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YEAR 2026

Public sitting

held on Thursday 22 January 2026, at 3 p.m., at the Peace Palace,

President Iwasawa presiding,

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

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le jeudi 22 janvier 2026, à 15 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

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

COMPTE RENDU

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

 Registrar Gautier

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

M. Gautier, greffier

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comme membres de la délégation.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this afternoon to hear the expert called by The Gambia, Professor Michael Newton.

Due to unforeseen technical issues, there will be no livestream of this afternoon's proceedings. The recording will be published on the website of the Court as soon as possible. Before hearing from the expert, I shall briefly explain the procedure to be followed today. At my invitation, the expert will take his place at the podium. I will then ask the expert to make the declaration set down in Article 64, subparagraph (b), of the Rules of Court. The expert called by The Gambia will then be asked to confirm his written statement, as well as his earlier reports annexed to The Gambia's written pleadings, subject to any correction the expert may wish to make. The written statement and reports will constitute the expert's evidence-in-chief and serve *in lieu* of his direct examination. Myanmar will then proceed to its cross-examination, which shall be confined in scope to statements already made by him as part of his written statement or reports. A maximum period of 40 minutes has been allocated for the cross-examination. Once cross-examination has been completed, The Gambia will have an opportunity to re-examine the expert, which will in turn be limited to matters raised in cross-examination. A maximum period of 15 minutes has been allocated for the re-examination. Questions may then be put to the expert by the President on behalf of the Court or by individual judges. The expert should reply orally, without further delay, save in exceptional cases, for example, when the information requested requires verification.

According to the Court's practice, the verbatim record will be circulated to the Parties as soon as available. The expert will also be asked to insert into the verbatim record corrections of any mistakes that may have occurred — without affecting the sense and content of the testimony or statement given — and will be requested to return the verbatim record, corrected and signed, to the Registrar at the latest by Monday at 6 p.m. in order to facilitate any supervision that the Court may think it proper to exercise in respect of any corrections made. I now invite Professor Michael Newton to the podium.

Good afternoon, Professor. I shall begin by inviting you to make the declaration set out in Article 64, paragraph (b), of the Rules of Court.

Mr NEWTON: Thank you, Mr President. “I solemnly declare upon my honour and conscience that I will speak the truth, the whole truth and nothing but the truth, and that my statement will be in accordance with my sincere belief.”

The PRESIDENT: I thank you. Before beginning the cross-examination and re-examination, I would like to remind counsel, as well as the expert, to speak at an appropriately slow pace for the benefit of the interpreters.

Professor Newton, the usher will give you your statement and reports as provided to the Court by The Gambia.

Mr NEWTON: Thank you.

The PRESIDENT: I now give the floor to counsel for The Gambia, Mr Paul Reichler, who will ask the expert to confirm his written statement as well as his two previous reports provided as annexes to The Gambia’s pleadings. Mr Reichler, you have the floor.

Mr REICHLER: Thank you, Mr President. Good afternoon, Professor Newton.

Mr NEWTON: Good afternoon.

Mr REICHLER: You prepared signed reports, which were submitted to the Court, in October 2020 and May 2024, and you submitted an affidavit, dated 18 November 2025. Do you confirm the accuracy and the correctness of everything that is in those two reports and in your affidavit?

Mr NEWTON: Yes, Sir, I do.

Mr REICHLER: Are there any corrections that you wish to make?

Mr NEWTON: No, Sir.

Mr REICHLER: Thank you.

The PRESIDENT: Thank you, Mr Reichler. I now give the floor to counsel for Myanmar, Mr David Hooper for cross-examination.

Mr HOOPER: Good afternoon to you, Professor Newton. Your statement at tab 4 summarizes your two earlier reports and — in your first report at paragraphs 3, 4, 5, 6 and 7 — you set out your extensive experience as a professional soldier, rising to the rank of Lieutenant Colonel in the United States Army, and you set out your subsequent academic career as a professor of the practice of law at Vanderbilt University in the United States, where you teach. You tell us that you specialize, in particular, on the application of international law to armed conflict, and you give extensive examples of your application in that field; is that correct? Is that correct, Sir?

Mr NEWTON: I'm sorry, I couldn't hear. Yes, Sir, it is.

Mr HOOPER: Thank you. Today, I appreciate you are a professor of law, but you come into court, as I understand it, with your military hat on, as a military expert; is that right?

Mr NEWTON: Partially correct, yes.

Mr HOOPER: All right. We will come to that.

The PRESIDENT: Let me interrupt. Professor Newton, maybe it is better to have a headphone on.

Mr HOOPER: Is it working? Good.

Mr NEWTON: Thank you.

Mr HOOPER: Is this working? I think it is. Thank you. In that capacity as an expert, you come in order to instruct the Court in your expert opinion as to whether the clearance operations conducted by Myanmar's armed forces in Rakhine State from 2016 to 2018, can be described as bona fide counter-insurgency operations; is that correct?

Mr NEWTON: I think I use the word authentic in places but I'll take "bona fide" as a synonym; so, yes, Sir.

Mr HOOPER: Now, as a lawyer, you know, as we all do, that as an expert, you come to court, this Court, to furnish it with information which is likely to be outside the Court's own experience and knowledge; is that correct?

Mr NEWTON: Yes, Sir.

Mr HOOPER: May I say I fully accept that you have the necessary expertise to instruct this Court on those military matters and to provide your opinion on them. Do you understand?

Mr NEWTON: Yes, Sir.

Mr HOOPER: As an expert, of course, your duty to the Court is to give your opinion objectively and without bias; is that correct?

Mr NEWTON: Yes, Sir.

Mr HOOPER: And that your duty to this Court overrides any other duty to any Party in the case; do you accept that?

Mr NEWTON: Yes, Sir.

Mr HOOPER: Do you consider that you have discharged those duties in these reports?

Mr NEWTON: I'm not sure I understand your question.

Mr HOOPER: Well, do you consider that in writing those reports, that you have discharged your obligation to the Court to give your opinion objectively and without bias?

Mr NEWTON: Yes, Sir. Those reports are over my signature and I take that very seriously.

Mr HOOPER: Now, I need to trace the manner in which your opinion is formed in the history of these reports. It seems that your opinion appeared fully formed, as it were, right from the get-go, from the very first report; is that right?

Mr NEWTON: You're referring to my first opinion?

Mr HOOPER: Yes. And your opinion, which has been unwavering, we can see quite clearly expressed in your first report: is that correct?

Mr NEWTON: Yes, Sir.

Mr HOOPER: Thank you. Your first report is dated October 2020. Can you be more specific? Or, more particularly, can I ask you this: When were you first instructed by The Gambia: can you recall?

Mr NEWTON: No, Sir.

Mr HOOPER: Was it a month or months before?

Mr NEWTON: I don't recall.

Mr HOOPER: In The Gambia's Memorial, it references your report at its — at paragraph 359 in The Gambia Memorial, it states this:

“Professor Newton reviewed the evidence gathered and analysed by the UN Fact Finding Mission and reached the same conclusions: that the clearance operations were planned in advance at the highest levels of the military hierarchy and carried out in conformity with orders passed down through the chain of command.”

That was the first part of it. Just pausing there: what you say there, that's the very nature of military command, is it not?

Mr NEWTON: Yes, Sir.

Mr HOOPER: All right. In the second part of their summary, they say: “The manner in which they were executed demonstrates that their purpose was not counter insurgency because they violated the most fundamental principles and practices of counter insurgency operations”; is that correct? That was a summary of your opinion?

Mr NEWTON: A brief summary, but essentially correct, yes.

Mr HOOPER: Well, we need to be brief, because I have a brief time with you. Thirdly, the only reasonable conclusion that can be drawn from the evidence is that the clearance operations were

aimed at the Rohingya population as a whole and that their purpose, you write, “was to destroy it”. Do you remember writing that?

Mr NEWTON: Or words to that effect, yes, Sir.

Mr HOOPER: At that stage — and we are talking about the first report, tab 5 in the judges’ bundle — at that time you had, and you specify, several documents which you list in your paragraph 2 in that first report. It includes the UN Fact Finding Mission and a few other reports. May I ask you, did you also have a draft of The Gambia’s Memorial?

Mr NEWTON: No, Sir. Ever.

Mr HOOPER: At no time?

Mr NEWTON: At no time.

Mr HOOPER: So you did not read the Memorial before you composed your opinion?

Mr NEWTON: No, Sir, there was no opportunity. I was instructed telephonically. I agreed to take on this matter on the question posed. I researched, I read — the entire FFM was the first thing I read and I wrote my opinion on the basis of my own independent research and study.

Mr HOOPER: But you did discuss, obviously, what your brief was with The Gambia?

Mr NEWTON: I don’t recall. I think I may have given them an indication of — I don’t recall. I just don’t.

Mr HOOPER: Clearly, your first report and the opinion reached in that report is entirely based on the representation of facts and opinions found in those documents that you read; is that correct?

Mr NEWTON: Yes, Sir. I had no fact-finding ability so I relied on the facts as stated in the FFM, the full FFM.

Mr HOOPER: Indeed, the Memorial states as much because it states explicitly, at its Chapter XII, paragraph 1117: “Based on the UN Fact Finding Mission, Professor Newton concludes . . .”, etc. That’s correct?

Mr NEWTON: I take your word for it, Sir.

Mr HOOPER: Let me come first to the military term. As I understand it, it is entirely a military term: COIN. C O I N. It is not an acronym, it is a contraction of the two words “counter”, “insurgency” — and use of that word appears to be relatively recent; is that correct?

Mr NEWTON: Yes, Sir. I’m hard — I could not pick up a particular time and date when that came into common usage but at this point it is in common usage.

Mr HOOPER: “Clearance operation” is a term that has been used in this case. Can you confirm that, as a military term, it is or has been used by the United Kingdom, United States, NATO and other countries?

Mr NEWTON: Yes, Sir. I think I have a footnote that acknowledges those sources, but the term “clearance operations” is commonly used in military circles all around the world.

Mr HOOPER: Very good, thank you. Just to be clear, and to remind ourselves — of course I am not speaking in Burmese — the Burmese phrase, in fact, translates (I understand) as “area clearance operation”. They use that phrase and also another phrase “counter terrorism operation”. Will you accept that?

Mr NEWTON: I will, on your word. I have no basis to know that.

Mr HOOPER: As to COIN, that is summed up in paragraph 3 of your summary statement at tab 4. I will just read a bit of it.

“Authentic counterinsurgency (COIN) requires comprehensive efforts to reassert the sovereign authority of the state, with the overall objective of establishing stable and secure peace that protects the civilian population. The civilian population *per se* cannot constitute a lawful military target of COIN.”

I accept that. Then, how COIN, that is [how] successful — that objective can be reached or best achieved — you set out at length in your first report: you set it out over some 15 pages of your first report, Annex V. In sum, if I try and summarize it, it comes to this: to confront the insurgents; to establish or re-establish State authority; not to target non-combatants; and, if you like, to win hearts and minds. Would that be a fair summation of what its basic objectives or conduct should be? Or put it another way: is COIN best practice for counter-insurgency?

Mr NEWTON: The principles of COIN that I outlined are universal across the planet. More or less what you described, minus the “hearts and minds” part. I didn’t use those terms. I don’t believe in that term; “hearts and minds” is a colloquial term that really is not used commonly in these circles as a professional practice.

Mr HOOPER: But COIN, really, the doctrine of COIN stands, really, for best practice for counter-insurgency?

Mr NEWTON: I would accept that with slight variations around the world, yes.

Mr HOOPER: And counter-insurgency, would you accept, in military circles, it is considered one of the most difficult of military operations?

Mr NEWTON: It’s difficult in the sense that it requires patience and persistence and adaptation over time because many times insurgents are changing, so it’s difficult in that sense, yes, Sir.

Mr HOOPER: Alright, thank you. And let’s leave aside the instant Myanmar situation for a moment this afternoon. The difficulty of counter-insurgency is reflected in many counter-insurgency operations that have occurred going back many years. You can see that. And many of those counter-insurgency operations have sadly involved all manner of excesses against the civilian population? That’s right, isn’t it?

Mr NEWTON: I’m not sure I know what you’re talking about in particular.

Mr HOOPER: I'm just saying that in many counter-insurgency operations that have been done, even by well-trained and resourced troops from my country and your own country, there have sadly been excesses committed during those counter-insurgency operations.

Mr NEWTON: I would agree with that, as a general principle, but I can also think of other examples where the abandonment of counter-insurgency doctrine directly led to entire defeats; South Sudan as an easy example, where the country separated simply because they used excessive force on a widespread basis.

Mr HOOPER: Yes. What I'm getting at is that counter-insurgency operations, they don't cease to be counter-insurgency operations because they do not conform with COIN doctrine. That would be right, wouldn't it?

Mr NEWTON: Essentially, it's a bald way of saying it, yes, Sir.

Mr HOOPER: And your conclusion, by the way, of that first report relating to COIN, is that any argument that the Tatmadaw's clearance operation against the Rohingya represented authentic or appropriate counter-insurgency is not credible. That's your conclusion. That's right, isn't it?

Mr NEWTON: Yes, Sir.

Mr HOOPER: And that opinion as to the application or non-application of COIN is repeated throughout your various formats, from the first report through the second and into the abbreviated summary prepared for this hearing. So, your conclusion, your opinion dealing with COIN is: it didn't comply?

Mr NEWTON: Yes, but dealing with COIN in general, or dealing with the application of this doctrine in this setting?

Mr HOOPER: In this setting. You say that the argument that the Tatmadaw's clearance operations were authentic or appropriate counter-insurgency is not credible. That was your conclusion?

Mr NEWTON: Yes.

Mr HOOPER: I'm only asking you to confirm that that was the case and I don't disagree. If the civilian population was subjected to the treatment described in the documents you had, the FFM reports, etc., it's clearly not a legitimate use of force, not complied with COIN doctrine or best practice. So there's no dispute on that. You can't go around willy-nilly killing civilians and targeting civilians there no dispute about that, you understand. So, on that aspect of your report, the key part of your report, on the documents you read, we don't dispute.

Now, in that first report, what is best practice for COIN covers almost the entire 15 pages of that report, but you make absolutely no mention of ARSA, the Arakan Rohingya Salvation Army. You don't mention it once in the entire report. Do you accept that?

Mr NEWTON: That would be a correct statement, yes, Sir.

Mr HOOPER: And surely as an expert, you would have mentioned the insurgents, that the counter-insurgency was directed against, or said to be directed against. You would have mentioned ARSA if you'd known about them in any detail, wouldn't you?

Mr NEWTON: Not necessarily. As I said, my basis of the facts — I had no independent fact-finding ability — was on the entirety of the FFM work, the FFM mentions ARSA in over 340 places. There's a whole section in the FFM discussing ARSA and making a legal determination, making the decision that after 25 August 2017 there was an armed conflict not of an international character. So if you're implying that I was not familiar with ARSA, what I knew of ARSA at that time was derived exclusively from the pages of the FFM, which devotes a great deal of treatment to detailing particular attacks here and there, and the nature of ARSA, and the organization such as they knew, etc.

Mr HOOPER: It's just, you see, I find it surprising that you put in an expert report on this situation of counter-insurgency and you don't mention the opposition at all. Do you understand why I'm surprised at that?

Mr NEWTON: No, Sir. The FFM at that point, early on, found over 54 villages where this *modus operandi* had happened and another 22 suspected. And the question I was asked was,

can I align this systematic *modus operandi* by the Tatmadaw with functional counter-insurgency doctrine, legitimate counter-insurgent efforts? And the answer was absolutely not. So, the efforts of the ARSA, as contained in the FMM, were relevant to the fact that there was an insurgency — no question — but that was a fundamental cornerstone. I didn't need that, I proceeded from the premise that there was an insurgency, I accepted the legal analysis of the FFM that there was an armed conflict not of international character at least as of 25 August. The question I was asked was to assess the responses, the *modus operandi* across those 54 verified up to 76 potential villages.

Mr HOOPER: We'll come back to the detail.

Mr REICHLER: Mr President, can counsel be instructed to allow the witness to finish his answer before he interrupts him?

The PRESIDENT: Yes, please, Sir.

Mr HOOPER: Right. Very well. Then you get to see the Counter-Memorial put in by Myanmar, which you say "expanded [your] knowledge of the relevant events" at paragraph 3 of that opinion. And your second report is largely a recital of The Gambia's Memorial and the FFM. But, as I understand it — Well, you do, you accept in that second opinion that there was an insurgency at paragraph 10 of the second document, which was something that you hadn't said before. What you say is "Myanmar claims that its [second] 'clearance operations' were intended to combat and defeat armed ARSA insurgents. To be sure, such an insurgency existed, and Myanmar responded to it." That's it. There's really not very much about ARSA. But you now recognize that there was an insurgency; is that correct?

Mr NEWTON: So, I recognized that in August 2020, when I wrote the first opinion because those facts, as I said, are clearly stated repeatedly in the text of the FFM. That's not negotiable. That's not debatable.

Mr HOOPER: And you say you've read the FFM and not just extracts from the FFM; is that correct?

Mr NEWTON: Correct, the entire FFM, that's correct. And there's a great deal of references to ARSA in the FFM, there's also a wonderful historical section on how ARSA developed in the International Crisis Group (ICG) report, so I took it as a cornerstone of my analysis, which was what I was asked to do: assess the *modus operandi*, the pattern of practice post-25 August against the established counter-insurgency doctrine. So spending time in that first opinion debating about the existence of an insurgency was not necessary. It was a separate question.

Mr HOOPER: And you now accept, clearly, there was an insurgency. Did you know or did you accept that ARSA had made attacks in 2016?

Mr NEWTON: Yes, Sir, that's clearly stated in the FFM and repeated places.

Mr HOOPER: As to ARSA's capacity in the second report, you are dismissive, are you not? But you do accept, may I ask you, that the International Crisis Group concluded that, by 2016, ARSA had evolved into a professional, well-organized and well-trained group. Did you know that?

Mr NEWTON: I'm not sure what you mean by the fact that I was dismissive. If you can show me where I said that, or what I said, I would be happy to address that comment. It was very clear after 25 August 2017 in the analysis of the FFM that the group met all the requisite requirements to become an armed force in the context of an armed conflict not of an international character, which meant there was an active insurgency, which meant that everything the Government did subsequent to that, and during that prior period as well, after the October 2016 attacks, was counter-insurgency. That was my analysis.

Mr HOOPER: And you're aware that ARSA was growing in capacity and size in training, were you?

Mr NEWTON: That was clearly demonstrated by the attacks of 25 August.

Mr HOOPER: Were you aware that it could call on thousands of people willing to engage in those attacks?

Mr NEWTON: What is the source of that information, Sir?

Mr HOOPER: Well, the Court has heard it. Were you familiar with that at all, in any form?

Mr NEWTON: I don't know that I knew exact numbers until I saw some of the statements attached to the Counter-Memorial which referenced numbers, etc.

MR HOOPER: Let me come to this simple point. ARSA posed a genuine challenge to the Government, did it not?

Mr NEWTON: I'm not sure what you mean by genuine challenge to the Government. They were an active insurgency that was attacking police posts and other places, so that's a serious insurgency, it's definitely an insurgency. But I'm not sure it's a challenge to the Government. They weren't trying to overthrow the Government.

Mr HOOPER: Do you agree that in asymmetric warfare where you've got insurgency, terrorism, guerrilla warfare . . . These are difficult for a State to confront, are they not? Because of the nature of it, terrorists just melt away, for example.

Mr NEWTON: Counter-insurgency is, yes, I would agree with that. It's a pernicious problem. Particularly in a case like this, where you have a section of the population, in the words of the International Crisis Group, that suffered from hopelessness and despair, so there's a rich recruiting ground right there. Every sovereign State, in my view, has an absolute right to confront insurgents and restore law and order and restore a legitimate government. But, at the same time, they have the correlative duty, absolutely at all times, to protect the population, all parts of the population, equally.

Mr HOOPER: These days, particularly, for example, in terms of weapons, handmade and sophisticated IEDs, explosive devices, have proved to be very effective, have they not, for insurgents?

Mr NEWTON: That's true in some settings. I'm trying to recall if I see specific — ARSA definitely had, in the language of the FFM, the capacity to make home-made IEDs. I'm not recalling any particular instances of effectiveness of those, but it just may be that I don't remember.

Mr HOOPER: And Rakhine State, given its geography, mountains, jungle-clad hills and the like, it's an ideal ground, isn't it, for insurgents?

Mr NEWTON: I wouldn't agree to that. Insurgents thrive depending on the nature of the organization and the political structure. Terrain is a factor, but there are so many other factors.

Mr HOOPER: All right.

Mr NEWTON: I wouldn't say it's ideal. It's just terrain.

Mr HOOPER: Now, you mentioned ARSA attacks and you recognize, then, that ARSA made over 30 co-ordinated attacks all over Rakhine State, or northern Rakhine State, on 25 August, and more the days following; is that right? Do you accept that?

Mr NEWTON: Yes, Sir. As I said, I accept the facts as stated in the full FFM report.

Mr HOOPER: And it was appropriate for Myanmar to react to it, though you say it should have done so properly; is that right?

Mr NEWTON: Yes, Sir. Myanmar had an absolute sovereign right to conduct military operations directed against the counter-insurgents, which is the first sentence of the rules of engagement posted in the Counter-Memorial.

Mr HOOPER: Do you accept that the number of assets, or the number of troops, that is, dedicated to the insurgency in this area — I understand it was about 1,400 — was appropriate for the size of the area that had to, as it were, be the subject of any counter-insurgency?

Mr NEWTON: I wouldn't know that, Sir. All I saw were references to the division numbers. I never saw a counting of the troops. I don't know how many were there.

Mr HOOPER: You accept Rakhine occupies a big area, doesn't it?

Mr NEWTON: Yes, Sir.

Mr HOOPER: As for the nature and extent of the counter-insurgency, do you accept — you have mentioned 46, plus some other locations. But do you accept now that instead of the hundreds of locations that have been spoken about earlier on in the pleadings, that now we are only talking about 46 in the evidence? Do you accept that? Or a few more than 46 perhaps?

Mr NEWTON: Sir, I don't know how many you're talking about in total. My factual findings were based on what the FFM said, and the findings there with respect to a *modus operandi*, they identified 54 corroborated instances and another 22. And one of the things that jumped out to me in reading the FFM thoroughly are the many places where they say there's allegations of an attack here or there's rumours of an attack here, but they can't be verified, therefore we won't count it. So I'm not sure they had it complete, but they acknowledged, "We can document these, and some others we can document, just not quite to our satisfaction." So I accept 54 corroborated examples of the *modus operandi* that I saw.

Mr HOOPER: Yes. That is out of over 500, though. Do you appreciate that?

Mr NEWTON: That's speculation, Sir. I don't know that.

Mr HOOPER: All right. And that 11 of those weren't in 2017; they were in 2016, nine months earlier. Did you know that?

Mr NEWTON: The FFM says that there were nine attacks in October 2016.

Mr HOOPER: Yes.

Mr NEWTON: And a separate 30 documented in October — sorry, August 2017.

Mr HOOPER: Did you appreciate when you wrote those reports that all the military activity in those localities followed directly on ARSA attacks in those localities or proximate to them? Did you know that, i.e. that no villages not associated with ARSA attacks were subject to direct counter-insurgency? Do you accept that?

Mr NEWTON: I'm sorry, say that again.

Mr HOOPER: That no villages — that the only villages that were the subject of specific evidential attacks, if you like, by the army, entry by the army, and counter-insurgency, I should say, no villages that didn't have ARSA attacks were subject to counter-insurgency. In other words, the army only went into villages where there had been ARSA involvement.

Mr NEWTON: I don't accept that, Sir. And Inn Din is a perfect example. There was no attack at Inn Din and then the clearance operation followed several days. And there were other villages where the FFM says the same thing, that there was no attack in that place, which led me to conclude that in those specific locations, the Tatmadaw simply decided that there must be ARSA there, we must go in, we must use this kind of force. The *modus operandi* is so consistent across all those places that it is a direct attack on the civilian population. It can't possibly be equated to a discriminate, focused attack on ARSA.

Mr HOOPER: All right. I am going to move on because the nature and extent of those attacks has been the subject of considerable evidence already and time moves on, so I cannot go into it all.

But returning to your first statement in 2020, your conclusion — and I have dealt with the COIN part of your conclusion. I now come to the other side. The contentious side, I suggest, is this. This is right from the get-go in your 2020 report at paragraph 29, at tab 5: “The only plausible conclusion from the available evidence is that the ‘clearance operations’ were conceived, coordinated, and conducted with the intention of” — and this is the quote I want you to pay attention to particularly — “destroying the Rohingya population on the basis of their ethnic and religious identity.”

Just pausing there, I am going to run through it fairly briefly and then pose my question. That opinion is then repeated in your second report, May 2024, by which time you had read the Counter-Memorial and certainly any references to ARSA. Your conclusion is that counter-insurgency operations were not COIN-compliant.” But you again say, “were done to destroy the Rohingya people”.

You repeat at every turn in that report — and I will run through it very quickly, at paragraphs 1, 3, 4, words to this effect, that “the ‘clearance operations’ can only be reasonably explained and understood as an organized and determined effort . . . to destroy the Rohingya people”. Paragraph 3:

“to eliminate the Rohingya group, or at least a substantial part of it”. Paragraph 9: “to destroy the civilian population in whole or in part”. Paragraph 10: “to destroy the Rohingya”. Paragraph 18: “a long-desired destruction of the Rohingya”. Paragraph 19: “the destruction of the group”. Paragraph 24: “to destroy”; 28, similarly. Paragraph 30: “with the intention of destroying the Rohingya population on the basis of their ethnic and religious identity”, and 31 and 33, and your affidavit statement in this case at tab 4. It is a distillation, but it says the same thing at paragraph 31: “determined effort by the Tatmadaw to destroy the Rohingya people as a group in Myanmar”.

In other words, 13 times in that second report you conclude findings of genocide, which is the issue in this case and a matter for the judges. Would you agree it is not a matter for a military expert’s opinion?

Mr NEWTON: For a person who is solely a military expert, but based on this evidence, Sir, I absolutely stand by that statement.

Mr HOOPER: All right.

Mr NEWTON: The pattern of attacks, the *modus operandi* that was consistently followed, was focused on that part of the population. The first part of that strategy, which appears over and over and over in the FFM, is to surround the village. A civilian area, mind you, a pure civilian area, not surrounding Rakhine villages, surrounding the Rohingya part. They surrounded it first. Then they began to shoot indiscriminately. That’s in the record. Over and over and over. There is no discrimination there. There is no effort at all to target specific houses or specific individuals. So the panic happens, people have to choose which kid to take, some people are shot in their homes, some people are shot in public places by this indiscriminate fire.

Let me finish the *modus operandi*, Sir, because that is the basis from which I derive those statements.

Mr HOOPER: All right.

Mr NEWTON: Very clearly, these are attacks not in Rakhine areas. These are attacks in Rohingya areas. They first surround, and many times, based on pre-planning, are attacking

simultaneously with different military units at different angles, or sometimes military units in BGP. These are co-ordinated, pre-planned attacks against Rohingya areas. They surround them, they indiscriminately shoot, then they segregate them.

And when I read that, I think of Srebrenica and other examples. They segregate the men and the boys, sometimes slitting their throats while their hands are still bound. As they are doing that, they are taking off groups of women to be gang raped and to be mass raped. As they are doing that, some other people are beginning to set fire to houses, other people are taking babies from the women's arms and throwing them into those burning houses. Some women, who are going off to be raped, are forced to throw their children down into wells.

Those efforts are part of an extermination campaign. The key thing to me, one of the key things that stuck out in looking at a consistent pattern of practice that was — so they surround, they shoot, they segregate men from boys, families broken apart, people split off from their children, then they execute. And in doing that, one of the key features that you see over and over and over and over and over again is shooting at fleeing refugees. Pure civilians. There is no discrimination there. People are leaving, they're fleeing, they're refugees. They're moving and they're still shot at and killed as they flee, followed by mass burnings. And it is notable in the record, and there is satellite evidence to corroborate that those burnings focused on Rohingya areas.

Mr HOOPER: Right.

Mr NEWTON: There are Rakhine areas left completely untouched, followed by bulldozing, which, to me, from my experience in Iraq, makes me think of the Anfal genocide. When you put that pattern together, with no discriminate force used against ARSA targets specifically, the rules of engagement specifically say that civilians — that the Tatmadaw must use discriminate force and that if they are to operate in an urban area, they must ensure the elimination of collateral damage. Based on that *modus operandi* and that consistent pattern of attacks which you see over and over and over in varying sequences and all across — all across the area, across the entire system of documented attacks, across that entire system, there's not a mention that we were moving against this place, against this person, and here are the steps we took to warn the civilian population, to alleviate collateral damage, here's our conclusion as to why we thought this was proportionate in accordance

with the rules of engagement. So I learned in the Counter-Memorial that there were rules of engagement. They were not only not followed, they were completely ignored, which is the substantive basis for those statements, Sir.

Mr HOOPER: All right. Thank you.

THE PRESIDENT: Mr Hooper, I am reminding you of the time allotted.

Mr HOOPER: Yes. Thank you very much, Mr President. Can I then just turn to a final matter? As a lawyer, you know that as an expert, independent of the Parties, you shouldn't be seen to usurp the role of the advocate in the proceedings. You know that, don't you?

Mr NEWTON: Yes, Sir.

Mr HOOPER: Right. Are you independent of the Parties?

Mr NEWTON: As I say, I'm the expert. These are my opinions based on my analysis of the facts, my deeper knowledge of these military practices, and my experience in the real world dealing with insurgencies in a number of countries and various components of the COIN problem. So yes, Sir, I take it very seriously. This is any analysis and my words over my signature.

Mr HOOPER: Well, let me just run through briefly and it's my last matter. I'll run through it and then pose my question. In 2017, you were selected for the expert roster of Justice Rapid Response, together with LAW (Legal Action Worldwide), the founder of which is also an expert with Justice Rapid Response. In May 2021, a joint press release was issued by that group — Justice Rapid Response and LAW — stating that they were working towards gathering evidence to support the legal cases, which is — one of these is one of those cases. Also, I think you served as one of the expert advisors to the Genocide Prevention Task Force under the auspices of the United States Holocaust Memorial Museum, which has also been referenced in this case, and also the Public International Law Policy Group (PILPG). You are a member of that team — PILPG's team — according to their website, and they're the author of documentary exhibits in this case, and PILPG of which you are a member of its team, is currently providing legal assistance to the national counsel

of the Union of Burma on the use of legal mechanisms to challenge the legitimacy of the present Government in Myanmar and is in the forefront of the resistance movement against the military junta, that is, the NCUB.

Now, bearing in mind all of that, do you agree that however much it might be right or even laudable to be associated with those bodies, it might appear to a reasonable disinterested observer that you have, to use an American phrase, a dog in the fight?

Mr NEWTON: No, Sir, I don't. Because of the nature of each of those — and I can recite what they are, if you want. I think — the Holocaust Memorial Museum project, I was one of the military experts in a project asked to assess how militaries should train and how militaries should prepare to counter genocide, the Albright-Cohen Commission was sponsored — I don't know — 17 or 18 years ago. I served on that and I've had nothing to do with the Holocaust Museum since. Justice Rapid Response: I didn't know that they had done anything there until I saw it in your filings. They keep an expert's roster of over 700 experts. They raise money. They send particular experts to particular places. I'm on their roster and I've never done anything for them ever. Public International Law & Policy Group, I did some work for them in Uganda — probably 18 years ago, maybe? I don't know and I know some of the people that are there, but in no way is my analysis affected by any of those associations or by any of that work, some of which I wasn't even aware of until I saw that in pleadings. So, no, Sir, these are my statements, my opinions, completely independent and impartial.

Mr HOOPER: All right. Throughout your reports, you don't consider or I say discuss at all any other possible conclusions to what you read in the FFM reports?

Mr NEWTON: Sir, the totality of the *modus operandi*, which was systematic, which was directly contravening all of the rules of engagement and it was interesting to, me in the Memorial, this is very telling — or the Counter-Memorial, I'm sorry — that, when I made the statement in the first paragraph 22 of my first statement, I said words to the effect that Tatmadaw commanders in no way can plead ignorance. They have to know that this is modern doctrine of counter-insurgency. When I saw the Counter-Memorial, I saw rules of engagement that largely reflected those norms. Those rules of engagement absolutely are valid counter-insurgency norms that were crafted in the

particularity of this context for ARSA and the Arakan Army. That told me they *do* understand those norms: they published rules of engagement, they disseminated them to troops because there is an annex in your work of how many thousands of copies you printed and disseminated. Then, with respect to this portion of the population, they engaged in that sustained *modus operandi*, from start to finish, which not only was not compliant with those rules of engagement on an aberrational basis — it simply ignored that they existed with two full divisions pre-planning co-ordination. And I'll give you the *modus operandi* again, which to me is absolutely indicative of an intentional, co-ordinated series of attacks directed against that portion of the population, surprise attacks on civilian villages, with no notice, with no warning — surprise attacks, often from multiple angles. Indiscriminate shooting from the get-go — no effort whatsoever to determine an ARSA location, or an ARSA house, or a safehouse or an IED factory — none whatsoever. No efforts to do a cordon and search [operation], where you would cordon an area and then search for the particular insurgent activity or thing you're looking for. Followed by segregations and executions, often in a gruesome way; followed by mass extermination, all at various places. I say it: followed by — it's all happening at once in chaos, but it's the same pattern over and over and over, directed against that group of people: extermination, shooting at refugees, followed by mass rapes, orchestrated all over the place. Every instance that I read had some elements of rape. There is no military necessity ever for rape. There is no military necessity ever to launch indiscriminate attacks against a civilian population with no notice, etc. Followed by the burnings, of course, and the bull-dozings. That entire pattern replicates itself in over 54 documented instances and *that's* the basis of my opinion, Sir.

Mr HOOPER: Well, thank you.

The PRESIDENT: I thank Mr Hooper, I now give the floor to counsel for The Gambia, Mr Reichler, in the event they wish to re-examine Mr Newton.

Mr REICHLER: Thank you very much, Mr President, just a few questions. Professor Newton, you were asked whether you considered that there were any other alternative explanations for the Tatmadaw's conduct and any alternatives to the conclusion that you reached that these "clearance

operations” were conducted with the intent to destroy the Rohingya population. Did you consider whether this was simply a disproportionate use of force by the Tatmadaw?

Mr NEWTON: I absolutely did, Sir, because that was — some things that I saw and in some of the filings: “this was just a random incident”; “this was just a renegade soldier”, etc. That can happen — and some of those things on the periphery might have been one soldier, renegade, etc. But the overall pattern of conduct in no way is just — can be properly characterized, in my opinion, as just indiscriminate use. The pattern, the consistency, the planning, the utter ignorance, i.e. the fact that there were COIN compliant rules of engagement in place which were completely ignored across the area, across the region, through an extended period — these were not just one day. The trick for me intellectually to an indiscriminate incident is that the rules of engagement are followed and then there’s an occasional aberration. Here, there were rules of engagement in place that were completely ignored and subordinated to a deliberate pattern. So, no, Sir, I believe it was as I stated.

Mr REICHLER: Could this have been another alternative explanation? Could this have been ethnic cleansing?

Mr NEWTON: Based on the facts as I saw them in the FFM in those at least 54 up to 76 incidents, my opinion is that it is not ethnic cleansing based on the pattern of practice: the mass rapes; the fact that it is documented in multiple witness statements that while those rapes are occurring, they’re racist, there are insults, there are ethnic slurs against that; the fact that babies are killed; that babies are thrown into burning houses; others are thrown into wells; others are thrown into the river. Ethnic cleansing does not involve killing the children of a particular group. The fact that men were slaughtered after — and sometimes they were hung. The fact that you’re shooting *at fleeing refugees*. If ethnic cleansing is your goal, you don’t keep shooting; you don’t put troops on the river as people are fleeing into Bangladesh and sink boats as they’re about to get into Bangladesh, and there are others, but the totality of the patterns, Sir, says to me that this is not just ethnic cleansing.

Mr REICHLER: On cross-examination, you expressed the opinion several times that these “clearance operations” or these *modus operandi* were preplanned. What’s the basis for your opinion

that these actions which you characterize as their *modus operandi* in 54 or more places were preplanned?

Mr NEWTON: Sir, I think there were preplanned both at a macro and a micro level. At the micro level, which I partially addressed, you had multiple units convening on a particular place, you had logistics co-ordination. There's an example — for example, where you have extra petrol being flown in, you have extra ammunition, so you had the logistical support, which required planning — had people of multiple commands. So, lots of examples on the micro level of co-ordinated attacks, rendez-vous points, etc., etc. On the macro level, after the 2016 events, very clearly rising tensions, very clearly — based on the reporting at the time, rising tensions between the various communities. Two pre-staged light infantry divisions who, when the signal was released from higher headquarters, went in and performed, as I've said, the sustained *modus operandi*. That takes planning. It takes “here's what we're going to do when we get to this place: one, two, three, four, five, six” and a disciplined military force does that. To me, it is a military impossibility that that pattern of conduct consistently replicated across so many places by so many different units could have been merely coincidence. It was pre-planned, it was orchestrated. To the best of my ability, that's the way I see the evidence from the FFM.

Mr REICHLER: Counsel asked you if you knew that a certain number of attackers attacked a particular village, and he himself referred to documents that they have submitted to the Court. These documents consist of military reports — that is, reports from field officers who were reporting on the events surrounding these alleged ARSA attacks to their superiors. Do you have any opinion on the reliability of such reports and the information contained in those reports: number of attackers, number of terrorists killed, etc.?

Mr NEWTON: Sir, in my extensive experience — and I can give you some concrete examples from around the world — military reporting that comes up within a chain of command is both unreliable — absolutely unreliable: I attach no evidentiary weight to such self-reporting through a chain of command — and self-serving. I say “unreliable” because I have never seen a military report that says the following: “We just ignored the rules of engagement and did the following things. We

just committed war crimes and did the following things.” People from subordinate ranks don’t self-report.

Furthermore, in my professional opinion, they don’t want to hear that at the superior level. So that’s the system. They’re totally unreliable, especially with regard to numbers, and that’s the self-serving part: “I inflicted X amount of damage.”

We’ve had body count inflation since Viet Nam, and it’s very common. So those reports, in my view, have no evidentiary weight; unless they are accompanied by independent external examinations and actual corroboration in whatever form, whether it’s imagery or whatever. They’re unreliable and self-serving, and that’s true for all armies, it’s not just true for the Tatmadaw.

I’ll give you an example from US practice: in the Haditha massacre in Iraq, a Marine unit murdered 24 Iraqis and committed some rapes on the margins. They sent back a perfectly fine patrol report. Perfectly fine, great patrol. Three other groups of Marines subsequently went into the same place. Here’s a village, they have just suffered this incredible trauma. Three other groups of Marines on three different other things went in for particular purposes, sent back their reports: “Mighty fine patrol, we killed some insurgents today.”

When the battalion commander of that unit heard rumours that something had happened, his immediate first response, instinctive, was: “My Marines would never do that.” It took many years of subsequent investigations, independent investigations, command inquiries to actually get the truth of what happened in Haditha, and which, of course, led to prosecutions.

So, no, Sir, I don’t believe that military reporting straight up through command channels has any evidentiary weight at all unless it’s corroborated.

Mr REICHLER: Thank you, Professor Newton. Mr President, I have no further questions.

The PRESIDENT: I thank Mr Reichler for re-examination. I thank you, Mr Newton.

Certain judges wish to put questions to you. Please respond to each judge’s question after it is put to you. When you have finished, I will call on the next judge who wishes to put a question.

I start with the Vice-President. You have the floor, Madam.

The VICE-PRESIDENT: Good afternoon, Professor Newton. I have a couple of questions for you. First, I'd like to know what were your terms of reference before you commenced your first report?

Mr NEWTON: Thank you, Madam Vice-President. Terms of reference is a formal form which implies a contract and a set-up deal. I never had such arrangement. I received a phone call, enquiring did I know much about this issue — and the answer was yes, in terms of the substance of it — and was I interested in assessing this set of facts in that particular situation against established counter-insurgency doctrine. I found that to be interesting, I found it to be relevant and that's why I accepted it.

But in terms of terms of reference, that's all it was: look at this pattern of attacks as documented in the FFM and give us your opinion about the validity of those attacks as military practice.

The VICE-PRESIDENT: What prompted your second report? Were there different terms of reference, or — what exactly prompted your second report?

Mr NEWTON: No, Madam, there were no separate "terms of reference". Again, that was much more as a phone call.

The second report was primarily prompted by the wealth of material that I learned in the Counter-Memorial materials. I had never seen rules of engagement. I had never seen many details provided by Myanmar in its reply and that was interesting to me because it exactly validated my core premise.

When I wrote in 2020 that — I think paragraph 22 — I didn't think there was any way that they could plausibly plead ignorance, when I saw the Counter-Memorial materials, it validated that instinct, which is why I then wrote in the second statement more detail about the rules of engagement and how I saw the fact that they did know current practice, they did know how to do counter-insurgency properly, in accordance with the law, they did publish rules of engagement that were compliant, which they completely ignored, and they ignored it with respect to this group, this area, this set of villages, up to 76, if you want to use the big number. So there were no separate terms of reference, Madam.

The VICE-PRESIDENT: Also, you have stated before us that you had no fact-finding ability of your own, so you depended entirely on the findings in other reports, in particular the UN FFM report; is that correct?

Mr NEWTON: Yes, Madam.

The VICE-PRESIDENT: That means that you took these reports and, based on their opinions and findings, you drew your own conclusions as well?

Mr NEWTON: I don't know about opinions and findings, Madam. I did a fact-based analysis. The first thing I did when I downloaded the full FFM report was read through their methodology where they talk about corroboration, they talk about independent sources, they talk about the objective corroboration in the form of imagery and medical personnel. I don't know how to do that; I'm glad somebody does. The corroboration, the system. Then I carefully read the report. I was careful not to just adopt their opinions. In fact, there are some things in there that I quite disagreed with but that's not my job. My job is to assess that factual basis across the entire campaign. I say "job"; my task.

So, no, I didn't adopt their opinions or their conclusions or anything. I made my own independent factual analysis of the sources of corroboration to the best as I could find and my knowledge of military operations; in the second report, informed by a great wealth of material that came in the form of annexes. So it was a bit more informed. There were some things that I knew early on, or suspected, that became clarified, and that was the process, Madam.

The VICE-PRESIDENT: But can I just ascertain that you yourself did not speak to any witnesses referred to in these reports?

Mr NEWTON: That is correct, Madam.

The VICE-PRESIDENT: Thank you. Thank you, Mr President.

The PRESIDENT: I thank the Vice-President for the questions. I next call on Judge Nolte.

Judge NOLTE: Thank you, Mr President, and thank you, Professor Newton. I have a question. At some point you said that what happened in Myanmar reminded you of a genocide in Iraq and I did not understand acoustically which genocide in Iraq you were referring to. Thank you.

Mr NEWTON: Thank you for the question, Judge, and I'm sorry, I have a terrible accent. I was one of the people that worked on the prosecution case in the Anfal genocide, which was Saddam's sustained campaign in northern Iraq directed against the Kurds, which took place in the context of the Iran-Iraq War. What struck me in the FFM report, just that little detail of bulldozers showing up. It's not enough to drive a people out, it's not enough to destroy their way of life, it's not enough to murder them: now we have to burn their villages — which happened — and bulldoze them into the ground. That happened in northern Iraq.

One of the — well, I say one — hundreds of evidentiary satellite images in that particular case were exactly those before and after photos. So when I saw some of the before and after photos in the FFM, that was what was immediately triggered.

Judge NOLTE: Thank you, Mr President.

The PRESIDENT: I thank Judge Nolte for the question. I next call on Judge Cleveland to put her question.

Judge CLEVELAND: Thank you, Mr President. Thank you and good afternoon, Professor Newton. My question is simply a point of clarification. Your witness statement and expert reports set forth what you describe as the distinguishing features of counter-terrorism and counter-insurgency operations. We have had some discussion today of best practices.

With respect to the relevant international law governing such operations, you reference international humanitarian law, international human rights law and international criminal law.

Is it a correct conclusion from your reports that the use of military force for purposes of counter-terrorism or counter-insurgency must satisfy, among others, the requirements of international humanitarian law? In other words, it requires the presence of an armed conflict with a qualifying non-State armed group and compliance with the international law rules regarding the

conduct of hostilities, including the principles of distinction, proportionality and precaution. Do you agree with that? Thank you.

Mr NEWTON: I agree in the macro, Madam, except that I am trying to think of examples where — an easy example, maybe, from this record, would have been much more debate before 25 August 2017 about whether the ARSA group had risen to the level of organization, the level of intensity, the level of sophistication, the command structures; all the basic criteria. And yet, I totally believe that the Government had, before they met that threshold, an absolute sovereign right to act against law-breakers, and particularly in that situation in a very tense ethnic conflict where you had roving bands from one ethnicity targeting another and this was a continuing problem.

I fully believe that the Government had the right to intervene in that situation to try to alleviate tensions. That right was based on the fact that there was law breaking and ethnic violence on their territory, without regard to the clear categorization that later became obvious, unmistakably obvious, whether they had actually met the threshold to be an armed conflict not of an international character.

I think I heard it correctly, the way you framed it, Madam, that it is a necessary prerequisite. I would not agree with that. I think the Government has an absolute sovereign right to intervene with law-breakers and brigands and restore law, legitimate government authority. But they must do it at all times in accordance with the relevant applicable law focusing on the problem, not the entirety of the civilian population.

Judge CLEVELAND: So I guess my follow-up question would be, prior to the existence of an international or a non-international armed conflict, what would you say was the relevant body of international law applicable to Myanmar's response to this problem?

Mr NEWTON: On a purely international level? Obviously, genocide law, which is applicable in times of peace and war. Crimes against humanity law, applicable in times of peace and times of war; various strands of human rights law. And to the extent that their international principles are embedded in domestic law, I would accept those as binding sources of international law. They just happen to be reflected in domestic practices. I'm trying to think if I'm missing something. There may

by some other particular treaty obligations applicable in a particular setting, but absolutely genocide law is relevant at all stages of that.

Judge CLEVELAND: Thank you, Professor Newton. And thank you, Mr President.

The PRESIDENT: I thank Judge Cleveland for her question, and I now give the floor to Judge Tladi for his question.

Judge TLADI: Thank you very much, Mr President. And my question will follow on I think from Judge Cleveland's question. One of the issues of dispute between the Parties concerns the relative strength, organization, character, nature of ARSA.

And it raises for me the question of whether or not counter-insurgency, as practice, is dependent upon any of those factors. I've looked at your first report, paragraph 9, there you say "[i]nsurgency is a complex and context-dependent phenomena. The details of particular COIN operations vary depending on the idiosyncrasies of the affected population, the terrain, and the characteristic of the State seeking to reassert its sovereignty." But nowhere there, and I haven't seen it anywhere else in your reports, is the nature, character, strength, of the insurgent a relevant factor. I'd like to know whether that's a relevant factor. Thank you.

Mr NEWTON: I think it certainly is a relevant factor. I'm not sure what you mean by relevant factor to relevant as opposed with respect to which characteristic, but I think nature and strength of the organization is always a relevant factor to stick to counter-insurgency, because one of the core tasks of a government that wishes to seek law, public safety, is to dry up the funds — dry up the sources of recruiting. Every insurgent group, however large or small, has some grievance. They have some motivating factor. They have something that they use to recruit, and it varies, as I say, across the world, lots of different things. The government always — and this is not dependent on the side, those are common factors — has the ability to deter recruiting. The very simple example from this case: in August 2017, there was a particular village in northern Rakhine province that was completely surrounded by Rakhine villagers, they called it the blockade, and ARSA leaders publicly said, "please help us, because our people are stuck inside, they can't get out of the blockade with armed Rakhine, we can't collect food, we can't use the bathroom, we can't collect firewood because the

perimeter . . .”; a very simple thing, to go in and I think that would have had a direct impact on, for example, undermining ARSA recruiting, that the Government was making. This is why the ICG called it a situation of hopelessness and despair. So numbers are always relevant to me in terms of recruiting, and the larger numbers grow, of course, that leads to organization, which leads to greater capacities, which leads to greater effectiveness, which does over time increase the level of violence moving towards the necessary threshold of intensity to legitimately be termed an armed conflict not of an international character and there is an extensive section in the FFM report that analyzes that with respect to ARSA. And debatable, I think more likely that they would have qualified in October 2016, but after August 2017, there is no question at all.

Judge TLADI: Let me make the question a little more specific. Recruitment is one thing as a tactic, but I guess my question is, if the level of organization of ARSA and the risk that it poses to the State is of a particularly high level, would that justify a greater use of force? I mean, that’s really the question that I’m asking, that’s the relevance in terms of counter-insurgency that I was thinking about.

Mr NEWTON: No, Sir, counter-insurgency doctrine is always aimed at the destruction of the group, it is never aimed at the destruction of the civilian population. And if you look at the roles of engagement which were crafted specifically for ARSA, they’re totally compliant, in my view, with absolute best practices and COIN universal standards applied around the world. The point I want to say, and with respect to your question, though, is that they’re malleable. They’re one size fits all. Those rules of engagement fit from a very small insurgency of 20 people, all the way up to a giant insurgency that has large weapons and ammunition, etc. The rules of engagement, the principles of counter-insurgency are not dependent on the size of the group or their capacity. That is the basic way to conduct, as I call them, authentic counter-insurgency operations. There are very clear distinctions between the entirety of the civilian population and the group, or the interests, or the funds, or whatever thing you’re trying to restore legitimate state authority over.

The PRESIDENT: I give the floor next to Judge Brant.

Judge BRANT: Thank you, Mr President. Thank you, Professor Newton. I would like to ask you to raise a question. In your opinion, in order to define a pattern of conduct as you try to establish, do you think it's relevant to determine the number of civilian casualties?

Mr NEWTON: The number of civilians killed?

Judge BRANT: Yes.

Mr NEWTON: On which side? The victims of the insurgents?

Judge BRANT: Yes, for the victims. Is that relevant in order to establish the pattern of conduct?

Mr NEWTON: I don't think so, Sir. I mean, there is . . .

Mr REICHLER: Pardon me, Mr President. It seems to me that the witness restated the question in a way that indicated he possibly did not understand it. Would it be possible to redo the question?

Mr PRESIDENT: Judge Brant, could you repeat your question? You can speak French because it's translated.

Judge BRANT: No, I can do it in English. I mean, in order to define — I want you to understand, really — what you mean for pattern of conduct, because you concluded that it's a pattern of conduct. I would like to understand if, in order to define this framework, a pattern of conduct, is it important to determine the number of civilian casualties? I mean, how many civilians have been killed in the situation to provide you the concept to understand if the pattern of conduct has been established? That's my point.

Mr NEWTON: Any number, Sir, I don't think it's a quantitative factor. The question is based on the two absolute sovereign prerogatives: one, the absolute ability to counter an insurgency, counter lawless behaviour, and the absolute necessity at all times of directing government forces, in this case the Tatmadaw, against only those people without respect to the civilian population. That's the pattern, and the pattern is, as I went through the litany of things that happened in Rohingya places,

that's the pattern. So if they had fired at refugees and all of them had been lucky and gotten away, they still would have committed that illegal conduct. If they had dropped babies in rivers and somebody had been lucky enough to get there and rescue them, they still would have committed that pattern of conduct. If they had burned down houses and there happened to be a water truck standing by that showed up on the scene accidentally and put them out, I don't think the number of victims is relevant.

Judge BRANT: Thank you.

The PRESIDENT: I thank Judge Brant for his question. I give the floor now to Judge Hmoud.

Judge HMOUD: Thank you, Mr President. And I thank Professor Newton for his testimony today as an expert. I have two, maybe three, questions in this regard.

When you say "authentic counter-insurgency", I mean — authentic — do you mean legitimate, legal, or something as opposed to a sham counter-insurgency operation? I'd like you to explain more about this because, again, if you violate the law in your country, it doesn't mean it's a sham operation. So if can you explain about this?

Mr NEWTON: Thank you, Judge — that's a good question.

When I use the term "authentic", what I was using you could say bona fide, you could say genuine. I think as I may have said legitimate in places, and what I mean is one that demonstrates that the Tatmadaw clearly demonstrated the knowledge of universal standards of how to do counter-insurgency. It's in their rules of engagement, very clearly, no mistake in that. With respect to activities directed against the insurgent and, on the flip side, activities directed only against the insurgent, and that's what I mean. It's a very clear marker, I'm either doing that and sometimes making a mistake, or I'm saying I'm doing that while I'm intentionally doing something completely different, which was my conclusion. So that's what I meant by legitimate, authentic, etc.

Judge HMOUD: And then my follow-up question, if you target the whole population, as supporters of the "terrorist", can't there be a plausible reason for that? Meaning that, in order to

achieve the counter-terrorism operation goal, you have to nip it in the bud, destroy the incubators. So your goal would not be for the operation to succeed no matter what the means are.

Would this make it legitimate counter-insurgency or an authentic counter-insurgency operation? There's the population, there are incubators — attacking to achieve my counter-insurgency operation objective against that group. Is it plausible?

Mr NEWTON: If you — as you say — attack a civilian population, that is not plausible. There is never a military necessity for attacking an entire village, an entire population with indiscriminate fire. And, as on this record, on these facts, also occasionally indirect fire other weapons systems, it's not just individual soldiers on the ground, which is notable to me because then the rules of engagement typical of countries all around the world who are endeavouring to do good faith — and counter-insurgency is difficult — but the absolute prohibition is on using other superior weaponry, mortars, helicopters, artillery, etc., without the approval of superior officers. So when a superior officer says, “we don't know who's in there, we don't know what they are, but they're of that ethnicity, we're going to attack the entire place” — no, Sir, that is not ever permissible.

Judge HMOUD: My final question is with regard to both your second report and your statement. I think it's a very similar statement you put in both, so I'll read from your second report. You say, “[t]he Counter-Memorial does not refute this. Instead, it seeks to defend attacks on civilians on that ground that the entire civilian population constituted the ‘support base’ for ARSA.” And then you refer to the Counter-Memorial. I read the paragraph in the Counter-Memorial in this regard, and my question: how do you deal when you have a counter-insurgency and, from your experience, when you have a base, how do you distinguish? They don't wear insignia, military uniforms, they're within the population, operation-wise; how does the military legitimately deal with an insurgency when faced with this situation? Thank you.

Mr NEWTON: Well that's a big question, Sir, and there are many, many, examples of that. That's why counter-insurgency is such a pervasive problem. And pernicious, and difficult, and, by definition, requires partially military solutions, sometimes that is the right answer. The ICG report, issued in December 2016, pleaded with Myanmar to take a concrete, integrated, political policy —

called it an “orchestrated policy” — to eliminate, as they say, “the hopelessness and the despair”. So one metric would be getting better intelligence collection. There is a quote in classic counter-insurgency doctrine that intelligence is both a medium and a means. If I am floating around and more people begin to talk to me because they trust me, that tells me I am doing something, but I also learn things. The rules of engagement in these settings, and the Tatmadaw rules of engagement, absolutely required discriminate force. It said: “You must always distinguish between enemies and civilians.”

So, the trick is, in a counter-insurgency, disaggregating, disentangling those things, and there are many ways of doing that. One way of doing it is to arrest and prosecute and build criminal cases against the key leadership. So, when you get a charismatic leader who all of a sudden is not in a position to do that, you begin to make hard choices. Another way to do it is to create incentives. For example, in this setting, I could have imagined people who had trouble getting NVC cards, who had trouble fishing because of curfews: “We’ll give you a fishing licence if you will help us collect and find and disentangle people.” There’s lots of ways of doing it.

And the other thing I would say is there are so many ways of doing it that are culturally dependent, and situation- I’d say context-specific. But it’s not static either; the situation is always going to be dynamic, so you are constantly adapting, refining and honing, but the universal core imperatives — in military parlance you would say the load-bearing pillar — the central mission, always stays the same, which is to direct activities, *all* activities, against the insurgents and not the civilian population.

Judge HMOUD: Thank you, Professor Newton. Mr President, I don’t have any further questions.

The PRESIDENT: I understand that there is no other judge on the Bench asking for the floor. That means that we have come to the close of the questioning of Professor Newton. Professor Newton, I thank you for appearing before the Court today.

Mr NEWTON: Thank you, Mr President.

The PRESIDENT: The Court will reconvene tomorrow, Friday 23 January 2026 at 10 a.m. to hear, in closed session, the witness called by Myanmar. This sitting is closed.

The Court rose at 4.35 p.m.
