

²⁹⁵ Amnesty International, *Destroy Everything*, p. 47, CMM, Vol. VI, Annex 269.

²⁹⁶ 2018 FFM Detailed Findings, para. 969, CMM, Vol. VI, Annex 239.

²⁹⁷ RG, para. 9.57. See also RG, paras. 7.48 (fn. 687), 9.18, 9.54 and 9.79.

This is demonstrated in the chart generated by UNOSAT, which detected most fires *after* military operations had ended.

102. It is to be recalled that The Gambia's Memorial had originally claimed that Myanmar's military operations had involved "burning alive the members of the Rohingya group in *hundreds* of villages all across northern Rakhine State"²⁹⁸. The evidence, however, simply does not substantiate such exorbitant claims. In the face of challenge by Myanmar, The Gambia then revised its claim, conceding in its Reply that the available evidence "does not mean that *dozens* of Rohingya villages were not burned during the 'clearance operations'"²⁹⁹.

103. Even if *dozens* of villages were so burned by the Myanmar security services during its operations, which has not been demonstrated, it would represent a small fraction of the more than 509 Bengali settlements across northern Rakhine State, and would not amount to a pattern of conduct involving the destruction of property from which an intention to bring about the physical or biological destruction of any protected group could reasonably be inferred.

P. Genocidal intent is not a reasonable inference

104. Mr President, having identified and examined 11 relevant features of the evidence, the question to be addressed is this: has a pattern of conduct been established by way of "fully conclusive" evidence, from which an inference of genocidal intent can reasonably be inferred? I suggest the short answer to that question is no.

Q. Genocidal intent is not the only reasonable inference

105. Even if The Gambia were able to prove that a genocidal intent was *a* reasonable inference to be drawn from an established pattern of conduct, its burden of proof does not end there.

106. According to your own case law, the Court will only be fully convinced that a genocidal intent has been clearly established by inference, if The Gambia has proved that genocidal intent "is the *only* inference that [can] reasonably be drawn from the acts in question"³⁰⁰.

²⁹⁸ MG, para. 8.1.

²⁹⁹ RG, para. 9.78.

³⁰⁰ *Croatia Genocide, 2015 Judgment*, p. 67, para. 148 (emphasis added).

107. But, as the Court found in the *Bosnia* and *Croatia* cases, if a reasonable inference to be drawn from the evidence is an intent to engage in ethnic cleansing³⁰¹, or an intent to punish³⁰², or if the evidence reflects a discriminatory intent³⁰³ or even, as The Gambia suggests, an intent to defeat terrorism³⁰⁴, then a genocidal intent will not be the only reasonable inference to draw, and the *dolus specialis* will then not be established.

4. Conclusion

108. Mr President, Members of the Court, for the reasons I have given, The Gambia has failed to prove to the very high standard of proof that applies in cases alleging breaches of the Convention, either

- (1) that acts constituting the *actus reus* of Article II paragraphs (a) to (d) of the Genocide convention were committed; or
- (2) that any such acts were committed with the requisite specific intent physically or biologically to destroy the group as such.

109. Apart from anything else, the lack of a genocidal intent is clear from the following:

- (1) There was no “consistent pattern of conduct” from which an intent to destroy any protected group as such can be inferred. While there was a significant number of casualties in three locations where the most intense clashes with ARSA took place, in the other 43 locations (as examined by Ms Lawrie) the alleged violence and loss of life was far less and often minimal or even non-existent.
- (2) The Gambia has failed to prove that there were 10,000 deaths resulting from intentional killing, but even assuming that this figure were correct, the figure would be small in relation to the size of the alleged targeted part of the group and its claim would fail for the same reasons as the virtually identical claim failed in the *Croatia* case³⁰⁵.

³⁰¹ *Bosnia Genocide, 2007 Judgment*, p. 122, para. 190. See also *Croatia Genocide, 2015 Judgment*, pp. 111-112, para. 374.

³⁰² *Croatia Genocide, 2015 Judgment*, pp. 125-126, para. 430.

³⁰³ *Bosnia Genocide, 2007 Judgment*, p. 121, para. 187; *Croatia Genocide, 2015 Judgment*, pp. 94, 97, paras. 270, 285.

³⁰⁴ RG, para. 9.36.

³⁰⁵ *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

- (3) Without exception, the counter-terrorism operations were *responsive* to ARSA violence.
- (4) Myanmar's operations were *only* conducted in locations proximate to where ARSA was active; Bengali villages where ARSA was not active were simply not subject to any form of military engagement. Indeed, many Bengali villages were completely untouched.
- (5) The operations were short-lived, lasting only a matter of *days*. No allegations of homicide, or even an assault, post-date 5 September 2017, which begs the question why expression of the alleged genocidal intent disappeared so precipitously and it remained so?
- (6) Myanmar made no attempt to harm a single individual out of 126,000 Bengali Muslims living in the Internally Displaced Persons camps in Rakhine State who, on any view, would have been supremely vulnerable to destruction had a genocidal intent existed. Similarly, the Myanmar military consistently eschewed opportunities to harm or kill as Bengalis fled the conflict areas on their way to Bangladesh.

110. Mr President, The Gambia has relied heavily throughout on the opinions of the FFM. But this Court must reach its own conclusions, based on *all* of the evidence before it, and applying the correct standard of proof for proceedings of this gravity.

111. Myanmar is confident that this Court will carefully and fairly examine *all* of the evidence, and when it does, will conclude that genocide has not been established, and did not take place.

112. Mr President, Members of the Court, that concludes my presentation. I thank you for your careful attention. And, perhaps after the lunch break, the Court may call upon Professor Miron to address the Court on why State responsibility has not been established.

The PRESIDENT: I thank Mr Blom-Cooper. Your statement brings to an end this morning's session. The Court will meet again this afternoon, at 3 p.m., to hear the remainder of the first round of oral argument of Myanmar.

The sitting is closed.

The Court rose at 1 p.m.
