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**International Court
of Justice**

**Cour internationale
de Justice**

THE HAGUE

LA HAYE

YEAR 2026

Public sitting

held on Tuesday 27 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 27 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
 Xue
 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^{me} Xue
M. Nolte
M^{me} Charlesworth
MM. Brant
Gómez Robledo
M^{me} Cleveland
MM. Aurescu
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Hmoud, juges
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The PRESIDENT: Please be seated. The sitting is open.

The Court meets this morning to hear the remainder of the second round of oral argument of The Gambia.

I now give the floor to Ms Jessica Jones. You have the floor, Madam.

Ms JONES:

I. THE *ACTUS REUS* OF GENOCIDE

1. Mr President, Members of the Court, good morning. And so we begin the last day of The Gambia's presentation of its case. I will address you this morning on Myanmar's commission of the *actus reus* of genocide.

2. There is in fact no serious issue in this case about whether the *actus reus* of genocide has been committed. You have heard yourselves the witnesses' evidence on what happened during the "clearance operations"; evidence which Myanmar has not counter. In the villages where our three witnesses lived — Min Gyi, Chut Pyin, Maung Nu — and in many other villages across northern Rakhine State, the Myanmar military indisputably committed atrocities. Whether those atrocities were genocide, because of the inferences to be drawn from the evidence, because they targeted a substantial part of the Rohingya group — those are questions of *mens rea*, not *actus reus*, and they will be addressed by Professor Sands and Mr Reichler in the speeches which follow this morning.

3. For *actus reus*, the focus is on *what* was done, not *why* it was done. Proving *actus reus* requires simply proving that any of the acts described in Article II of the Convention were committed against members of the Rohingya group. So we ask of the evidence: was anyone killed? Was anyone caused serious bodily or mental harm? Were conditions of life deliberately inflicted on the group which were calculated to cause their destruction? Were measures imposed which were intended to restrict births within the group? In respect of all of these, the answer is yes.

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

4. Mr President, Members of the Court, in two painful but powerful days last week, you heard from The Gambia's witnesses, of how their lives, their families, were decimated by Myanmar's genocidal campaign. Their experiences are repeated in over 40 signed witness statements, and in

hundreds of further accounts obtained by the FFM and the IIMM. There is no doubt that there were killings within the terms of Article II (a).

5. Mr Blom-Cooper suggested last week that The Gambia has failed to distinguish between killings which fall within the terms of Article II “as opposed to the killings of those actively involved in the violence, or unintentional collateral casualties, which do not”¹. The reality, however, is that trying to focus on this distinction — a distinction that The Gambia accepts exists in the law — does not assist Myanmar. The evidence is clear and unwavering: innocent civilians were intentionally killed. Witness MS’s daughter was intentionally shot as she tried to flee. His wife and four other children were intentionally forced into a burning building to die. Witness NJ’s infant son was stabbed and thrown on a fire. There is no possible argument that these children were people actively involved in violence — there is no evidence, nor any assertion that they were — nor, indeed, that they were collateral casualties. The circumstances of their deaths speak for themselves. Even Myanmar’s own evidence, which Mr Suleman took you to yesterday, is that 376 ARSA terrorists were killed in the second wave of the “clearance operations”. What then of the 9,600 other people who were killed, at minimum? Myanmar provides no case that they were combatants nor collateral casualties. The perpetration of killings within the terms of Article II (a) is convincingly established.

6. Mr President, as a final point on the *actus reus* of paragraph (a), I underscore that it does not matter for this stage of the Court’s analysis how many Rohingya were killed. Mr Blom-Cooper suggested last week that 10,000 deaths were not enough to establish the *actus reus* of killing because it is not enough people to contribute to the physical destruction of the group as a whole².

7. Putting to one side the fact that the figure of 10,000 is noted by the FFM to be a likely underestimate³, limited in particular by Myanmar’s destruction of evidence and its refusal to co-operate with international organizations to conduct investigations⁴, and that there are some

¹ CR 2026/11, p. 62, para. 80 (Blom-Cooper).

² CR 2026/11, pp. 46-47, para. 17 (Blom-Cooper).

³ UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1007. MG, Vol. II, Annex 40. UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), available at <https://digitallibrary.un.org/record/1643079?ln=en>, para. 1275.

⁴ CR 2026/4, pp. 32-45, paras. 1-41 (Al Ameen).

estimates that the death toll was more than twice as high⁵, The Gambia does not accept that there is a numeric threshold which must be reached for the *actus reus* of genocidal killing to have occurred. Any act of killing is inherently capable of contributing to the destruction of the group. While the number of group members targeted and affected may be relevant to whether genocidal intent is established — an issue which was raised by Judge Aurescu in his questions to the Parties, and which will be answered more fully by Professor Sands in his speech which follows — there is no quantitative requirement imposed on the *actus reus*. The 10,000 deaths, at least, which were caused by the Tatmadaw during the “clearance operations” were each a human tragedy; and they were each a genocidal act within the meaning of Article II (a).

2. Article II (b): causing serious bodily or mental harm

8. Alongside those acts, Myanmar caused serious bodily or mental harm to members of the Rohingya group, within the terms of Article II (b) of the Convention.

9. In the *Krstić* judgment, the ICTY held that “inhuman treatment, torture, rape, sexual abuse . . . are among the acts which may cause serious bodily or mental injury”⁶. Each of these modalities of Article II (b) was committed by Myanmar. By way of example from the evidence: the targeting of children, including by throwing them into rivers to drown⁷, is plainly inhuman treatment. The barricading of people in burning buildings⁸ and gratuitous sexual mutilation⁹: torture. Rape and sexual abuse were “widespread”¹⁰, and Mr Loewenstein yesterday reminded you of some of the harrowing evidence in that regard. The physical and mental harm caused by these acts is of the most serious nature.

10. Similarly serious harm was caused to those who witnessed such acts perpetrated on their loved ones. As the ICTY has acknowledged, being “forced to watch sexual attacks on a woman, in

⁵ UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1007, note 2266. MG, Vol. II, Annex 40.

⁶ ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-T, Trial Judgement (2 August 2001), para. 513.

⁷ UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 770. MG, Vol. II, Annex 40.

⁸ *Ibid.*, paras. 772, 784.

⁹ *Ibid.*, paras. 790, 926.

¹⁰ *Ibid.*, para. 941 (emphasis added).

particular, a woman whom [the witness] knew as a friend, caused [] severe mental suffering”¹¹. The evidence here is of precisely this, happening over and over again — husbands witnessing their wives raped¹²; mothers, their daughters¹³; sisters, friends and neighbours¹⁴; and, as in the cases of MS and NJ, parents seeing their children brutally murdered in front of them¹⁵. The seriousness of the harm caused not just to those who suffered these acts, but also to those who witnessed them, was evident in their testimony to the Court; the extent of their suffering more than eight years after these events continues to be extreme.

11. It is not, of course, necessary for the harm that is caused to result in “permanent or irreparable” damage¹⁶ — though one may expect that the acts described by the witnesses and in the United Nations evidence, are such that serious permanent harm has been caused. Nevertheless, what is necessary is that the harmful conduct causes “grave and long-term disadvantage to the ability of the members of the protected group to lead a normal and constructive life so as to threaten the physical destruction of the group”¹⁷. This point was made in your *Croatia* Judgment¹⁸, and the serious harm caused to the Rohingya amply fulfils this requirement.

12. Thus, for example, the serious physical and mental harm caused by the widespread sexual violence, including gang rape, contributes to the destruction of the group because it affects and impedes normal marital relations for survivors afterwards, and it affects their ability and their willingness to bear children, on whom the survival of the group depends. The specific targeting of children, about which there is so much evidence in this case, and who represent the future of the group itself, also causes serious harm — in itself capable of leading to the destruction of the group.

¹¹ ICTY, *Prosecutor v. Furundzija*, IT-95-17/1 (10 December 1998), para. 267.

¹² UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 841. MG, Vol. II, Annex 40.

¹³ Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0335. MG, Vol. X, Annex 336; Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0519. MG, Vol. X, Annex 336; Witness Statement of Christina Lamb (8 October 2020), para. 5. MG, Vol. XI, Annex 371.

¹⁴ Fortify Rights, “Firsthand Testimonies from August-September ‘Clearance Operations’ in Myanmar” (14 April 2020) (full version of MG, Vol. X, Annex 338), p. 61. RG, Vol. III, Annex 43. Legal Action Worldwide, Collated Information from Victims/Witnesses, Statement CK0437. MG, Vol. X, Annex 336.

¹⁵ Witness Statement No. 013, signed 23 September 2020, para. 34. MG, Vol. X, Annex 350; CR 2026/15, pp. 13-16 (Witness MS); Witness Statement of NJ (November 2025), para. 51; CR 2026/14, p. 14 (Witness NJ).

¹⁶ ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Judgement (8 April 2015), para. 212.

¹⁷ *Ibid.*

¹⁸ *Croatia Genocide, 2015 Judgment*, p. 70, para. 157.

13. Mr President, Members of the Court, one of the striking features of this case is the number of Rohingya — 700,000 of them, almost the entire Rohingya population of northern Rakhine State, around two thirds of the Rohingya population of Myanmar overall — who had to flee to Bangladesh to escape the genocidal violence of the Tatmadaw. The circumstances of their desperate flight fall within the terms of Article II (b) because of the serious physical and mental harm the refugees were caused. There was a baseline, profound harm caused by being forced to flee with a stark choice of that — or be killed, and it was compounded by the attending circumstances: the fear and uncertainty as to their fate, and the fate of family members from whom they were separated, sometimes never to see again; the appalling conditions of their journey to Bangladesh, described by Mr Loewenstein yesterday, including the lack of food¹⁹ and the ongoing threat of genocidal violence²⁰; and the unsafe and unsanitary conditions of the camps in which they sought refuge²¹, where they are unable to live normal lives and which, accordingly, contribute to the destruction of the group²².

14. The witnesses' evidence was clear about the serious harm this has caused. Recall Witness MN, for example, who escaped the Tatmadaw's genocidal violence in Maung Nu, but who had to flee from his village to survive. He told you straightforwardly, in response to Judge Nolte's question, that he was "afraid of being killed if I didn't flee"²³. The consequence is that he has never been able to bury and properly mourn his murdered father²⁴: you saw for yourselves the continuing mental harm that has caused him. Or Witness NJ, who — leaving behind the burned body of her infant son and not knowing the fate of her husband — fled from her own village to a relative's village nearby, but found herself having to flee again when, three days' later, the Tatmadaw attacked that village too²⁵, and so she commenced an arduous journey to the relative safety of Bangladesh.

¹⁹ 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), available at <https://digitallibrary.un.org/record/1643079?ln=en>, para. 984; Save the Children, "*Horrors I will never forget*": *The stories of Rohingya children* (2017), p. 15. MG, Vol. IV, Annex 100.

²⁰ Witness Statement of Christina Lamb (8 October 2020), para. 14. MG, Vol. XI, Annex 371.

²¹ CR 2026/15, p. 20 (Witness MS).

²² ICTY, *Prosecutor v. Tolimir*, IT-05-88/2-A, Appeals Judgement (8 April 2015), paras. 210-212. See also UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1399. MG, Vol. II, Annex 40.

²³ CR 2026/13, p. 46 (Witness MN).

²⁴ CR 2026/13, p. 43 (Witness MN).

²⁵ Witness Statement of NJ (November 2025), paras. 48, 52, 69-70.

15. Members of the group were undoubtedly caused serious harm by the extensive physical and sexual violence to which they were subjected and which they witnessed; and they were also caused serious mental harm — equally genocidal in its perpetration and effect — by the circumstances of their flight to Bangladesh.

16. In respect of the *actus reus* of genocide enshrined in Article II (b), the evidence could scarcely be more compelling. On a widespread scale, the Tatmadaw, acting as an organ of the Myanmar State, caused serious bodily or mental harm to the Rohingya.

3. Article II (c) and (d): intentionally inflicting conditions of life calculated to bring about physical destruction; imposing measures intended to prevent births

17. Mr President, because this is the second round of presentations, and because you underscored on Friday the need for the Parties to be succinct in our submissions, I am not going to address the Court today on the aspects of *actus reus* enshrined in Article II (c) and (d) — intentionally inflicting conditions of life calculated to bring about the physical destruction of the group and imposing measures intended to prevent births within the group. They are important features of Myanmar’s conduct towards the Rohingya in this case, and they form a full part of The Gambia’s case. The evidence shows that Myanmar perpetrated them. But you have our case on them, it was fully set out in Mr Loewenstein’s speech in the first round²⁶. I do not need to repeat it. And, of course, it is sufficient for the purposes of your determination if *any* manifestation of the *actus reus* was committed; a feature which, on the body of evidence that exists, is conclusively established in this case.

4. Conclusion

18. Indeed, Mr President, Members of the Court, when you consider all of the evidence in this case together — the signed witness statements before you of survivors and eyewitnesses; the hundreds of statements taken and relied on by the UN FFM and IIMM; the satellite imagery; the NGO reports — when you consider what all of that evidence shows, evidence on which, as Mr Reichler explained yesterday, you can place substantial weight, there can be no doubt about the existence of the *actus reus* of genocide. Sadly, the evidence easily reaches the threshold of “fully

²⁶ CR 2026/5, pp. 18-21, paras. 27-42 (Loewenstein).

convincing”. The first of the legal constituents of genocide is established. The second legal constituent — the *mens rea* — is what Professor Sands and Mr Reichler will address you on next.

19. Members of the Court, I thank you for your attention this morning and over the previous two weeks of this hearing. Mr President, may I ask that you now call Professor Sands to the podium.

The PRESIDENT: I thank Ms Jones for her statement. I now give Professor Philippe Sands to address the Court. You have the floor, Sir.

Mr SANDS:

II. MYANMAR ACTED WITH GENOCIDAL INTENT

1. Mr President, Members of the Court, I turn now to the important question of *dolus specialis*. As in our first-round presentations, this is a subject on which Mr Reichler and I will both address you. It is, of course, the decisive issue in this case. As Ms Jones has just made clear, there really is not any real issue that the *actus reus* of genocide has been committed: in the three villages, and in at least the 51 other locations in which the FFM has detailed corroborating evidence of a “strikingly similar *modus operandi*” in the Tatmadaw “clearance operations”.

2. So it falls to you to determine, in the light of the irrefutable evidence on *actus reus*, whether — when they were performing the heinous “clearance operations” across northern Rakhine State, as an organ of the Union of Myanmar — the Tatmadaw were targeting a substantial part of the Rohingya group, and whether they were doing so with the intent to destroy the group in whole or in part.

1. Substantiality

3. I will deal first with substantiality. As I mentioned yesterday, the question of whether the Rohingya are a protected group under the Convention is not in issue. Mr Staker, on behalf of Myanmar, has accepted that the “acts aimed at the destruction of the [Rohingya] population in northern Rakhine State as such would fall within the scope of the Convention”²⁷.

²⁷ CR 2026/7, p. 33, para. 66 (Staker).

4. The second point on which there is no difference between the Parties is that, for the purposes of the substantiality test, what matters is the targeted group, not the number of victims. That is what I meant when I said that genocide is not a numbers game: there is no magical number of victims which turns one kind of crime into another kind of crime.

5. So the only question that remains, at least in respect of defining the Rohingya group, is whether the targeted part is a *substantial* part of the group. That requirement emerges from your Judgments in *Bosnia* and *Croatia*²⁸ and, from what I heard from the other side last week, I do not think there is much in the way of a legal dispute between the Parties as to what the jurisprudence requires. The key legal requirements are that the targeted part of the group must be “significant enough to have an impact on the group as a whole”²⁹. To assess whether that is the case requires consideration of the three factors identified in the *Bosnia* Judgment at paragraph 296 and the *Croatia* Judgment at paragraph 142, the ones that I put up on the screen last week. Those factors are (1) the quantitative element; (2) the qualitative element, such as the prominence of the targeted part; and (3) geographical factors, including the scope of the perpetrator’s opportunity to target³⁰.

6. Let me be very clear about The Gambia’s case in this regard. We have been consistent from the outset: we say that the Tatmadaw targeted for destruction a substantial part of the Rohingya population and the part that they targeted with intent to destroy was the part of the Rohingya group who lived in northern Rakhine State. Northern Rakhine State, as you now know, is comprised of the three townships about which you have heard so much over the last two weeks: Maungdaw, Buthidaung and Rathedaung Townships. The Rohingya who lived in these areas, and who were targeted by Myanmar’s genocidal campaign, are, by any reasonable standard, a substantial part of the group overall. The metrics this Court set out in *Bosnia* and *Croatia* make that clear.

7. I will here answer Judge Aurescu’s question, about the relevance of numbers to *mens rea*. This is the first way, Sir, in which the relevance arises: numbers will be relevant as one of the factors which bear on whether the intention of Myanmar to target a part of the group for destruction was “substantial”. If Myanmar had targeted a single home or a single person, that would not be

²⁸ *Bosnia Genocide, 2007 Judgment*, p. 126, para. 198; *Croatia Genocide, 2015 Judgment*, p. 65, para. 142.

²⁹ *Bosnia Genocide, 2007 Judgment*, p. 126, para. 198.

³⁰ *Bosnia Genocide, 2007 Judgment*, p. 166, para. 296; *Croatia Genocide, 2015 Judgment*, p. 65, para. 142.

“substantial”. But it did not target a single home or a single person: it targeted tens of thousands of homes, and over 800,000 human beings.

8. Numbers *also* arise, Sir, in respect of another aspect of *mens rea*, namely the consideration of the pattern of conduct, and whether the only reasonable inference to be drawn from it is genocidal intent. I am going to address that later, but want to flag at this point, in light of your question, Judge Aurescu, that I am dealing here with one aspect of *mens rea* to which we say numbers are relevant, the “substantiality” of the targeted group.

9. As to the quantitative criterion for substantiality: the FFM estimated that the Rohingya population in Myanmar before the “clearance operations” was 1.2 million³¹. Some two thirds of that population lived in the three townships comprising northern Rakhine State³² — that is about 800,000 individual human beings. Of these, around 700,000 Rohingya fled to Bangladesh in 2017³³ — that is nearly 90 per cent of those living in northern Rakhine State, and *two thirds* of the entire Rohingya population in the country as a whole. Can this Court really say that this is not a “substantial” number? Can counsel for Myanmar really make that argument? We do not think so. On purely numeric grounds, the part of the group that was targeted was manifestly substantial.

10. Allow me to respond here to the question put by Judge *ad hoc* Kress, also on behalf of Judge Charlesworth, namely whether The Gambia has evidence as to the overall population of the villages targeted in the second wave of “clearance operations”, and of the 178 villages alleged to have been burned or razed during or after the operations.

11. The answer to those questions is yes, up to a point. However, it is difficult to answer the question with any degree of precision because Myanmar has not registered Rohingya children or included the Rohingya population in the official census³⁴. So there are no official figures that record the Rohingya population when the “clearance operations” began.

³¹ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 September 2019), para. 120. MG, Vol. III, Annex 49.

³² UN High Commissioner for Refugees, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018), p. 11. MG, Vol. II, Annex 31.

³³ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1331. MG, Vol. II, Annex 40.

³⁴ UN High Commissioner for Refugees, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018), p. 11. MG, Vol. II, Annex 31; UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), available at <https://digitallibrary.un.org/record/1643079?ln=en>, paras. 461–468.

12. Nevertheless, and notwithstanding the absence of official figures, we do have some numbers to share with you, based on the numbers that Myanmar provided in Annex 465 of its Counter-Memorial. These state — if you add up each individual line — that the Rohingya population of Maungdaw Township in 2017 was — and I apologize for the detailed numbers — 492,363 (of a total population, including Hindus and others Myanmar describes as Nationals, of 528,812). To this figure may be added, from the same Annex, the Rohingya in Buthidaung Township and Rathedaung Township, respectively 286,182 and 36,914 Rohingya. That gives a total of 815,459 Rohingya in northern Rakhine State, before the 2017 “clearance operations”. This is very close to the estimate of 800,000 indicated in the 2019 FFM report³⁵.

13. The FFM report has stated that 178 villages have been *totally* destroyed, out of 993 Rohingya villages in northern Rakhine State (where the population of some 815,000 might be assumed to live)³⁶. That is about 18 per cent of the villages. The FFM does not name the 178 villages, and so we are not able to cross-refer to the population figures that Myanmar has provided.

14. The FFM has also stated that at least — it is at least, it may be more — a further 214 villages have been partially destroyed; that is, an additional 22 per cent of the Rohingya villages. That makes a total of 392 villages totally or partially destroyed, which is about 40 per cent of the total. If you assume that the Rohingya population might be evenly spread across all of the villages, 40 per cent of the Rohingya population equates to some 326,000 people.

15. As regards your question, Judge *ad hoc* Kress and Judge Charlesworth, as to the overall population of the 178 villages burned or razed during or after the operations, on the basis of the figures that I have just set out, we would estimate the population to be around 146,000 Rohingya.

16. As regards your question on the overall population of the villages targeted in the second wave of “clearance operations”, we are not able to give an estimate. What we are able to estimate is the overall population of villages targeted and totally or partially destroyed during all the “clearance operations”: that population of the 392 villages — and, of course, it may be more — is around 322,000 people.

³⁵ UN Human Rights Council, *Detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/42/CRP.5 (16 September 2019), para. 120. MG, Vol. III, Annex 49.

³⁶ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 959. MG, Vol. II, Annex 40.

17. If the targeted population is taken as all those living in northern Rakhine State, then we are talking about 815,459 people. The evidence before you shows that some 700,000 Rohingya fled for their lives. What these figures offer is clear support for the conclusion that the targeted Rohingya population included all those living in northern Rakhine State, 815,000 or so people. Whether you take that figure, or 146,000 people, or 326,000 people, the number is, we say, substantial by any reasonable standard.

18. I pause here to address Myanmar's argument that the targeted part of the group was not substantial because the estimates are that a mere 10,000 to 25,000³⁷ Rohingya were killed in the "clearance operations". A couple of points: *first*, that is a lot of human beings, and the suggestion that killing such numbers is not "substantial" is an argument, I suspect, that counsel for Myanmar will not be promoting very widely outside the hearing of their client.

19. *Second*, as the FFM recorded, these numbers are in any event likely to be an underestimate³⁸. Surveys conducted to establish the number of deaths, in the first month of the 2017 "clearance operations" alone, concluded there were between 9,400 and 13,700 people killed; and even then, these numbers reflect only deaths for which there was a surviving family member eyewitness³⁹. And as you have heard from Professor d'Argent yesterday, and from Ms Al Ameen in our first round, Myanmar has gone out of its way to destroy the evidence, including the evidence of the burial of large numbers of bodies in mass graves⁴⁰. And that, we assume, is partly why they used bulldozers. The total number of those killed will never be known. As the FFM concluded, the number of deaths cited in its reports are only "conservative estimates"⁴¹.

20. *Third*, I want to underscore that it is the *targeted* part of the group that must be substantial, not the numbers of victims in the final reckoning. Professor Miron agreed with that in her speech last

³⁷ *Ibid.*, para. 1007.

³⁸ *Ibid.*, para. 1007; 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), available at <https://digitallibrary.un.org/record/1643079?ln=en>, para. 1275.

³⁹ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 1007. MG, Vol. II, Annex 8.

⁴⁰ CR 2026/4, pp. 32-45, paras. 1-41 (Al Ameen).

⁴¹ UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), paras. 1007. MG, Vol. II, Annex 40. UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), available at <https://digitallibrary.un.org/record/1643079?ln=en>, para. 1275.

week⁴². And as Professor Newton made clear in answer to the question posed by Judge Brant, it would not change the facts of what happened — the pattern of conduct in respect of the targeted part of the group — if the Tatmadaw fired into crowds of fleeing Rohingya but happened to miss all of them⁴³. It would not alter the substantiality of the targeted part of the group if the babies thrown into wells and rivers and flames were in fact saved⁴⁴. The requirement for substantiality is not about the end result, it is about those towards whom the genocidal actors target their intentions and the genocidal acts that follow.

21. And *fourth*, as I am sure you have not forgotten, killing, as Ms Jones said, is not the only genocidal act. Causing serious bodily and mental harm is also a genocidal act. Many more than 10,000 Rohingya were victims of beatings, stabbings, gunshot wounds and rapes. And 700,000 of them fled to Bangladesh to escape being killed or raped or mistreated, or all of the above, with all of the serious physical and mental harm that attaches to having to flee, and to then have to live in difficult conditions, and then know that you likely will never return to your home. On Friday you heard from Witness M1. She described her trauma, and she was able to return to Myanmar after one month and five days, and you heard her describe how she still suffers today. The 10,000 to 25,000 Rohingya who lost their lives in the course of Myanmar's genocidal campaign are of course in a sense the headline victims. But the 700,000 who fled to Bangladesh for their lives were no less targeted than their murdered brothers and sisters. Each and every one of them is also a victim of this genocide, and they form a substantial part of the group, the targeted group. And, of course, amongst them, are a huge number of children. Many people today in the Great Hall of Justice will have had their own family experiences, as I do, with my own mother, having seen what it means for a person to have gone through the trauma of separation and displacement as a child — the consequences are something that that person will carry for the rest of their life. It never goes away. The fact that you have escaped with your life does not mean you are not a victim of genocide. I hope that counsel for Myanmar will not seek to argue the contrary.

⁴² CR 2026/7, p. 47, para. 26 (Miron).

⁴³ CR 2026/16, pp. 42-43 (Newton).

⁴⁴ *Ibid.*

22. I turn to the qualitative factors. The Rohingya of northern Rakhine State are emblematic of the Rohingya group as a whole, because northern Rakhine State is the only part of Myanmar where the Rohingya were a majority of the population⁴⁵, particularly in Maungdaw and Buthidaung townships. In 2017, based on the figures that I mentioned that Myanmar has provided, the Rohingya made up about 80 per cent of the population of northern Rakhine State⁴⁶. Just as Srebrenica was of “immense strategic importance to the Bosnian Serb leadership”⁴⁷ in their aim of creating an ethnically Serb state, so too was northern Rakhine State to the Myanmar leadership — the Rohingya of northern Rakhine State needed to be destroyed because it was the one place where they predominated, the one place which aberrated from an ethnically Rakhine Myanmar. And so to target them in this area was to target an emblematic part of the Rohingya community, the destruction of which would substantially affect the survival of the group. And this also means that Myanmar’s frankly hopeless argument that it had a greater opportunity to destroy the group, and did not take it, because it did not target those Rohingya who were in IDP camps in Sittwe, completely flounders. May I just say what a terrible argument that is, and I hope we will not hear it again. The Rohingya of the IDP camps, outside northern Rakhine State, were not the targeted part of the group during the “clearance operations”.

23. On this third factor, opportunity available to the perpetrators, Myanmar once again, as you will have heard and seen for yourselves, cherry-picks at the evidence: it says that because there were occasions when Rohingya were allowed to flee, or encountered members of the Tatmadaw while they were fleeing and amazingly they were not killed, that means the targeted part of the group was not substantial, or there was not an intent to destroy them. This analysis — if you can call it that — commits two basic errors. First, as I have said, it reduces genocide to murder and killing, and that is wrong. But there are five genocidal acts in Article II, four of which were committed in this case. The fleeing Rohingya were subject to genocidal acts within Article II (*b*) and it was not necessary for them *also* to be killed in order for them to form part of the targeted group. The second error is that it

⁴⁵ UN High Commissioner for Refugees, *Culture, Context and Mental Health of Rohingya Refugees: A review for staff in mental health and psychosocial support programmes for Rohingya refugees* (2018), p. 11. MG, Vol. II, Annex 31.

⁴⁶ Myanmar, Ministry of Immigration and Population, *List of population in all the administrative villages and villages tracts of Maungdaw Township, Buthidaung Township, Rathedaung Township, information provided for: Before 2017 ARSA Attack, and 30 June 2023*. CMM, Vol. IX, Annex 465.

⁴⁷ ICTY, *Prosecutor v. Radislav Krstić*, IT-98-33-A, Appeals Judgement (19 April 2004), paras. 15-16.

suggests that specific examples of perpetrators refraining from killing members of the group is enough to counteract all the other evidence before you that they acted with genocidal intent — this included, as you now know, abundant evidence — you heard it from Witness MS, who told you about his young daughter being shot as she fled, crossing a river⁴⁸ — that those fleeing were not just left to make their way to Bangladesh, but were indiscriminately fired at as they fled⁴⁹, or had their boats intentionally sunk by the Tatmadaw so that they drowned rather than make it to the relative safety of Bangladesh⁵⁰. Mr Reichler will have more to say about these events.

24. The point here is that the Court’s assessment of genocidal intent has to be made by consideration of “all of the evidence, taken together”⁵¹. As the *Tolimir* Trial Chamber explained, “this approach is in line with the fluid concept of intent”⁵². In the circumstances of the *Tolimir* case, which are, it must be said, similar in some important respects to the circumstances of this case,

“where the underlying acts of genocide were committed in a period of less than a month, in a confined geographical area and by forces who, as the evidence has demonstrated, closely coordinated their activities to ensure the efficiency of both the killing and forcible transfer operations, it would be artificial to make a finding that genocidal intent existed for some acts, and not for others”⁵³.

Myanmar’s attempt to identify some acts that it says were not genocidal — allowing fleeing refugees to pass while on their way out of the country to Bangladesh, and not killing them — cannot undermine the substantial evidence that, overall, its conduct *was* genocidal, and the part of the group targeted was a substantial part of the whole.

2. The specific intent to destroy

25. Mr President, I turn now to the question of proving the specific intent to destroy. You will recall The Gambia’s position, based squarely on paragraph 373 of the *Bosnia* Judgment. There is no issue there. The specific intent can be established by reference to either particular circumstances, or

⁴⁸ CR 2026/15, p. 16 (Witness MS).

⁴⁹ CR 2026/16, p. 29 (Newton). See also CR 2026/15, pp. 13-16 (Witness MS).

⁵⁰ The Public International Law & Policy Group, *Documenting Atrocity Crimes Committed Against the Rohingya in Myanmar’s Rakhine State: Factual Findings & Legal Analysis Report* (December 2018), p. 73. MG, Vol. IV, Annex 121; UN Human Rights Council, *Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 985. MG, Vol. II, Annex 40. CR 2026/16, p. 33 (Newton).

⁵¹ ICTY, *Prosecutor v. Zdravko Tolimir*, IT-05-88/2-T, Trial Judgement (12 December 2012), para. 772.

⁵² *Ibid.*

⁵³ *Ibid.*

by reference to a pattern of conduct, and that in this case, we say, both approaches establish conclusively that Myanmar acted with genocidal intent.

26. The particular circumstances approach, we say, arises at least in respect of the three main villages on which you have heard so much: Min Gyi, Maung Nu, and Chut Pyin. Those are the villages from which the three witnesses you heard from last week came. The particular circumstances each of them described — with dignity and poise, and which left me, as many others in the room, deeply affected — do not permit of any conclusion other than that the “clearance operations” in their villages were acts that are properly characterized as genocidal, within the meaning of the 1948 Convention. There is no world in which the shooting of Witness MS’s daughter, as she waded across a river to escape, was not genocidal; or the intentional burning of his wife and four other children inside a house⁵⁴. There is no world in which the gang rape of Witness NJ, the murder of her infant child in front of her, was not genocidal. Nor the murder of Witness MN’s 80-year-old father and 8-year-old nephew. These are not only war crimes, or only ethnic cleansing — and let us be sure, because the Court has made this clear, the mere fact that they might also be these other crimes does not mean that they cannot be — and are not — also acts of genocide.

27. That what was done to Witness NJ and her child was an act of genocide is confirmed by the case law. Contrary to what counsel for Myanmar told you, we do believe that national jurisprudence can assist in the process of reflection, because it offers guidance on how a rule is to be interpreted or applied. And in this regard we have found instructive, especially instructive, the jurisprudence from Germany, because it interprets and applies a definition of genocide that is in effect a direct transposition of the language of Article II of the 1948 Convention, and because the judgments cite two international judgments, including the judgments of the International Court of Justice, for assistance in interpreting and applying German domestic law. I will just give you one example (there are others): the judgment of the Bundesgerichtshof of 30 November 2022⁵⁵. This is Germany’s highest court, and it found the defendant, a member of ISIS, to be guilty of genocide

⁵⁴ CR 2026/15, pp. 14-16 (Witness MS).

⁵⁵ Federal Court of Justice of Germany, Case No. 3 StR 230/22, Judgment (30 November 2022), available at https://www.bundesgerichtshof.de/SharedDocs/Entscheidungen/DE/Strafsenate/3_StS/2022/3_StR_230-22.pdf?__blob=publicationFile&v=1 (translation provided by Counsel).

under Section 6 (1) of the Völkerstrafgesetzbuch (the Code of Crimes under International Law)⁵⁶. The guilt of that defendant arose for his acts (*actus reus*) against just two people — “knowingly and intentionally inflicting serious physical injury on the daughter of the joint plaintiff and serious psychological injury on the plaintiff”⁵⁷. The *mens rea* in that case was “the intention of destroying the Yazidi religious group as such”⁵⁸. I should say, here, that these are my own translations of the German original, so they are not official and I stand to be corrected by, and defer fully to, Judge Nolte and *ad hoc* Judge Kress on the translations. Of course, we accept completely that the judgment of the Bundesgerichtshof is not binding on this Court — of course it is not — but it is a very helpful authority. Why? Because it offers the clearest support for the proposition that the murder of a woman’s child and the gang rape of that woman will be treated as an act of genocide by the highest court of an important country, where those acts are intended to destroy a part of the group of which she was a member, as such.

28. And so it is with the three witnesses who came all the way to The Hague to give a voice to their villages. Each of their neighbours who survived have equally horrifying stories to the ones you heard. The extreme brutality, the indiscriminate nature of the attacks, the targeting of children, the targeting of those who were fleeing, the sexual violence, the burning and the destruction, the bulldozing, these were central features of Myanmar’s conduct in the three main villages and at least 51 more, according to the FFM, and they conclusively demonstrate in our submission genocidal intent. We commend again to this Court the Joint Declaration of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom — not just any countries — who deal with this approach to establishing genocidal intent⁵⁹. As they put it, in paragraph 52 of their joint submission, citing the jurisprudence of this Court,

“the Declarants note that the Court’s express reference to a ‘reasonableness criterion’ is key to a balanced approach. The Court highlights the central importance of

⁵⁶ German Federal Office of Justice, *Code of Crimes against International Law* (updated 30 July 2024), available at https://www.gesetze-im-internet.de/englisch_vstgb/englisch_vstgb.html#p0027.

⁵⁷ Federal Court of Justice of Germany, Case No. 3 StR 230/22, Judgment (30 November 2022), available at https://www.bundesgerichtshof.de/SharedDocs/Entscheidungen/DE/Strafsenate/3_StS/2022/3_StR_230-22.pdf?__blob=publicationFile&v=1 (translation provided by Counsel), No. 8, 16bb.

⁵⁸ *Ibid.*, No. 5, 8, 15.

⁵⁹ Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland (15 November 2025), para. 52.

reasonableness by observing that ‘[t]he notion of “reasonableness” must necessarily be regarded as implicit in the reasoning of the Court,’ not least to avoid an approach [— these are the key words —] that would make it ‘impossible to reach conclusions by way of inference.’”

And then at paragraph 54:

“when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically. The jurisprudence of international criminal tribunals demonstrates that this approach is not only desirable, but an important element of the sound administration of justice. In this respect, the Declarants agree with the approach of the ICTY Appeals Chamber, which required trial chambers to assess ‘whether all of the evidence, taken together, demonstrated a genocidal mental state,’ while noting that a ‘compartmentalized mode of analysis [would] obscur[e] the proper inquiry.’”⁶⁰

And “obscure a proper inquiry” is exactly what Myanmar tries to do, by compartmentalizing.

29. The accounts of the three witnesses you heard from were at one with the testimony of Professor Newton, who wrote in his 2020 report: “The only plausible conclusion from the available evidence is that the ‘clearance operations’ were conceived, coordinated, and conducted with the intention of destroying the Rohingya population on the basis of their ethnic and religious identity.”⁶¹ And of course, that report from 2020 could have been challenged. They could have found an expert to say “he is wrong”. They have had five years to do that. Have they done it? No, they have not. When this text, these words, were put to Professor Newton by Mr Hooper, last week, what did Professor Newton say? “For a person who is solely a military expert, but based on this evidence, Sir, I absolutely stand by that statement.”⁶² He has not budged in the face of everything Myanmar has raised.

30. The pattern of conduct is clear and “fully conclusive” in being established across those three villages, and extended to the wider number of villages subjected to “clearance operations”, at least the 54 for which the United Nations had substantial corroborated evidence. My colleagues addressed this in detail yesterday; Mr Loewenstein and Ms Al Ameen last week. And so here we turn to the only reasonable inference standard. Again, I flag, in response to your question, Judge Aureescu, that numbers — particularly in terms of the scale of what occurred — are relevant in this sense: they

⁶⁰ *Ibid.*, para. 54.

⁶¹ First Expert Report of Professor Michael A. Newton (October 2020), para. 29. MG, Vol. XI, Annex 359.

⁶² CR 2026/16, p. 28 (Newton).

serve as evidence that genocidal intent is a reasonable, and indeed the only reasonable, inference to be drawn — the only explanation that can make any sense for why the Tatmadaw acted as they did.

31. You have heard plenty over the last two weeks about the seven indicators of genocidal intent that the FFM identified from all of the evidence. You have heard from us how those indicators mirror the factors identified by this Court in its Judgment in *Croatia*⁶³. Myanmar has tried to suggest that The Gambia's reliance on them somehow reverses the burden of proof⁶⁴, or amounts to an attempt to create a new approach to establishing genocidal intent⁶⁵, or is somehow circular⁶⁶. These arguments are wrong. They rest on complete mischaracterizations of what we said, and what the FFM was doing in identifying and then relying on the seven indicators, and what we are seeking to do by also referring to them. These indicators are not, as Myanmar tried to suggest, identifying a new free-standing basis for finding genocidal intent, to be applied across future cases and with a certain number needing to be fulfilled before a genocide can be committed⁶⁷. The suggestion is absurd. The FFM did not invent these indicators. It drew them directly from the jurisprudence of the ICTY and the ICTR, and that is why we feel able to refer to them⁶⁸.

32. The key point is that they are all evidential features of *this* case, features which the evidence shows characterized Myanmar's conduct towards the Rohingya of northern Rakhine State in 2016 and 2017, features which, in the FFM's view, demonstrate that Myanmar acted with genocidal intent. And they are relied on by The Gambia for no greater purpose than to show that, on analysis of the evidence, this is what is clear: Myanmar acted with a genocidal intent. It acted with this intent — as the FFM concluded, and as we say this Court should conclude — because its discriminatory policies, its hate speech, its pre-planning and organization, its extreme brutality, its sexual violence, its

⁶³ *Croatia Genocide, 2015 Judgment*, p. 121, para. 413.

⁶⁴ CR 2026/7, pp. 52-57, paras. 43-59 (Miron).

⁶⁵ CR 2026/8, p. 16, para. 22 (Talmon).

⁶⁶ CR 2026/8, pp. 16-17, para. 27 (Talmon).

⁶⁷ CR 2026/8, pp. 16-22, paras. 22-45 (Talmon).

⁶⁸ ICTY, *Prosecutor v. Jelusic*, IT-95-10-A, Judgement (5 July 2001), para. 47; ICTR, *Prosecutor v. Ndindabahizi*, ICTR-2001-71-T, Judgement (15 July 2004), para. 461; ICTR, *Prosecutor v. Jelusic*, IT-95-10-A, Judgement (5 July 2001), para. 48; ICTY, *Prosecutor v. Krstic*, IT98-33-A, Judgement (19 April 2004), para. 225; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgement (2 September 1998); *Prosecutor v. Furundzija*, IT-95-17/1, Trial Chamber Judgement (10 December 1998), para. 267; *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, Judgement (13 December 2004), paras. 360-364; *Prosecutor v. Popovic et al.*, IT-05-88-T, Judgement (10 June 2010), para. 1177; *Prosecutor v. Karadzic*, IT-95-5/IT-18-1-R-61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedure and Evidence (11 July 1996), para. 94; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Judgement (21 May 1999), paras. 93, 527; *Prosecutor v. Popovic et al*, IT-05-88-T, Judgement and Sentence (10 June 2010), para. 1177.

targeting of children, its destruction of evidence, its impunity for the perpetrators, its failure to co-operate with the UN, cannot reasonably be understood in any other way. If Myanmar is right in its suggestion that these aspects of the evidence are *not* to be taken into account when considering whether a genocidal intent existed⁶⁹, then on what is this Court supposed to base its findings?

33. This is the evidence in this case; it is through an assessment of all of the evidence taken together — comprehensively, holistically, not compartmentalized, as the six interveners put it⁷⁰ — that the Court is required to reach its conclusions on intent. And it is from all of this evidence, which demonstrates the presence of these seven features, that the inescapable, inevitable conclusion is presented that Myanmar acted with genocidal intent. In contrast, Myanmar invites you to engage precisely in the exercise of compartmentalization — or maybe we should call it salami slicing — the motivation of which is solely to avoid the conclusion that the evidence shows a reasonable inference of genocidal intent.

3. Conclusion

34. I come to the conclusions. Mr President, Members of the Court, it is clear from the evidence that Myanmar targeted a substantial part of the Rohingya group.

35. It is clear that the particular circumstances of that targeting — in many villages — establish that it did so with genocidal intent.

36. And it is clear that the pattern of conduct across at least 54 villages gives rise to the reasonable inference that Myanmar, through the Tatmadaw, acted with a genocidal intent towards the Rohingya of northern Rakhine State.

37. The evidence of a genocidal intent is “fully conclusive”⁷¹. The Gambia has no doubt about that whatsoever. The 11 interveners appear to have no doubt about that. The various UN bodies and those who prepared all the reports appear to have no doubt about that. Where is the doubt as to the existence of a reasonable inference? Who has intervened to support Myanmar’s contrary view? Where is the evidence before you — in the form of witness testimony, or expert testimony — that

⁶⁹ CR 2026/11, p. 35, para. 49 (Miron).

⁷⁰ Joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland (15 November 2025), para. 54.

⁷¹ *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

would allow you to conclude that a reasonable inference of genocidal intent did not exist? There is none.

38. Mr President, last week counsel for Myanmar suggested that The Gambia somehow was trying to “muddle the waters”, and to “misconstrue the applicable legal standard for inference”, with a speech — my speech in the first round — on “a reasonable inference”, rather than the “only reasonable inference”⁷². It may be that Professor Talmon got confused, that he was somehow expressing a kind of *dolus perplexus*. But I think each of you understood what it is that The Gambia was doing in arguing in this way, proceeding with care and logically: first, you have to establish that genocide is *a* reasonable inference, and once you have done that, then you show that it is the *only* reasonable inference. That seems pretty logical to us. It is not muddled waters, it is not even muddied waters. It is clear waters. It is clear intention. It is clear and fully convincing evidence.

39. Mr President, Members of the Court, this brings to a close my arguments in this case. I would like to take the opportunity to thank my junior, Jessica Jones, for her outstanding assistance over the past six years. I would also like to thank Ms Sun Young Hwang, Ms Jennifer Schoppmann and Ms Nancy Lopez for their incredible support in relation to the preparation of my speeches and of others. I thank you for your continued attention, once more, today and over the past three weeks, and now I invite you to call to the bar my dear friend and colleague, Mr Paul Reichler. He will address the point that Professor Talmon is waiting for: genocidal intent is indeed the *only* reasonable inference to be drawn from the evidence before you. Thank you.

The PRESIDENT: I thank Professor Sands for his statement. I now give the floor to Mr Reichler to address the Court. You have the floor, Sir.

Mr REICHLER:

III. GENOCIDAL INTENT IS THE ONLY REASONABLE INFERENCE

1. Mr President, Members of the Court, good morning. I will address you, as I did in the first round, on why Myanmar’s intent to destroy the Rohingya group is the only reasonable inference that the evidence permits you to draw from its pattern of conduct. I may refer to some of the points in my

⁷² CR 2026/8, p. 19, para. 38 (Talmon).

first speech, but I will not repeat them. I will focus on responding to Myanmar's arguments about their intent in carrying out the "clearance operations" in 2016 and 2017, as you heard from them last week.

2. One of the great benefits of oral hearings is that the Parties have relatively little time, as compared to the written phase of the pleadings, to present their arguments. With experienced counsel on both sides, this normally results in their concentration on the main issues and brings the principal points of disagreement into sharp focus for the Court, especially by the time we get to the second round. Such is the case here, with respect to the disagreement on Myanmar's intent in carrying out the "clearance operations" in the manner it did.

3. For The Gambia, as you know, the evidence is compelling and fully convincing that Myanmar acted with the intent to destroy the Rohingya population in northern Rakhine State, for the reasons Professor Sands and my colleagues who spoke yesterday have explained. For Myanmar, in contrast, as they have said repeatedly, their intent was counter-insurgency: to respond to what they called ARSA's "terrorism". They have stuck to this story since the beginning of the case, through the Counter-Memorial and the Rejoinder, and at these oral hearings⁷³. Mr Blom-Cooper told you that the inference you should draw from Myanmar's actions during the "clearance operations" is that "the intent of Myanmar was to confront terrorism"⁷⁴. Professor Talmon identified a range of hypothetical intentions, but you will have noted that he avoided attributing any of them to Myanmar⁷⁵; and he cannot do so, because Myanmar has never argued for them, and there is no evidence to support them. In sum, they have put all their eggs in the counter-terrorism basket.

4. The dispute between the Parties could not be clearer, and it is this: by the means and manner in which the "clearance operations" were actually carried out — that is, when the Tatmadaw and related security forces entered Rohingya villages and began shooting indiscriminately — was Myanmar's intent, as reflected in the acts of its State agents, in this case its military forces, to "counter terrorism", as Myanmar told you; or was it to destroy the Rohingya as a group, as concluded by the UN Fact-Finding Mission, and all the other UN bodies and independent and reputable NGOs

⁷³ CMM, paras. 1.7-1.21; 3.1-3.135; RM, paras. 3.1-3.123.

⁷⁴ CR 2026/11, p. 61, para. 77 (Blom-Cooper).

⁷⁵ CR 2026/8, p. 19, para. 39; p. 22, para. 45 (Talmon).

whose reports are in evidence, and is further evidenced by the testimony of all of The Gambia's witnesses, both in person and in written statements, and in the reports and testimony of Professor Newton, the only expert witness to have submitted reports and appeared before you? That is the key question for you to answer.

5. In regard to this key question, I will make several points. First, it is now agreed by the Parties that genocide can occur during counter-terrorism operations. This is a huge point. As Professor Sands pointed out yesterday, Myanmar's lead counsel, Mr Staker, expressly conceded this at the hearings⁷⁶. The issue is now beyond dispute: genocide *can* accompany counter-terrorism operations; the mere existence of counter-terrorism or other military operations does *not* prevent the Court from finding that Myanmar carried out these operations with genocidal intent. This is fully consistent with the ICTR's judgment in the *Akayesu* case⁷⁷ and the German court's ruling in the case concerning the Yazidi genocide in Iraq, both of which we cited in our first round⁷⁸ and Professor Sands mentioned today.

6. Accordingly, even if you believe Myanmar's counsel, Ms Lawrie, that "ARSA is the *reason* why Myanmar conducted counter-terrorism operations in [northern Rakhine State]"⁷⁹ — and as we have made clear for the record, we do *not* — that still does not cut it for Myanmar. Thanks to Mr Staker's admission, confirming what they said previously and repeatedly in the written pleadings⁸⁰, the fact that there was a counter-terrorism operation in progress — if that was indeed the case — is pure context. It is not intent. It is not the intent of the State at the time its authorized agents began firing their weapons deliberately at Rohingya civilians, including women and children, upon entering scores of Rohingya villages and began to slaughter the civilian population.

7. To put the question plainly: at the time and in the places where the *actus reus* of genocide were committed, what was the intent of the State, as reflected in the pattern of conduct by its authorized agents — the Tatmadaw — when they engaged in that horrendous conduct? The Court has received voluminous evidence on what those acts were, and is certainly well aware of them. They

⁷⁶ CR 2026/7, p. 33, para. 67 (Staker).

⁷⁷ CR 2026/1, pp. 30-31, para. 20 (Sands).

⁷⁸ CR 2026/1, p. 27, para. 10 (Sands).

⁷⁹ CR 2026/8, p. 47, para. 3 (Lawrie) (emphasis added).

⁸⁰ CMM, para. 8.14.

were highlighted by Professor Newton on cross-examination⁸¹, in which he spelled out the various elements of the genocidal *modus operandi* employed by the Tatmadaw in at least 54 Rohingya villages, based on the findings and conclusions of the UN Fact-Finding Mission. Citations to his testimony and the specific paragraphs of the FFM report to which he referred will appear in footnote⁸². Yesterday, I enumerated them in my speech, as did Ms Ho and Mr Loewenstein and Mr Suleman⁸³. Again, citations will appear in footnote. I will avoid further repetition of them. I am confident you know them well and do not need to hear them again from me now.

8. Mr President, you have been told by Professor Newton during his cross-examination that this *modus operandi* violated every core principle of a counter-terrorism doctrine that is universally accepted, including by Myanmar⁸⁴. Myanmar's acceptance of the doctrine is reflected in the rules of engagement the Tatmadaw prepared for these operations, which state, on their first page, that they applied to operations against ARSA⁸⁵.

9. As Professor Newton told you, there was no problem with the content of the rules of engagement; the problem was that they were completely ignored, in the orders that were given to the soldiers to act as they did, and in the conduct, the pattern of conduct, of the soldiers in carrying out those orders, in village after village. Every rule was ignored and violated⁸⁶. The fact that multiple Tatmadaw units deliberately, blatantly, flagrantly, egregiously and consistently violated these rules in scores of Rohingya villages, spread all across northern Rakhine State, while under the command of their officers, is compelling and convincing and conclusive evidence that counter-terrorism was *not*, and could *not* have *been* their intent. We say the means and manner by which the "clearance operations" were conducted against the Rohingya rule out any possible reasonable inference that the operations were conducted with the intent to combat terrorism.

⁸¹ CR 2026/16, pp. 28-29, 32-33, 38, 44 (Newton).

⁸² UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), paras. 752, 880, 1429-1431. MG, Vol. II, Annex 40.

⁸³ CR 2026/19, p. 37, para. 41 (Ho); CR 2026/19, pp. 40, 42-44, 46, 48, paras. 8, 14, 17, 20, 25, 31 (Loewenstein).

⁸⁴ CR 2026/16, pp. 44-45 (Newton).

⁸⁵ CR 2026/16, pp. 39-41 (Newton).

⁸⁶ CR 2026/16, pp. 29-33, 36, 44 (Newton).

10. The Court must, of course, examine the totality of the evidence and make its own determination of what is reasonable to infer from this pattern of conduct. In doing so, it is, of course, free to consider other possible inferences as to intent, beyond the two inferences advocated, respectively, by the Parties. If Myanmar's intent was not counter-terrorism, as it stubbornly continues to maintain, what could its intent have been, other than to destroy the Rohingya group, in whole or in part?

11. For example, given the mass exodus of Rohingya to Bangladesh, does the evidence convince you that Myanmar's intent was to forcibly displace, or to ethnically cleanse, the Rohingya group rather than to destroy it? Myanmar has not made that argument, and we say it cannot do so, because there is no basis in the evidence from which you could reasonably infer that this was Myanmar's intent.

12. The question was put to Professor Newton last Thursday. He was asked: "Could this have been ethnic cleansing?"⁸⁷ This was his response, which I will quote in full to avoid any suggestion that we are using it selectively:

"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."⁸⁸

13. Professor Newton's testimony is fully supported by the evidence in the FFM's reports, including the following passages from the 2018 report, in regard specifically to the targeting and killing of refugees while they were trying to cross the border into Bangladesh:

— "Soldiers opened fire on groups of Rohingya at or close to the border crossing points, including large numbers gathered at the shores of the Bay of Bengal or Naf River, while waiting to cross into Bangladesh."⁸⁹

⁸⁷ CR 2026/16, p. 33 (Reichler).

⁸⁸ CR 2026/16, p. 33 (Newton) (emphasis in the original).

⁸⁹ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), para. 900. MG, Vol. II, Annex 40.

- “Soldiers also shot at boats carrying Rohingya to Bangladesh, resulting in further casualties.”⁹⁰
- “Soldiers also used large knives to kill or attempt to kill Rohingya individuals crossing the border.”⁹¹
- “Landmines were planted by Tatmadaw soldiers along border crossing points in northern Maungdaw Township. Soldiers were seen by witnesses laying mines in border areas after 25 August 2017 . . . This indicates that the use of landmines was intended to target fleeing Rohingya civilians and to prevent those who had already left from returning.”⁹²
- “Data from *Médecins Sans Frontières* indicated the scale of violent deaths *en route* to Bangladesh, noting that 13.4 per cent of violent deaths occurred during the period between displacement from their village and arrival in Bangladesh.”⁹³

14. These facts and many others set out in the Fact-Finding Mission’s report led the FFM to reject forced displacement as a reasonable inference of Myanmar’s intent, based on the Tatmadaw’s *modus operandi* and pattern of conduct. This is from the 2018 report — I apologize again for the long quote, but it is important not to quote selectively:

“The suggestion that the authorities may have been legitimately seeking demographic change in Rakhine State (as opposed to the destruction of the Rohingya [as a group]) cannot be reconciled with the scope of violence and brutality of the military, or the serious bodily and mental harm inflicted on the civilian population . . . It would not have necessitated the killing of more than 10,000 civilians, the systematic and coordinated rape of women, the mass deportation of over 725,000 people, and the destruction of entire villages.

An argument that the intent may have been to displace the Rohingya population, but not to seek its ultimate destruction, falls at the same hurdle. The scale and scope of violence in its varied forms, the intensity and brutality of the attacks, and the physical destruction of Rohingya life as it once was, through the mass demolition of their villages and homes, make it difficult to consider any such inferences as reasonable. When considered against the patterns of oppression and dehumanization spanning decades and a coordinated and widely prevalent discriminatory rhetoric on the part of the very authorities entrusted with ensuring the Rohingya’s safety, livelihood and protection, the picture becomes even more complete”⁹⁴.

15. Mr President, there are stark and fundamental differences between an operation that is conducted to forcibly displace a particular population, and one that is intended to destroy them as a

⁹⁰ *Ibid.*, para. 901.

⁹¹ *Ibid.*, para. 902.

⁹² 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), available at <https://digitallibrary.un.org/record/1643079?ln=en&v=pdf>, paras. 1205-1206, 1209-1211.

⁹³ *Ibid.*, para. 988.

⁹⁴ UN Human Rights Council, *Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar*, UN doc. A/HRC/39/CRP.2 (17 September 2018), paras. 1437-1438. MG, Vol. II, Annex 40.

group. Let me give you a concrete example of this difference. It comes from your own jurisprudence, specifically in the case of *Georgia v. Russia*. I will be very careful to keep my discussion of the case uncontroversial, since I was an advocate in that case. Georgia, as you will recall, accused Russia of forced displacement of ethnic Georgians, from what was then the Georgian province of South Ossetia, in violation of the CERD Convention.

16. Provisional measures were ordered upon Georgia's request. The evidence on which the Court relied to determine that Georgia's claims were plausible was this. In 2008, Russian troops crossed the international border into South Ossetia, the population of which was roughly half ethnic Georgian and half ethnic Ossetian, the latter being the group favoured by the Russians. The evidence showed that when the Russians arrived at ethnic Georgian villages, or mixed villages, they ordered the Georgian population to leave South Ossetia and head south across the provincial border into Georgia proper. There was no evidence of targeting or significant physical harm done to those Georgians who complied. Where there was resistance, the evidence shows that the Russians started burning some houses, and less frequently killed some residents. But the burning and the killing stopped after the rest of the villagers fled. Fleeing refugees were not shot at by the Russian forces. Children and babies were not targeted or torn from their mothers. There was no systematic sexual violence. On those facts, if proven, this was forced displacement, or ethnic cleansing. It was not genocide. These facts stand in sharp contrast with what Myanmar did in northern Rakhine State.

17. The Court never reached the merits of that case, because it upheld Russia's preliminary objection to its jurisdiction. But the Court *did* find that there was forced displacement or ethnic cleansing in the *Bosnia* and *Croatia* cases. The situation in Myanmar is, of course, worlds apart from that of the former Yugoslavia. As the Court well knows, when Yugoslavia broke apart, some of its constituent republics immediately began fighting over *territory*.

18. The historical record shows that there was a mad scramble for territory, especially between Croatia and Serbia, and between Bosnia and Serbia. Each of these ethnic-based republics sought to expand its territory by taking over areas where their fellow Croats or Serbs or Bosnians lived, at the expense of the other republics and the unwanted ethnic groups who lived there.

19. There was extensive military conflict on all fronts, and tens of thousands, including civilians, were killed. But both the *Bosnia* and *Croatia* cases were essentially about the control of

territory, and the objective of each of the new States to establish an ethnically homogeneous State, or as close to that as possible, by taking over territory from a rival State where their fellow group members lived and expelling members of other ethnic groups. Thus, the Court was on solid ground in determining, in *Croatia v. Serbia*, that the intentions of both States were not to *destroy* unwanted ethnic groups, but to forcibly displace or ethnically cleanse them from its territory, or from the territory it sought in the fighting⁹⁵.

20. Here again, the facts stand in total contrast with what occurred in Myanmar. The Tatmadaw were not seeking to enlarge Myanmar's territory, or to defend it against any other State. They were not seeking to gain someone else's territory to bring ethnic Burmese within an enlarged Myanmar. Nor, as the evidence discussed yesterday and today shows, were they simply seeking to expel the Rohingya from Myanmar. We say this evidence convincingly shows that the means and manner by which the "clearance operations" were conducted *preclude* any reasonable inference that these operations by the Tatmadaw were intended as forced displacement or ethnic cleansing, just as they preclude any reasonable inference that they were intended merely to combat ARSA. As you have seen, this is what the UN Fact-Finding Mission concluded.

21. And there is still another, very compelling reason, why it is not even arguable that Myanmar acted with the intent to forcibly displace the Rohingya group from its territory. Myanmar categorically denies that this was its intent. Repeatedly. Last Tuesday, Myanmar told you in no uncertain terms that, in the words of Mr Blom-Cooper, the "large movement of Bengalis from Rakhine State to Bangladesh . . . was not the product of deliberate policy or intent to systematically displace the population into Bangladesh"⁹⁶. In its written pleadings, in at least five different places, Myanmar makes the same denial⁹⁷. Here is just one example of their multiple denials that they intended to ethnically cleanse or forcibly displace the Rohingya. This is from the Rejoinder:

"The fact that Myanmar entered into arrangements for the repatriation of those who went to Bangladesh in 1978 and in 1991-1992, and is willing and prepared to accept repatriation of those currently in Bangladesh, is inconsistent with the alleged intention to remove this population from Myanmar."⁹⁸

⁹⁵ *Croatia Genocide, 2015 Judgment*, pp. 126, 151, paras. 435, 511.

⁹⁶ CR 2026/11, p. 50, para. 30 (Blom-Cooper).

⁹⁷ See e.g. CMM, paras. 10.68, 16.27; RM, paras. 10.33, 13.73, 16.13.

⁹⁸ RM, para. 16.13.

22. Mr President, if there is *one* thing in respect of *mens rea* that the Parties *agree* upon, it is that Myanmar did *not* act with an intent to forcibly displace or ethnically cleanse its Rohingya population. It would be striking, in such circumstances, and especially in light of the totality of the evidence, including the express findings of the UN Fact-Finding Mission, for the Court to determine, notwithstanding the Parties' agreement on this point, that Myanmar's intention was to forcibly displace or ethnically cleanse the Rohingya group from northern Rakhine State. The Court would be adopting a position that neither Party has argued for, that both Parties reject and which is completely belied by the evidence, including expert testimony.

23. To be sure, hundreds of thousands of Rohingya fled to Bangladesh. This was because it was the only place to which they could escape being killed by the Tatmadaw, since it was close by and accessible by land or by river crossing, at least for the majority of Rohingya from northern Rakhine State, and Bangladesh, to its honour, mercifully kept the border open to these refugees. Yes, there might have been a few Tatmadaw soldiers who did not interfere with these border crossings. But they were the exceptions rather than the rule. The fact that so many Rohingya made it to Bangladesh was not due to the Tatmadaw's kindness, but to the sheer volume of the refugee flow, which made it impossible to stop.

Mr President, it is now 11.30 a.m. If I may, I would like to continue with my speech. If a coffee break is desired before I finish, may I suggest that a convenient place to stop would be after paragraph 29? But I am in your hands.

The PRESIDENT: I think you should complete your statement.

Mr REICHLER: Thank you, Mr President.

24. I regret to say that we cannot avoid the suspicion that Myanmar, out of desperation, might change its narrative in the second round, after we have finished speaking and there is no opportunity for us to respond further. Subtly, but not so subtly that we did not notice, Professor Talmon recalled at the close of his speech on 16 January, that six years ago, at the hearings on provisional measures in December 2019, Myanmar's former counsel, Mr Schabas, who resigned after the military coup, suggested that there might be other explanations for Myanmar's conduct, including "ethnic

cleansing”⁹⁹. Was Professor Talmon dropping this breadcrumb so that they could say they mentioned it in the first round, thus making it fair game for their second round? We hope not. It would be quite unseemly for Myanmar to make a 180-degree reversal of its long-held position in the second round, and it would be directly contrary to Mr Blom-Cooper’s renewed assurances last week that forced displacement was not Myanmar’s intent.

25. But even if they leave Mr Blom-Cooper hanging out to dry in the second round, there are other reasons why a reversal of their position would not preclude you from concluding that the only reasonable inference, the only reasonable conclusion, to be drawn from the totality of the evidence, is that Myanmar acted with the intent to destroy the Rohingya as a group. As I pointed out in the first round, even in a case — which is not this one — where there has been forced displacement or ethnic cleansing, a finding of genocidal intent may still be made, if the Court finds that the intent of the displacement was to destroy the group. On this point, it is worth recalling the Court’s language in each of its prior cases under the 1948 Convention.

26. In the *Bosnia* case, the Court said:

“This is not to say that acts described as ‘ethnic cleansing’ may never constitute genocide, if they are such as to be characterized as, for example, ‘deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part’ . . . that is to say with a view to the destruction of the group, as distinct from its removal from the region.”¹⁰⁰

That is this case.

27. To the same effect, in *Croatia*, the Court explained that genocidal intent could have been established, that is, that the intent to destroy the group was the only reasonable inference, if the evidence had shown that “the forced displacement was carried out in circumstances calculated to result in the total or partial physical destruction of the group”¹⁰¹. This case certainly meets that standard.

28. As the Court has made clear, depending on the totality of the evidence, even where the Court has found ethnic cleansing or forced displacement to have occurred, it can also find genocide, if these practices — if these actions — reflect the intent of the State, acting through its authorized

⁹⁹ CR 2026/8, p. 22, para. 45 (Talmon) (citing CR 2019/19, p. 33, para. 37 (Schabas); p. 42, paras. 6-7 (Staker)).

¹⁰⁰ *Bosnia Genocide, Judgment, 2007*, p. 123, para. 190.

¹⁰¹ *Croatia Genocide, Judgment 2015*, p. 114, para. 376.

agents, to destroy the protected group. It is significant that the joint interveners — Germany, France, the UK, the Netherlands, Denmark and Canada — agree with this, at paragraph 46 of their joint Declaration of intervention, to which we refer you¹⁰².

29. Just as ethnic cleansing and forced displacement can be genocidal, if they are carried out with an intent to destroy the group, so can war crimes and crimes against humanity. As Professor Sands explained, there is some overlap among these legal concepts. Of course, not every war crime, and not every crime against humanity, will be genocide. But the specific acts listed in Article II (a) through (d) of the Convention as the *actus reus* of genocide may also be war crimes or crimes against humanity — which will constitute genocide if they are committed with genocidal intent. In other words, the mere fact that certain crimes are war crimes or crimes against humanity does not preclude a finding that the same acts constitute genocide, if the evidence establishes that they were crimes as defined by Article 2, subparagraphs (a) through (d), and that they were committed with the intent to destroy a protected racial, ethnic or religious group. Here, as we have shown you, the evidence collected by the UN Fact-Finding Mission and many, many others, convincingly establishes that the crimes committed in northern Rakhine State were committed with the intent to destroy the Rohingya as a group, and that they constitute genocide.

30. Mr President, I will conclude by providing The Gambia’s response to the final part of Judge Hmoud’s second question, since Professor Sands, after providing our answers to the first question and the first part of the second question, left the rest for me. Specifically, I will respond to this question: “If there exist other motives or objectives for a State, in addition to . . . genocidal intent, that can be established by such evidence, would this negate the possibility of proof of *dolus specialis* as the only reasonable inference?”¹⁰³

31. First, we thank Judge Hmoud for this question. Our concise answer is “no”; this would not negate *dolus specialis* as the only reasonable inference. I will explain why this is so. First — or second — as the Court has recognized, drawing from consistent ICTY jurisprudence, there is a clear difference between motive or objective of an act or operation, and the intent with which it is carried

¹⁰² Joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland (15 November 2023), para. 46.

¹⁰³ CR 2026/12, p. 48 (Hmoud).

out by the agents of the State. I addressed this issue in the first round, and rather than repeat myself, which we have been urged not to do, I will refer you to my discussion of this point at pages 37 to 43, paragraphs 16 to 34, of the transcript for Wednesday afternoon, 14 January. To quickly summarize, *motive* is the reason or purpose for the action or operation that is undertaken; *intent* is the state of mind of the State acting through its authorized agents, while they are committing the acts which constitute the *actus reus* of the crime, in this case the crimes listed in Article II (a) to (d) of the 1948 Convention.

32. The Court recognized the difference between motive and intent in the *Bosnia* case, where it stated that the intent to commit genocide is “to be distinguished from other reasons or motives the perpetrator may have”¹⁰⁴. It found in that case that the Serb militia massacred thousands of Bosnian men and boys at Srebrenica with genocidal intent, even after finding that “an essential motive of much of the Bosnian Serb leadership [was] to create a larger Serb State, by a war of conquest if necessary”¹⁰⁵.

33. Judge Bhandari’s separate opinion in the *Croatia* case includes a detailed review of the ICTY’s well-developed jurisprudence on the difference between motive, or objective or purpose on the one hand, and intent on the other. Among several cases that underscore this difference is the Appeals Chamber’s decision in *Prosecutor v. Blaškić*: “*Mens rea* is the mental state or degree of fault which the accused held at the relevant time.” That is, the time when the acts are being committed. “Motive is generally considered as that which causes a person to act . . . as far as criminal responsibility is concerned, motive is generally irrelevant in international criminal law.”¹⁰⁶ The Gambia agrees with what the ICTY rulings cited by Judge Bhandari say — “that genocidal *intent* may exist *simultaneously* with other, *ulterior motives*”¹⁰⁷.

34. This point is not, or should not be, contentious. Myanmar agrees with us — they agree with us — that there is a difference between motive and intent. Professor Talmon acknowledged this

¹⁰⁴ *Bosnia Genocide, Judgment, 2007*, p. 122, para. 189.

¹⁰⁵ *Ibid.*, p. 196, para. 372.

¹⁰⁶ *Prosecutor v. Tihomir Blaškić*, IT-95-14-A, Judgement (29 July 2004), para. 694 (citing *Tadić*, IT-94-1-A, Judgement (15 July 1999), para. 268).

¹⁰⁷ *Croatia Genocide, Judgment 2015*, separate opinion of Judge Bhandari, p. 441, para. 50 (emphasis in original).

on 16 January and I quote his words: “motive and intent are not the same”¹⁰⁸. And as I said previously, Mr Staker agreed that, even if counter-terrorism was Myanmar’s motive or objective, that would not rule out that the Tatmadaw acted with genocidal intent.

35. As applied in this case, even if you are convinced that Myanmar planned the “clearance operations” for the purpose, or for the “reason”— to use Myanmar’s counsel’s words— of combatting terrorism, that would only give you the motive for the “clearance operations”. What matters, under the Genocide Convention, is the intent of the State at the very time its authorities were carrying out these operations in the Rohingya villages of northern Rakhine State — *at the very time* they were attacking innocent civilians indiscriminately, segregating and executing men and boys, raping and gang raping women and girls, killing children and infants — tossing them into fires — burning Rohingya homes and entire villages, targeting and killing fleeing refugees before they could escape to safety in Bangladesh, and, for many months afterwards, extending well into 2018, continuing to destroy more and more Rohingya villages — including over 180 which Myanmar admits, they admit, there were no ARSA activities — and then bulldozing over Rohingya structures to erase any presence or memory of them and promoting resettlement by the ethnic Rakhine, or constructing military bases where the Rohingya lived.

36. It is from this pattern of conduct, conclusively established to the standard of “fully convincing” by the totality of the evidence, that you must determine whether there is any reasonable inference that you can draw *other than* that these atrocities were committed with an intent to destroy the Rohingya as a group, as such.

37. It is not sufficient for there to be another *possible* or *plausible* or *potential* or *hypothetical* inference. To “negate” *dolus specialis*, to use Judge Hmoud’s words, there must be a *reasonable* alternative inference to be drawn from the totality of the evidence — not just any inference.

38. We say, emphatically, that there is none. The only reasonable inference that can be drawn from Myanmar’s pattern of conduct — the only *reasonable* conclusion that can be drawn — is that Myanmar acted with the intent to destroy the Rohingyas as a group. This is the very definition of genocide. It is the Court’s own definition. I will conclude with the same words with which I

¹⁰⁸ CR 2026/8, pp. 20-21, para. 42 (Talmon).

concluded my speech on this subject last week, which are the Court's words in the *Bosnia* case: "Where these requirements are satisfied . . . the law must not shy away from referring to the crime committed by its proper name."¹⁰⁹

39. Mr President, Members of the Court, that name is *Genocide*.

40. As always, I want to thank the Court for its kind courtesy and patient attention this morning and throughout these proceedings. It has been a true honour for me to appear before you in these proceedings. I ask you now to call my esteemed colleague and long-time friend, Professor d'Argent, to the podium.

The PRESIDENT: I thank Mr Reichler for his statement. 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 11.50 to 12.05 p.m.

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

M. D'ARGENT : Merci, Monsieur le président.

IV. RÉPARATIONS

1. Monsieur le président, Mesdames et Messieurs les juges, au terme de ce second tour de plaidoiries pour la Gambie, il me faut encore dire quelques mots sur le constat de responsabilité et sur les réparations qu'elle sollicite. Faute de temps, je n'aborderai pas les conséquences des violations des mesures conservatoires, cette question a été couverte lors du premier tour de plaidoiries¹¹⁰ et à nouveau hier en ce qui concerne la destruction des preuves¹¹¹. À la fin de mon exposé, je répondrai à la deuxième question posée par M^{me} la juge Cleveland.

¹⁰⁹ *Bosnia Genocide, Judgment, 2007*, p. 164, para. 293 (citing *Krstić*, IT-98-33-A, Appeals Chamber Judgement, 19 April 2004, paras. 37-38).

¹¹⁰ CR 2026/6, p. 23 et suiv. (Suleman) ; CR 2026/6, p. 34 et suiv. (d'Argent).

¹¹¹ CR 2026/19, p. 64 et suiv. (d'Argent).

1. Constat de responsabilité pour le génocide et déclarations de violations

2. Monsieur le président, le Myanmar ne conteste pas que la Cour a le pouvoir de faire droit aux demandes de la Gambie en termes de constat de responsabilité pour le génocide et de déclarations de violations. Le Myanmar ne conteste pas non plus que la Cour a le pouvoir de faire droit aux demandes de la Gambie en termes de cessation, s'agissant des violations continues.

3. Vous connaissez ces demandes et vous entendrez dans quelques minutes les conclusions finales de la Gambie. Aucune de ces demandes n'est présentée à titre subsidiaire par rapport à la demande qui est au cœur de cette affaire : dire pour droit que la République de l'Union du Myanmar est responsable du génocide perpétré contre le groupe des Rohingya par ses forces de sécurité lors des opérations de nettoyage. Mesdames et Messieurs les juges : un génocide a eu lieu. Il faut le dire ; il faut le dire clairement, sans ambages, sans animosité, sans arrière-pensée politique, comme votre serment l'exige.

4. Le Myanmar n'a pas contesté que le génocide est un fait internationalement illicite composite ; ainsi, sa responsabilité remonte aux premières attaques d'octobre 2016 et englobe chaque acte constitutif de l'*actus reus*.

5. Le Myanmar n'a pas contesté que les membres de ses forces armées et de police engagés dans les opérations de nettoyage ont agi en cette qualité et que leur comportement engage donc sa responsabilité internationale¹¹². Le fait qu'ils aient contrevenu aux règles d'engagement est juridiquement sans importance sous l'angle de l'attribution de leur comportement au Myanmar¹¹³. Le Myanmar ne l'a pas contesté.

6. Au cours de ces opérations de nettoyage, certains individus ont très vraisemblablement commis des actes de génocide sur les instructions, les directives ou le contrôle des militaires, ces actes étant alors attribuables au Myanmar en vertu de l'article 8 des articles sur la responsabilité de la CDI et de votre jurisprudence.

7. Quoi qu'il en soit, quoi qu'il en ait pu être, et en toute hypothèse, le Myanmar n'a pas contesté qu'en vertu de l'article premier de la convention, il était tenu de prévenir les actes de génocide perpétrés par des individus ayant participé aux opérations de nettoyage aux côtés des forces

¹¹² Articles sur la responsabilité de l'État pour fait internationalement illicite, art. 4.

¹¹³ *Ibid.*, art. 7.

de sécurité. Le Myanmar a donc manqué à l'obligation de prévenir ces actes et la Gambie demande à la Cour de le constater. Il en est de même du constat de manquement à l'obligation de punir et des autres faits illicites énoncés dans les conclusions finales.

8. Restent dès lors la question des réparations et celle des assurances et garanties de non-répétition.

2. Réparations

9. La question des réparations est fondamentale en termes de droit et de justice. Mesdames et Messieurs les juges, vous avez entendu les trois témoins présentés par la Gambie. Ce fut à peine supportable. Ce fut toutefois essentiel. Ce fut un moment de justice.

10. Vous avez entendu trois victimes survivantes, mais il y en a, hélas, des centaines de milliers d'autres dans les camps au Bangladesh. *Chacune* de ces victimes mérite justice et attend que justice soit faite.

11. Bien sûr, votre décision à cet égard doit être fondée en droit. Malgré le caractère inédit de cette affaire et contrairement à ce que soutient le Myanmar, il n'y a aucun obstacle juridique en la matière.

A. Compétence

12. La première question est de savoir si la Cour a besoin d'une autre base de compétence que l'article IX de la convention pour décider si le Myanmar est tenu de réparer. Le Myanmar soutient que tel est le cas, parce que les dommages ont été subis par des individus qui n'ont pas la nationalité de l'État demandeur.

13. Alors, je ne vais pas répéter ce que j'ai dit à cet égard lors du premier tour¹¹⁴, mais je note que mes arguments au sujet de l'interprétation des termes de l'article IX au regard de votre jurisprudence n'ont pas reçu de réponse de la part du Myanmar.

14. Selon la Gambie, la compétence de la Cour pour décider les questions de responsabilité a été tranchée par l'arrêt du 22 juillet 2022. Certes, la Cour n'a pas décidé qu'il existait une obligation de réparation au bénéfice des victimes, mais elle a certainement décidé qu'elle était compétente pour

¹¹⁴ CR 2026/6, p. 41-42, par. 31-37 (d'Argent).

décider si cette obligation existe en droit coutumier et si le Myanmar en est débiteur. Votre décision à cet égard a force de chose jugée.

15. Si la Cour juge maintenant que cette obligation n'existe pas, la question de savoir si la Gambie a qualité pour en exiger l'exécution disparaît.

16. En revanche, si la Cour considère que cette obligation existe, aucune base de compétence supplémentaire n'est requise pour décider que le Myanmar en est débiteur. Seule demeurera la question de savoir si la Gambie a qualité pour demander l'exécution de l'obligation de réparation en faveur des victimes. Si la réponse est négative, votre examen s'arrête là. Si la réponse est positive, aucune autre base de compétence n'est nécessaire pour se prononcer sur les réparations sollicitées.

B. Obligation de réparer au bénéfice des victimes

17. Les Parties sont en désaccord sur l'existence ou non de l'obligation, pour l'État responsable d'un génocide, de réparer les préjudices subis par les victimes lorsqu'elles n'ont pas la nationalité de l'État demandeur. Selon la Gambie, cette obligation est indéniable en droit international coutumier car, comme la Cour l'a rappelé et le Myanmar l'admet¹¹⁵, les membres d'un groupe protégé ont eux-mêmes le « droit ... d'être protégés contre les actes de génocide et les actes prohibés connexes visés à l'article III »¹¹⁶. La violation de ce droit des individus entraîne, pour l'État responsable, l'obligation d'en réparer les conséquences préjudiciables en leur faveur. Cela est vrai, quelle que soit leur nationalité ou l'absence de nationalité réelle.

18. Pour nous contredire, M. Talmon s'est prévalu du commentaire de la CDI au sujet de l'article 28 des Articles sur la responsabilité internationale des États¹¹⁷, article qui inaugure la deuxième partie consacrée au contenu de la responsabilité. Il n'a cité qu'un extrait très limité du paragraphe 3 du commentaire de l'article 28. Le voici dans son intégralité à l'écran. Et j'en souligne quelques passages :

« L'article 28 n'exclut pas la possibilité qu'un fait internationalement illicite puisse entraîner des conséquences juridiques dans les relations entre l'État responsable de ce fait et des personnes ou des entités autres que des États. C'est ce qui découle de l'article premier ... [L]a responsabilité des États s'étend par exemple aux violations

¹¹⁵ CR 2026/12, p. 40-41, par. 48 (Talmon).

¹¹⁶ *Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël), mesures conservatoires, ordonnance du 26 janvier 2024, C.I.J. Recueil 2024 (I), p. 23, par. 54.*

¹¹⁷ CR 2026/12, p. 32, par. 10 (Talmon).

des droits de l'homme et autres violations du droit international lorsque le bénéficiaire principal de l'obligation violée n'est pas un État. Toutefois, alors que la première partie [du projet d'articles] s'applique à tous les cas dans lesquels un fait internationalement illicite peut être commis par un État, la deuxième partie [des Articles sur la responsabilité] a une portée plus limitée. Elle ne s'applique pas aux obligations de réparation dans la mesure où celles-ci s'exercent envers une personne ou une entité ... Autrement dit, les dispositions de la deuxième partie sont sans préjudice de tout droit que la responsabilité internationale d'un État peut faire naître directement au profit d'une personne ou d'une entité autre qu'un État et l'article 33 l'indique clairement. »¹¹⁸

19. Il est donc erroné de soutenir que le droit de la responsabilité internationale ne fait en aucun cas naître une obligation de réparation à charge de l'État responsable au profit des victimes de son fait illicite. Simplement, le droit codifié par la CDI dans la deuxième partie des Articles concerne le « [c]ontenu de la responsabilité internationale de l'État », *entre États*.

20. M. Talmon s'est encore prévalu du paragraphe 111 de l'avis consultatif de la Cour sur les *Obligations des États en matière de changement climatique*¹¹⁹. Toutefois, ce paragraphe concerne seulement « la question de savoir si des individus ont le droit *d'invoquer* la responsabilité juridique des États, ou de présenter une plainte »¹²⁰. En l'espèce, c'est la Gambie qui a invoqué la responsabilité juridique du Myanmar, et la Cour a reconnu qu'elle avait qualité pour ce faire. L'extrait de votre jurisprudence invoqué par M. Talmon n'est donc pas relatif à l'obligation de réparer au bénéfice des individus.

21. M. Talmon a encore soutenu que les « Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes » adoptés par consensus en 2005 par l'Assemblée générale¹²¹ ne sont pas juridiquement contraignants et ne créeraient donc aucune obligation « to make reparation directly to the alleged victims of genocide »¹²². Alors, certes, ce texte n'est pas contraignant en tant que tel, mais, élaboré durant de longues années sur la base de la pratique internationale, il fait clairement la différence entre le « should » et le « shall ». Et sous ce dernier aspect, il reflète le droit coutumier et il complète la codification de ce droit puisque la CDI avait

¹¹⁸ CDI, *Annuaire de la Commission du droit international*, 2001, vol. II, deuxième partie, commentaire de l'article 28, p. 93, par. 3 (les italiques sont de nous).

¹¹⁹ CR 2026/12, p. 33, par. 13 (Talmon).

¹²⁰ *Obligations des États en matière de changement climatique, avis consultatif du 23 juillet 2025*, par. 111 (les italiques sont de nous).

¹²¹ Nations Unies, « Principes fondamentaux et directives concernant le droit à un recours et à réparation des victimes de violations flagrantes du droit international des droits de l'homme et de violations graves du droit international humanitaire », résolution adoptée par l'Assemblée générale le 16 décembre 2005, doc. A/RES/60/147.

¹²² CR 2026/12, p. 35, par. 22 (Talmon).

seulement couvert l'obligation de réparer en faveur des États et entre eux. Les principes et directives de 2005 ont été invoqués et mis en œuvre dans la pratique internationale. Ainsi, la résolution de l'Assemblée générale adoptée au lendemain de l'invasion de l'Ukraine par la Russie s'y est référée pour affirmer l'obligation de la Fédération de Russie de réparer les dommages subis par les particuliers à la suite de la guerre¹²³. Le Conseil des ministres du Conseil de l'Europe créa le registre des dommages pour l'Ukraine en se référant explicitement aux mêmes principes fondamentaux et directives¹²⁴. Cette pratique confirme non seulement le fait que les États considèrent que l'obligation de réparer en faveur des victimes existe en droit coutumier, mais elle confirme aussi le droit des États autres que l'État lésé qui ont participé à ces actes juridiques de demander l'exécution de cette obligation dans l'intérêt des victimes.

22. La Cour a par deux fois reconnu l'existence de l'obligation de réparer dans l'intérêt des victimes : dans l'avis consultatif sur le *Mur* en 2004 et vingt ans plus tard dans l'avis consultatif sur le territoire palestinien occupé. Le Myanmar a soutenu que, dans l'avis sur le *Mur*, la Cour ne s'était pas prononcée sur « the question of whether non-injured States had a right to claim reparation in the interest of the Palestinians »¹²⁵. Et cela est exact, mais ce n'est pas la question : la Gambie s'appuie sur votre jurisprudence de 2004 au soutien de *l'existence* même de l'obligation de réparation en faveur des particuliers.

23. En 2024, vous avez confirmé l'existence de cette obligation en ces termes : « Israël a ... l'obligation de réparer intégralement les dommages causés par ses faits internationalement illicites à toutes les personnes physiques ou morales concernées »¹²⁶. Les paragraphes suivants de votre avis sont consacrés aux formes que cette réparation doit prendre. L'Assemblée générale a approuvé l'avis de la Cour¹²⁷, confirmant à nouveau que, dans la pratique contemporaine, les États

¹²³ Nations Unies, « Aggression contre l'Ukraine : recours et réparation », résolution adoptée par l'Assemblée générale le 14 novembre 2022, doc. A/RES/ES-11/5.

¹²⁴ Conseil de l'Europe, Comité des ministres, « Résolution CM/Res(2023)3 établissant l'Accord partiel élargi sur le Registre des dommages causés par l'agression de la Fédération de Russie contre l'Ukraine » (adoptée le 12 mai 2023, amendée le 27 septembre 2023).

¹²⁵ CR 2026/12, p. 36, par. 27 (Talmon).

¹²⁶ *Conséquences juridiques découlant des politiques et pratiques d'Israël dans le Territoire palestinien occupé, y compris Jérusalem-Est, avis consultatif du 19 juillet 2024*, p. 73, par. 269 (les italiques sont de nous).

¹²⁷ Nations Unies, « Avis consultatif de la Cour internationale de Justice sur les conséquences juridiques découlant des politiques et pratiques d'Israël dans le Territoire palestinien occupé, y compris Jérusalem-Est, et de l'illicéité de la présence d'Israël dans le Territoire palestinien occupé », doc. A/ES-10/L.31/Rev.1, résolution adoptée par l'Assemblée générale le 18 septembre 2024, doc. A/RES/ES-10/24.

reconnaissent l'existence, en droit coutumier, de l'obligation de réparation dans l'intérêt des bénéficiaires des obligations violées. Le Myanmar n'a rien dit de votre avis de 2024 ni de sa réception par les États, alors même qu'il a voté pour la résolution de l'Assemblée générale l'ayant approuvé¹²⁸.

C. Qualité de la Gambie pour demander l'exécution de l'obligation de réparation dans l'intérêt des victimes Rohingya

24. J'aborde désormais la question de savoir si la Gambie a qualité pour demander l'exécution par le Myanmar de son obligation de réparation dans l'intérêt des victimes Rohingya.

25. Cette question, nous le reconnaissons, n'a pas été tranchée explicitement par votre arrêt de 2022, lequel vise, en son paragraphe 112, la qualité pour faire constater le manquement aux obligations *erga omnes partes* et y mettre fin si ce manquement est continu. On ne peut toutefois pas déduire de ce paragraphe que la Cour aurait exclu le droit de la Gambie d'invoquer la responsabilité du Myanmar afin de demander l'exécution de son obligation de réparation dans l'intérêt des victimes. D'ailleurs, le Myanmar n'a pas soutenu que votre arrêt serait *res judicata* en ce sens, par implication *a contrario*. On peut plutôt penser que, par implication logique positive, la Cour a aussi accepté la qualité de la Gambie à cet égard, puisque le Myanmar s'opposait à sa qualité pour agir à tous égards, y compris pour le motif tenant à la question dont nous discutons¹²⁹.

26. Si cette question n'a pas été implicitement tranchée positivement par votre arrêt de 2022, il appartient alors à la Cour de la trancher maintenant.

27. Contrairement à ce qu'a soutenu M. Talmon¹³⁰, cette question ne se pose pas en termes de droit international coutumier. En effet, il n'est pas question ici d'une obligation particulière nouvelle à charge du Myanmar dont il faudrait fonder l'existence dans la théorie des sources. L'obligation de réparer au bénéfice des victimes est certes une obligation de nature coutumière et elle naît automatiquement du fait illicite, mais la qualité de la Gambie pour en demander l'exécution n'ajoute rien à cette obligation et ne l'alourdit pas. Cette obligation existe indépendamment de la demande de la Gambie concernant son exécution. Et la qualité de la Gambie à cet égard est une conséquence

¹²⁸ Nations Unies, *Documents officiels de l'Assemblée générale, dixième session extraordinaire d'urgence*, 55^e session plénière, 18 septembre 2024, doc. A/ES-10/PV.55, p. 17.

¹²⁹ CR 2026/6, p. 40-41, par. 30 (d'Argent).

¹³⁰ CR 2026/12, p. 35, par. 23-24 (Talmon).

logique du caractère collectif des obligations violées et du fait que les bénéficiaires de celles-ci sont des citoyens (ou plutôt, des sous-citoyens) de l'État responsable.

28. Mesdames et Messieurs les juges, lorsque la Cour a statué dans *Belgique c. Sénégal* ou dans la présente affaire sur la qualité pour agir du demandeur, aucune référence au droit coutumier ne fut faite et aucun examen d'une pratique générale et constante acceptée comme étant de droit ne fut entrepris. La raison en est simplement que la question juridique en cause n'était pas celle de l'existence ou non d'une obligation juridique additionnelle à charge du défendeur.

29. Ainsi, la CDI a pu proposer l'article 48, paragraphe 2, alinéa *b*), sans examen préalable des deux éléments constitutifs de la coutume, et la Cour a consacré cette solution en 2025 sans le faire non plus. Les arguments du Myanmar à cet égard recyclent ses arguments développés au stade des exceptions préliminaires sur la base du principe de la nationalité des réclamations. Ces arguments ont été rejetés par la Cour et ils ne doivent pas être examinés, ou réexaminés, sous l'angle de la théorie des sources et du droit coutumier.

30. Ainsi, le paragraphe 443 de l'avis consultatif sur le changement climatique reflète l'état du droit. Et M. Talmon n'a pas soutenu que vous vous étiez trompés.

31. Le Myanmar a toutefois encore soutenu que la qualité de la Gambie ferait défaut parce que la convention ne reconnaît pas aux victimes le droit d'invoquer la responsabilité du Myanmar et qu'elle ne prévoit pas un droit à la réparation en leur faveur. Comme je l'ai dit, ce droit existe automatiquement en droit coutumier. Selon le Myanmar, cette exigence découlerait de l'article 48, paragraphe 2, alinéa *b*), en ce qu'il concerne « [l]'exécution de l'obligation de réparation conformément aux articles précédents »¹³¹. La simple lecture de cette disposition permet de comprendre que l'argument est erroné. En effet, ce morceau de phrase, « conformément aux articles précédents », signifie seulement que l'exécution de l'obligation de réparation doit avoir lieu conformément aux articles précédents, et non que les articles précédents seraient le fondement de l'obligation de réparation ou de la demande de réparation.

¹³¹ Articles sur la responsabilité de l'État pour fait internationalement illicite, art. 48, par. 2, al. *b*) ; CR 2026/12, p. 35, par. 24 (Talmon).

D. Formes de réparation

32. J'en viens aux formes de réparation sollicitées, au sujet desquelles le Myanmar est resté très discret¹³².

33. À propos de la restitution, la Cour a précisé dans l'affaire relative à des *Usines de pâte à papier* que, « [t]out comme les autres formes de réparation, *la restitution doit être appropriée au préjudice subi, compte tenu de la nature du fait illicite dont il procède* ». Et la Cour cita l'arrêt *Avena* au soutien de cette affirmation¹³³.

34. Les mesures de restitution sollicitées sont particulièrement appropriées au préjudice subi par les victimes du génocide, compte tenu de la nature de ce fait illicite. Il appartient bien sûr à la Cour de l'apprécier.

35. Lors du premier tour, j'ai attiré l'attention de la Cour sur les deux premières mesures de restitution sollicitées. Depuis, vous avez entendu nos témoins : revenir sur leurs terres est leur souhait le plus cher et leur demande est certainement représentative d'un très grand nombre de réfugiés. La demande de la Gambie à cet égard n'est en rien formulée en termes d'obligation de retour pour les réfugiés, mais d'obligation pour le Myanmar de permettre ce retour dans des conditions de dignité et de sécurité, et aussi de restitution (ou de remplacement en nature) des propriétés individuelles et collectives. Et par ailleurs, la troisième mesure de restitution concernant la réunification des familles nous semble aussi essentielle.

36. S'agissant des autres formes de restitution demandées par la Gambie, elles sont tout autant nécessaires et elles sont, selon nous, tout autant « appropriée[s] au préjudice subi, compte tenu de la nature du fait illicite dont il procède »¹³⁴. Ces mesures reflètent les principes fondamentaux et directives de 2005 et je me permets de vous renvoyer à nos écritures à ce sujet.

37. Le Myanmar a soutenu que, en l'absence d'identification plus précise des victimes, la Cour devrait s'abstenir d'ordonner toute réparation¹³⁵. Pourtant, le groupe des victimes est parfaitement identifié et le manque de précision quant à l'ampleur exacte des dommages n'a jamais empêché la

¹³² CR 2026/12, p. 39, par. 40 (Talmon).

¹³³ *Usines de pâte à papier sur le fleuve Uruguay (Argentine c. Uruguay)*, arrêt, C.I.J. Recueil 2010 (I), p. 104, par. 274.

¹³⁴ *Ibid.*

¹³⁵ CR 2026/12, p. 39, par. 40 (Talmon).

Cour d'affirmer dans l'arrêt sur le fond que le défendeur était obligé de réparer, pour autant que l'existence même de préjudices soit avérée¹³⁶ — ce qui est assurément le cas en l'espèce. Pour le reste, la Gambie demande, conformément à la pratique habituelle de la Cour, que l'identification précise des différents préjudices matériels et moraux, leur étendue et leur évaluation soient examinées lors d'une phase ultérieure de la procédure.

38. Toutefois, Monsieur le président, Mesdames et Messieurs les juges, les mesures de restitution sollicitées ne peuvent pas attendre, sous peine de tolérer la persistance d'importants effets préjudiciables du génocide. La Gambie demande donc que les mesures de restitution sollicitées soient ordonnées sans attendre.

3. Assurances et garanties de non-répétition

39. Monsieur le président, Mesdames et Messieurs les juges, j'en arrive à la dernière question : les assurances et garanties de non-répétition. À cet égard, le débat porte sur trois points : le droit de la Gambie d'en demander, la nécessité d'en ordonner et le caractère approprié des mesures sollicitées par la Gambie.

40. Sur le droit de la Gambie de demander des garanties de non-répétition, je peux être bref, compte tenu de ce que j'ai dit lors du premier tour. Cette question n'est pas davantage une question de source coutumière ou de fondement coutumier. Le paragraphe 443 de votre avis consultatif fait également autorité sur ce point.

41. Quant à la nécessité d'en ordonner, il y a lieu de savoir « si les circonstances l'exigent », comme le précise l'article 30, alinéa *b*), des articles de la CDI. Les Parties s'accordent sur cette condition et elles s'accordent aussi sur le fait qu'il appartient à la Cour de l'apprécier. Vous connaissez les positions radicalement différentes des Parties à cet égard. Mais, contrairement à ce qui a été dit¹³⁷, la Gambie n'invoque pas seulement le caractère des obligations violées et la gravité des violations pour justifier sa demande. En plus des éléments dont j'avais fait état lors du premier tour¹³⁸ — et vous vous souviendrez peut-être de ces éléments — j'ajoute ceci : dans votre

¹³⁶ Par exemple, *Activités armées sur le territoire du Congo (République démocratique du Congo c. Ouganda)*, arrêt, C.I.J. Recueil 2005, p. 168.

¹³⁷ CR 2026/12, p. 40, par. 44 (Talmon).

¹³⁸ CR 2026/6, p. 45-47, par. 47-49 (d'Argent).

ordonnance en indication de mesures conservatoires, vous aviez relevé « que le Myanmar ne [vous] a présenté aucune mesure concrète visant spécifiquement à reconnaître et à garantir le droit des Rohingya d'exister en tant que groupe protégé au titre de la convention sur le génocide »¹³⁹. Les choses ont-elles changé depuis lors ? Depuis six ans ? Absolument pas. Pourtant, l'effet contraignant de votre ordonnance va prendre fin avec votre arrêt. Mais les droits que vous avez protégés en attendant de statuer sur le fond sont toujours tout autant gravement menacés. Mesdames et Messieurs les juges, c'est pour cette raison que des garanties de non-répétition s'imposent.

42. Lesquelles ? Celles que vous jugerez appropriées. Le caractère approprié de la mesure que vous ordonnerez s'entend de ce qui est requis pour protéger effectivement les droits des membres du groupe des Rohingya au titre de la convention, afin que l'enfer ne se déchaîne plus dans l'État de Rakhine à leur retour. C'est pour cela qu'il faut garantir à tout le moins qu'ils pourront trouver au Myanmar la place qui leur revient et qu'ils méritent. Vous connaissez la garantie de non-répétition sollicitée par la Gambie et vous savez aussi les raisons discriminatoires pour lesquelles le Myanmar s'y oppose. Peut-être faut-il donc plus. Et vous en avez le pouvoir.

4. Deuxième question de M^{me} la juge Cleveland

43. Monsieur le président, je termine avec quelques éléments de réponse à la deuxième question posée par M^{me} la juge Cleveland en ces termes — je rappelle votre question, Madame la juge :

« Are there decisions of other international courts, tribunals or bodies that either Party considers relevant to the propriety or appropriate scope of such remedies, should those questions arise in this case? »

44. Alors, Madame la juge, la réponse à votre question est potentiellement très large si l'on entend couvrir l'ensemble de la jurisprudence et de la pratique en matière de réparations. Et je limiterai bien sûr la réponse de la Gambie à quelques éléments qui paraissent plus directement pertinents sous l'angle des restitutions immobilières et des garanties de non-répétition.

45. S'agissant des restitutions immobilières, la Commission for Real Property Claims of Displaced Persons and Refugees (CRPC), qui a été créée par les accords de paix de Dayton sur la

¹³⁹ *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. 27, par. 73.*

Bosnie-Herzégovine, est un exemple intéressant dans un contexte post-conflictuel au bénéfice des particuliers¹⁴⁰. Vous connaissez certainement cette pratique. La jurisprudence de la Cour interaméricaine des droits de l'homme offre également des exemples de restitutions immobilières intéressants, notamment au bénéfice de communautés autochtones s'agissant de leurs terres ancestrales¹⁴¹ — et je suis sûr que beaucoup de membres de la Cour sont familiers avec ces affaires. Le retour de victimes de déplacements forcés a également été ordonné au titre de restitution par la Cour de San José¹⁴². La Cour africaine des droits de l'homme et des peuples a de même ordonné la restitution de terres ancestrales à un peuple autochtone¹⁴³.

46. Comme on le sait, la Cour interaméricaine a été pionnière en matière de garanties de non-répétition. Et il est impossible de rapporter ici toute sa riche jurisprudence en la matière. Quelques exemples sont cités en notes infrapaginales¹⁴⁴, y compris dans des affaires où des garanties de non-répétition ont été ordonnées pour corriger des législations en matière de nationalité¹⁴⁵ ou afin d'assurer la reconnaissance juridique des membres d'un groupe particulier¹⁴⁶. La Cour africaine des droits de l'homme et des peuples a également prononcé des mesures visant à la reconnaissance pleine et entière d'une population autochtone¹⁴⁷.

47. Alors, la jurisprudence des cours régionales doit bien entendu être replacée dans le contexte juridique particulier de l'instrument dont elles sont les gardiennes et de la spécificité des affaires tranchées, mais cette jurisprudence offre néanmoins d'intéressants points de comparaison. La présente affaire est à maints égards singulière et sans véritable précédent. Mais les règles existent et,

¹⁴⁰ Hans van Houtte et Iasson Yi, « Due Process In International Mass Claims », *Erasmus Law Review*, vol. 1, n° 2 (2008), p. 65, accessible à l'adresse suivante : https://repub.eur.nl/pub/11452/04-due_process_in_international_mass_claims.pdf.

¹⁴¹ Cour interaméricaine des droits de l'homme (CIADH), *Sawhoyamaya Indigenous Community v. Paraguay, Merits, Reparations and Costs, Judgment of 29 March 2006*.

¹⁴² CIADH, *Ituango Massacres v. Colombia, Preliminary Objections, Merits, Reparations and Costs, Judgment of 1 July 2006*.

¹⁴³ Cour africaine des droits de l'homme et des peuples (AfCHPR), *African Commission on Human and Peoples' Rights v. Kenya (Ogiek case), Merits, Judgment of 26 May 2017 et Reparations, Judgment of 23 June 2022*.

¹⁴⁴ CIADH, *Plan de Sánchez Massacre v. Guatemala, Merits, Judgment of 29 April 2004* ; CIADH, *Rochela Massacre v. Colombia, Merits, Reparations, and Costs, Judgment of 11 May 2007*.

¹⁴⁵ CIADH, *Girls Yean and Bosico v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment of 8 September 2005* ; CIADH, *Expelled Dominicans and Haitians v. Dominican Republic, Preliminary Objections, Merits, Reparations and Costs, Judgment of 28 August 2014*.

¹⁴⁶ CIADH, *Saramaka People v. Suriname, Preliminary Objections, Merits, Reparations, and Costs, Judgment of 28 November 2007*.

¹⁴⁷ AfCHPR, *African Commission on Human and Peoples' Rights v. Kenya (Ogiek case), Merits, Judgment of 26 May 2017 et Reparations, Judgment of 23 June 2022*.

comme je l'ai montré, il n'y a pas d'obstacle à leur application. La Cour est aussi la gardienne, en l'espèce, d'un instrument protecteur des droits humains fondamentaux.

48. À nouveau, je remercie la Cour pour sa bienveillante attention, et puis-je vous demander, Monsieur le président, de bien vouloir donner la parole à S. Exc. l'*Attorney General* Jallow, agent de la République de la Gambie, pour quelques mots de conclusion et pour la lecture des conclusions finales de son pays ?

Le PRÉSIDENT : Je remercie le professeur d'Argent. I now give the floor to the Agent of The Gambia, HE Mr Dawda Jallow. You have the floor, Excellency.

Mr JALLOW:

V. CONCLUDING REMARKS AND FINAL SUBMISSIONS

1. Mr President, esteemed judges, it is my honour to conclude The Gambia's presentation in these oral proceedings and to read out our final submissions.

2. You have heard over the past three weeks the extensive evidence presented by The Gambia of Myanmar's commission of genocide against the Rohingya group in northern Rakhine State, as well as other violations of the 1948 Genocide Convention. This evidence, drawn from independent, credible and authoritative sources is fully convincing that Myanmar committed genocide.

3. The matter is now in the hands of this august Court. We trust that as the guardian of the Genocide Convention, the Court will discharge its duty to uphold the rights of the Rohingya as a protected group under the Convention by holding Myanmar accountable for its violations of the Convention. We further trust that as the principal judicial organ of the United Nations, the Court will do justice to the efforts of the United Nations and so many of its bodies to honour the commitment of the Convention's drafters to prevent and punish genocide.

4. In his opening remarks, Myanmar's Agent stated that a judgment holding Myanmar responsible for genocide would "place an indelible stain" on Myanmar and its people¹⁴⁸. That has the matter backwards — it is the Myanmar military's commission of genocide that has left the stain, and it is only through truth and accountability that the stain can be removed.

¹⁴⁸ CR 2026/7, p. 12, para. 2 (Hlaing).

5. A judgment from this Court declaring the truth about Myanmar's genocide of the Rohingya and ordering appropriate remedies, including measures for reparations, will help to break Myanmar out of its cycle of atrocities and impunities, a cycle that currently has the senior general who oversaw the genocide ruling the country by dint of brute force.

6. The Rohingya people, and the people of Myanmar, deserve justice and accountability. It is our sincere hope and expectation that this honourable Court will deliver.

7. Mr President, Members of the Court, I would like to extend our sincere appreciation for all the efforts of your distinguished Registrar and the entire Registry staff, who handled the complicated logistics for these hearings with impeccable skills, diligence, kindness and dedication. I also want to thank the interpreters for their customary flawless performance, especially given the unique challenges posed at these hearings. And I would also like to thank you, the eminent judges, for your keen and courteous attention throughout these proceedings, and for your thoughtful questions.

8. I will now read out The Gambia's final submissions.

“The Republic of The Gambia respectfully requests the International Court of Justice to adjudge and declare that:

- (1) The Republic of the Union of Myanmar is responsible for genocide against the Rohingya group perpetrated by its security forces and individuals acting under their instruction, direction, or control, during the ‘clearance operations’ of 2016-2018 in northern Rakhine State, in violation of Article I, Article II ((a), (b), (c), and (d)) and Article III (a) of the Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Convention’);
- (2) The Republic of the Union of Myanmar has failed to prevent acts of genocide perpetrated by individuals alongside its security forces during the ‘clearance operations’ of 2016-2018 in northern Rakhine State, in violation of Article I of the Convention;
- (3) The Republic of the Union of Myanmar has directly and publicly incited acts of genocide, in violation of Article III (c) of the Convention;
- (4) The Republic of the Union of Myanmar has failed to punish acts punishable under Article III of the Convention, in violation of Articles I, IV and VI of the Convention;
- (5) The Republic of the Union of Myanmar has failed to enact the necessary legislation to give effect to the provisions of the Convention, in violation of Article V of the Convention;
- (6) As a consequence of its responsibility for these violations of the Convention, the Republic of the Union of Myanmar:
 - (A) must cease forthwith any ongoing internationally wrongful act referred to in paragraphs 3, 4 and 5, in particular:

- (i) take immediate and effective steps to suppress and prevent any direct and public incitement to commit genocide;
 - (ii) take immediate and effective steps to enact specific and complete genocide criminal legislation applicable to all individuals, addressing all the prohibited acts under Article III of the Convention and providing for adequate and severe penalties;
 - (iii) take immediate and effective steps to submit to trial before an independent and effective tribunal, including before an international penal tribunal, those members of its armed forces, police and other security forces or any other persons within its jurisdiction who are suspected on probable grounds of having committed acts of genocide referred to in paragraphs 1 and 2 and punishable under Article III;
- (B) shall provide reparation for the victims of the genocide referred to in paragraph 1 and the acts of genocide referred to in paragraph 2, who are members of the Rohingya group, and shall:
- (i) by way of restitution:
 - (1) allow the safe and dignified return to their place of residence of displaced members of the Rohingya group, whether they are displaced within Myanmar or abroad;
 - (2) return to the Rohingya their individual and collective property, including their land, houses, places of worship and communal life, fields, livestock and crops, or replace them in kind;
 - (3) allow and facilitate the safe and dignified reunification of families;
 - (4) provide for the rehabilitation of the physically or mentally injured members of the Rohingya group; such rehabilitation must include adequate medical and psychological care as well as legal and social services;
 - (5) facilitate the search for the disappeared and assist in the recovery, identification and reburial of the bodies of those killed in accordance with the expressed or presumed wishes of the victims and in accordance with the cultural and religious practices of the Rohingya;
 - (6) ensure the protection of the Rohingya against discrimination and persecution;
 - (7) ensure the right of the Rohingya to identify as such;
 - (8) ensure the liberty and freedom of movement of the Rohingya within Myanmar and remove any restriction on their place of residence; and
 - (9) remove any restriction or discrimination on the employment or access to livelihoods of the Rohingya.
 - (ii) Compensate, and provide any additional forms of reparation, for any harm, loss or injury suffered by the Rohingya victims that is not capable of full reparation by restitution.

- (C) must offer assurances and guarantees of non-repetition by notably providing full and equal citizenship to all members of the Rohingya group who are present in Myanmar or have been displaced due to the events for which Myanmar bears responsibility under the Convention.
- (7) The Republic of the Union of Myanmar has failed to fully and adequately implement the Provisional Measures Order and must:
- (A) by way of restitution as referred to in paragraph 6 (B) (i) above, make good any bodily or mental injury, including death, suffered by members of the Rohingya group, or any material injury caused to their property, as a result of Myanmar's violations of paragraph 86 (1), (2) or (3) of the Order;
 - (B) compensate, and provide any additional forms of reparation, for any harm, loss or injury referred to in paragraph 7 (A) above that is not capable of full reparation by restitution.
- (8) Failing agreement between the Parties on the amount of compensation and any additional forms of reparation referred to in paragraph 6 (B) (ii) and paragraph 7 (B) above, the question will be decided by the Court in a subsequent phase of the proceedings in this case.”

Thank you, Mr President. That concludes The Gambia's final submissions in this matter.

The PRESIDENT: I thank the Agent of The Gambia for the conclusions presented on behalf of his Government. This brings to an end the second round of oral argument of The Gambia, as well as this morning's sitting. The Court will meet again tomorrow, Wednesday 28 January 2026 at 3 p.m., to hear the second round of oral argument of Myanmar.

The sitting is closed.

The Court rose at 12.50 p.m.
