

Corrigé  
Corrected

CR 2026/22

International Court  
of Justice

THE HAGUE

Cour internationale  
de Justice

LA HAYE

YEAR 2026

*Public sitting*

*held on Thursday 29 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)*

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VERBATIM RECORD

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ANNÉE 2026

*Audience publique*

*tenue le jeudi 29 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)*

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COMPTE RENDU

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*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

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*Présents* : M. Iwasawa, président  
M<sup>me</sup> Sebutinde, vice-présidente  
MM. Tomka  
Abraham  
M<sup>me</sup> Xue  
M. Nolte  
M<sup>me</sup> Charlesworth  
MM. Brant  
Gómez Robledo  
M<sup>me</sup> Cleveland  
MM. Aurescu  
Tladi  
Hmoud, juges  
M<sup>me</sup> Pillay  
M. Kress, juges *ad hoc*  
  
M. Gautier, greffier

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Ms Noor Begum,

Mr Mohammed Eliyas,

Ms Fatema Fatema,

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- M<sup>me</sup> Mary Lobo, assistante juridique,
- M<sup>me</sup> Capucine Hamon, avocate à la Cour, membre du barreau de Paris, collaboratrice, cabinet FAR Avocats,

*comme membres de la délégation.*

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

The Court meets this morning to resume hearing the second round of oral argument of Myanmar.

Je donne maintenant la parole à la professeure Alina Miron. Vous avez la parole, Madame.

M<sup>me</sup> MIRON :

## **I. ALLÉGATIONS CONCERNANT LES DESTRUCTIONS MATÉRIELLES ET LA VIOLATION DE L'OBLIGATION DE PUNIR**

1. Monsieur le président, Mesdames et Messieurs de la Cour, ma plaidoirie d'aujourd'hui est consacrée à trois thèmes : 1) l'absence de coopération avec les missions d'enquête des Nations Unies ; 2) les allégations portant sur l'obligation d'enquêter et d'engager éventuellement des poursuites ; et 3) les destructions de villages. Dans ce cadre, je répondrai également aux questions adressées au Myanmar par les juges Charlesworth et Pillay, ainsi que par le juge Gómez Robledo. Et je commencerai par votre question, Monsieur le juge Gómez Robledo.

### **1. Réponse au juge Gómez Robledo**

2. Dans la première partie de votre question — reproduite à l'écran —, le Myanmar est invité à indiquer les raisons qui l'ont conduit à ne pas reconnaître l'autorité et le mandat de certaines instances internationales désignées par le Conseil des droits de l'homme et nommées par son président. Le Myanmar vous est reconnaissant de lui offrir ainsi l'occasion de présenter son point de vue. Et la Cour jugera si c'est un point de vue raisonnable.

#### **A. Raisons de la méfiance du Myanmar**

3. S'agissant du rapporteur spécial sur la situation des droits de l'homme, il faut rappeler que le gouvernement avait donné pleine assistance à M<sup>me</sup> Yanghee Lee pour qu'elle puisse remplir son mandat. Il lui a notamment permis de visiter le pays à six reprises entre 2014 et 2017. Elle a ainsi eu accès à de nombreuses régions, y compris à l'État rakhine. La rupture a été consommée après des déclarations particulièrement maladroites et peu diplomatiques de la part de la rapporteuse spéciale,

faites au lendemain de sa visite au pays en juillet 2017<sup>1</sup>. Si la Cour souhaite connaître la teneur de ces déclarations, elles sont reproduites à l'onglet n° 1.2 du dossier d'audience d'aujourd'hui.

4. Ces déclarations ont offensé le peuple du Myanmar et la représentation nationale<sup>2</sup>, raison pour laquelle le gouvernement avait demandé au Conseil des droits de l'homme de désigner un autre rapporteur spécial. Le Myanmar réitéra en même temps son engagement à continuer à collaborer avec cette instance au sujet des réformes en matière de droits humains. Ses demandes de remplacement ont été réitérées en 2018 et 2019<sup>3</sup>, mais ont été ignorées par le Conseil des droits de l'homme. Un nouveau rapporteur n'a été désigné qu'en 2020, le Conseil portant alors son choix sur un profil particulièrement politique, qui augure mal de son indépendance<sup>4</sup>.

5. Pour ce qui est de l'absence de reconnaissance du FFM et de l'IIMM, le Myanmar a déjà fourni quelques explications à l'écrit et à l'oral<sup>5</sup>. Et je résume ces explications. Plusieurs raisons contribuent en effet à alimenter la grande méfiance du Myanmar à l'égard de ces deux organes subsidiaires créés par le Conseil des droits de l'homme.

6. Premièrement, le Conseil a procédé à leur création en faisant fi du consentement du Myanmar, ainsi que de l'opposition exprimée par plusieurs États, y compris des États de la région. Et, si les résolutions qui mettent en place ces organes ont bien été adoptées sans vote, c'est loin d'être le cas qu'elles aient été adoptées avec l'assentiment des membres du Conseil présents. Les

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<sup>1</sup> Voir Haut-Commissariat des Nations Unies aux droits de l'homme, « End of Mission Statement by Special Rapporteur on the situation of human rights in Myanmar », 21 juillet 2017, accessible à l'adresse suivante : <https://www.ohchr.org/en/statements-and-speeches/2017/07/end-mission-statement-special-rapporteur-situation-human-rights>.

<sup>2</sup> « MP denounces UN Human Rights Special Rapporteur's statement », *The Global New Light of Myanmar*, 25 juillet 2017, p. 2, accessible à l'adresse suivante : [https://uzo.sakura.ne.jp/burma/nlm/nlm\\_data/gnlm\\_2017/gnlm\\_07\\_2017/gnlm\\_25\\_07\\_2017.pdf](https://uzo.sakura.ne.jp/burma/nlm/nlm_data/gnlm_2017/gnlm_07_2017/gnlm_25_07_2017.pdf) ; « Pyithu Hluttaw unanimously denounces UN envoy's rights report », *The Global New Light of Myanmar*, 26 juillet 2017, p. 7, accessible à l'adresse suivante : [https://uzo.sakura.ne.jp/burma/nlm/nlm\\_data/gnlm\\_2017/gnlm\\_07\\_2017/gnlm\\_26\\_07\\_2017.pdf](https://uzo.sakura.ne.jp/burma/nlm/nlm_data/gnlm_2017/gnlm_07_2017/gnlm_26_07_2017.pdf).

<sup>3</sup> Letter from the Permanent Representative of Myanmar to the United Nations Office and other International Organizations to the President of the Human Rights Council, 3 janvier 2018, DM, vol. III, annexe 67 ; Myanmar, « Statement by Ambassador Kyaw Moe Tun, Permanent Representative of Myanmar Item 4: Interactive dialogue with the Special Rapporteur on Situation of Human Rights in Myanmar at the 41st Session of Human Rights Council Geneva », 2 juillet 2019, accessible à l'adresse suivante : [https://myanmar.gov.mm/en/news-media/news/latest-news/-/asset\\_publisher/idasset354/content/statement-by-ambassador-kyaw-moe-tun-permanent-representative-of-myanmar-item-4-interactive-dialogue-with-the-special-rapporteur-on-situation-of-human](https://myanmar.gov.mm/en/news-media/news/latest-news/-/asset_publisher/idasset354/content/statement-by-ambassador-kyaw-moe-tun-permanent-representative-of-myanmar-item-4-interactive-dialogue-with-the-special-rapporteur-on-situation-of-human).

<sup>4</sup> Haut-Commissariat des Nations Unies aux droits de l'homme, « Rapporteur spécial sur la situation des droits de l'homme au Myanmar », accessible à l'adresse suivante : <https://www.ohchr.org/fr/special-procedures/sr-myanmar>.

<sup>5</sup> CMM, par. 6.69-6.70, 12.83-12.84 ; DM, par. 6.5-6.15, 6.27-6.31, 7.8, 12.46.

déclarations des États se dissociant du consensus sont reproduites à l'onglet n° 1.3 du dossier des juges d'aujourd'hui<sup>6</sup>.

7. En faisant fi de ces considérations, le Conseil des droits de l'homme s'est ainsi départi du cadre fixé par l'Assemblée générale des Nations Unies aux missions d'établissement des faits. En effet, la résolution 46/59 de l'Assemblée générale du 9 décembre 1991<sup>7</sup> — qui se trouve à l'onglet n° 1.4 de votre dossier d'audience — insiste sur la nécessité d'obtenir le consentement de l'État territorial au déploiement d'une telle mission, comme sur le fait que l'État territorial a la possibilité de refuser ce consentement<sup>8</sup>. Selon le paragraphe 6 de cette résolution, « [l]'envoi d'une mission d'établissement des faits de l'Organisation des Nations Unies dans le territoire d'un État exige le consentement préalable dudit État, sous réserve des dispositions pertinentes de la Charte des Nations Unies », donc des pouvoirs du Conseil de sécurité.

8. Certes, cette disposition concerne l'accès au territoire de l'État concerné et non l'établissement de la mission en tant que tel. Mais en l'absence d'un tel accès, la mission pourra difficilement remplir sa fonction, qui est de permettre aux organes compétents de l'ONU « d'acquérir une *pleine* connaissance de *tous* les faits pertinents »<sup>9</sup>. Dès lors, le consentement de l'État concerné, sans conditionner la légalité même de la création d'une mission d'établissement des faits, pèse considérablement dans la réussite de son mandat. Imposer une mission à l'État territorial, sans donner le temps à la discussion, facilite peut-être sa création, mais ne garantit pour autant pas son succès.

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<sup>6</sup> OHCHR, Human Rights Council decides to dispatch a fact-finding mission to Myanmar to establish facts on violations, especially in Rakhine State, 24 mars 2017, CMM, vol. VI, annexe 230, p. 121, 123 ; Statement by H.E. Mr Kyaw Moe Tun, Permanent Representative of Myanmar at the consideration of the draft resolution on “the Situation of Human Rights of Rohingya Muslims and other minorities in Myanmar” at the 39th session of the Human Rights Council, Geneva, 27 septembre 2018, DM, vol. IV, annexe 117 ; Speech given by the Chinese delegation at the 39th session of the Human Rights Council, « The Human Rights Situation of Rohingya Muslims and Other Minorities in Myanmar », Draft resolution (A/HRC/39/L.22), Speech before taking action, 27 septembre 2018, DM, vol. IV, annexe 118 ; 37th session of the Human Rights Council, Item 4, Decision, Explanation of vote before the vote on the situation of human rights of Rohingya Muslims and other minorities in Myanmar (A/HRC/39/L.22), 27 septembre 2018, DM, vol. IV, annexe 119 ; Nations Unies, Conseil de sécurité, 8477<sup>e</sup> séance, doc. S/PV.8477, jeudi 28 février 2019 (M. Suan (Myanmar)), p. 20, DM, vol. IV, annexe 123 ; 42nd session of the UN Human Rights Council, Item 4 of the agenda « Dialogue with an international mission after establishing the facts in Myanmar », Speech of the Representative Republic of Belarus, 17 septembre 2019, DM, vol. IV, annexe 125.

<sup>7</sup> Nations Unies, « Déclaration concernant les activités d'établissement des faits de l'Organisation des Nations Unies en vue du maintien de la paix et de la sécurité internationales », résolution adoptée par l'Assemblée générale le 9 décembre 1991, doc. A/RES/46/59, annexe, par. 6.

<sup>8</sup> *Ibid.*, par. 6, 19, 20.

<sup>9</sup> Les italiques sont de nous.

9. Deuxième raison de la méfiance du Myanmar : le Conseil a fait preuve de partialité dans la définition même du mandat du FFM et de l'IIMM. Cette partialité statutaire est manifeste au paragraphe 11 de la résolution portant création du FFM, selon lequel la mission doit « établir les faits et les circonstances concernant les allégations de récentes violations des droits de l'homme *par des membres de l'armée et des forces de sécurité*, et d'atteintes à ces droits, au Myanmar et, en particulier, dans l'État de Rakhine »<sup>10</sup>.

10. Ainsi, le FFM a été mandaté non pas pour établir tous les faits pertinents dans leur complexité, y compris en faisant la part de ceux imputables à l'ARSA, mais uniquement pour établir les faits permettant d'alimenter la possible mise en cause des organes de l'État, en particulier de l'armée et des forces de police.

11. Sous cet aspect aussi, le Conseil a choisi de se départir du cadre fixé par la résolution de l'Assemblée générale que j'ai mentionnée. Le paragraphe 3 de cette résolution prévoit en effet que « [l]es activités d'établissement des faits devraient être menées de manière complète, objective, impartiale »<sup>11</sup>. En outre, selon le paragraphe 5 de la résolution, « [p]our décider si une telle mission doit être entreprise et à quel moment », les organes compétents de l'ONU devraient garder à l'esprit que celle-ci « devrait contribuer à accroître la confiance et à désamorcer le différend ou la situation et non à aggraver cette dernière »<sup>12</sup>.

12. En somme, le FFM et par la suite l'IIMM ont été créés en cultivant le clivage et la confrontation plutôt que la coopération. Le Myanmar n'a eu de cesse de dénoncer le mandat à charge du FFM ; sans succès<sup>13</sup>. Le rapport préliminaire de cet organe en 2018 a achevé de le convaincre de

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<sup>10</sup> Nations Unies, Assemblée générale, Conseil des droits de l'homme, « Situation des droits de l'homme au Myanmar », résolution adoptée le 3 avril 2017, doc. A/HRC/RES/34/22, par. 11 (les italiques sont de nous).

<sup>11</sup> Nations Unies, « Déclaration concernant les activités d'établissement des faits de l'Organisation des Nations Unies en vue du maintien de la paix et de la sécurité internationales », résolution adoptée par l'Assemblée générale le 9 décembre 1991, doc. A/RES/46/59, annexe, par. 3.

<sup>12</sup> *Ibid.*, par. 5.

<sup>13</sup> Nations Unies, Conseil de sécurité, 8477<sup>e</sup> séance, 28 février 2019, doc. S/PV.8477 (M. Suan (Myanmar)), p. 19-20, DM, vol. IV, annexe 123 ; Statement by Ambassador Hau Do Suan, Permanent Representative of the Republic of the Union of Myanmar to the United Nations in response to the Presentation made by Mr Marzuki Darusman, Chair of the former Independent International Fact-finding Mission on Myanmar, New York, 22 octobre 2019, DM, vol. IV, annexe 125 ; Statement by H.E. Mr Kyaw Moe Tun, Permanent Representative of Myanmar at the consideration of the draft resolution on “the Situation of Human Rights of Rohingya Muslims and other minorities in Myanmar” at the 39<sup>th</sup> session of the Human Rights Council, Geneva, 27 septembre 2018, DM, vol. IV, annexe 117.

sa partialité, puisqu'il ignore de façon évidente le rôle de l'ARSA dans les confrontations et dans les pertes de vies humaines et destructions<sup>14</sup>.

13. Visiblement, le Conseil des droits de l'homme n'a pas cherché à coopérer avec le Myanmar dans l'établissement des faits, mais à lui imposer une procédure inquisitoriale et partielle. Pourtant, la coopération est un processus à double sens, dans lequel les deux parties vont à la rencontre de leurs préoccupations réciproques. Or, depuis le début, le Conseil a simplement ignoré les préoccupations légitimes du Myanmar et celui-ci ne devrait pas être le seul à porter la responsabilité de l'échec de ce processus. Et contrairement au professeur Philippe Sands, je ne pense pas que la critique fondée, étayée d'une mission de l'ONU et des résultats de son travail soit de nature à affaiblir des missions similaires, voire l'ONU elle-même. Au contraire, elle peut conduire à améliorer de tels processus.

14. Je rajoute que, depuis 2021, l'IIMM continue ses activités et le Conseil des droits de l'homme continue à examiner les travaux de l'IIMM sans que le gouvernement de Naypyidaw puisse exprimer son point de vue dans cette instance, car il faut rappeler que le gouvernement actuel n'est toujours pas accrédité aux Nations Unies et n'est, dès lors, autorisé à siéger et à prendre la parole dans aucune des instances onusiennes.

Dans ces circonstances, rien ne garantissait au Myanmar que la coopération avec ces organes « aurait permis de corroborer ou, au contraire, d'infirmer les faits allégués »<sup>15</sup>, comme M. le juge Gómez Robledo semble l'espérer.

## **B. L'obligation de coopérer en vertu de la convention**

15. Comme le Myanmar l'a montré dans ses écritures, ni la convention de 1948, ni même la Charte des Nations Unies ne lui imposent une obligation de donner accès au FFM et à l'IIMM à son territoire ou de leur fournir des informations. La simple mention de l'obligation de coopérer dans le préambule de la convention contre le génocide ne constitue pas une base à cet effet. D'une part, le préambule n'a pas de portée normative autonome et ne crée pas d'obligations en lui-même<sup>16</sup>. D'autre

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<sup>14</sup> DM, par. 6.5, 6.10, 12.46, note 1913.

<sup>15</sup> CR 2026/12, p. 45 (juge Gómez Robledo).

<sup>16</sup> *Immunités et procédures pénales (Guinée équatoriale c. France), exceptions préliminaires, arrêt, C.I.J. Recueil 2018 (I), p. 321, par. 92 a contrario ; Sud-Ouest africain (Éthiopie c. Afrique du Sud ; Libéria c. Afrique du Sud), deuxième phase, arrêt, C.I.J. Recueil 1966, p. 34, par. 50 ; Affaire concernant un litige entre la République argentine et la République du Chili relatif au canal de Beagle, 18 février 1977, Recueil des sentences arbitrales (RSA), vol. XXI, p. 89, par. 19.*

part, la coopération est envisagée, mais ce qui est envisagé par le préambule est d'abord une coopération afin d'adopter un cadre juridique adéquat, à savoir la convention elle-même. Si l'obligation de coopération est incluse dans la résolution 96 (I), à laquelle le préambule renvoie, rapportons-nous à cette résolution. Celle-ci

« [r]ecommande d'organiser la collaboration internationale des États en vue de prendre rapidement des mesures préventives contre le crime de génocide et d'en faciliter la répression, et, à cette fin,

*Charge le Conseil économique et social d'entreprendre les études nécessaires en vue de rédiger un projet de Convention sur le crime de génocide »* (les italiques sont de nous).

16. Au-delà du préambule, l'obligation de coopération est certes prévue à l'article VI de la convention, mais elle est également circonscrite par cette disposition car elle envisage le jugement des responsables de génocide par une cour criminelle internationale compétente à l'égard des parties contractantes qui en auront reconnu la juridiction. Comme je l'ai souligné la semaine dernière, dans l'affaire du *Génocide en Bosnie*, la Cour a considéré que la Serbie avait une obligation de coopérer avec le TPIY car, d'une part, il s'agissait d'un organe juridictionnel établi par le Conseil de sécurité, et donc compétent, et que, d'autre part, la Serbie elle-même en avait reconnu la juridiction<sup>17</sup>. Le FFM et l'IIMM ne jouissent d'aucune de ces deux caractéristiques : ce ne sont pas des organes juridictionnels et leur mandat n'a pas été reconnu par le Myanmar. Pour ces raisons, la convention ne crée point d'obligation de coopérer avec eux à la charge du Myanmar.

17. J'ajoute enfin que la Cour elle-même s'est refusée à imposer au Myanmar une quelconque obligation de coopérer avec ces organes, bien que la Gambie vous ait invité à le faire dans le cadre de la procédure en indication de mesures conservatoires<sup>18</sup>.

### **C. La Cour devrait-elle en tirer des conséquences négatives ?**

18. Et, j'en viens maintenant à la dernière partie de la question. Dans cette dernière partie, le juge Gómez Robledo a rappelé l'obligation des parties de coopérer avec la Cour elle-même en matière probatoire, en se référant aux affaires relatives aux *Usines de pâte à papier* et au *Génocide en Croatie*. Cette obligation de coopération dans la manifestation de la vérité existe indubitablement,

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<sup>17</sup> CR 2026/11, p. 41, par. 65 (Miron) ; *Génocide en Bosnie, arrêt 2007*, p. 227-228, 443-447.

<sup>18</sup> *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. 7, par. 10, et p. 8, par. 12 f).

mais elle n'implique nullement une obligation de coopérer avec des organes tiers, comme le FMM et l'IIMM. Dans ces deux affaires, la Cour faisait référence à la mise à disposition de l'autre partie et de la Cour elle-même, sur demande, de certains documents en particulier. En l'espèce, la Gambie n'a point sollicité du Myanmar la mise à disposition de quelconques documents. Au contraire, c'est le Myanmar qui a fait des demandes en ce sens, à la fois à la Gambie et à l'IIMM, demandes auxquelles ils n'ont répondu que d'une manière très parcimonieuse<sup>19</sup>. Mes collègues ont suffisamment mis en lumière les conséquences de l'absence de divulgation d'informations essentielles pour l'appréciation de la fiabilité des preuves présentées par l'État demandeur et je ne vais pas y revenir.

19. Dans ce contexte, à la question finale du juge Gómez Robledo — « Quelles conséquences la Cour devrait-elle tirer du refus de coopérer de la part des autorités du Myanmar avec les organes chargés par les Nations Unies d'enquêter sur les faits ? » —, le Myanmar peut répondre sans détour : aucune conséquence. La Cour ne devrait tirer aucune conséquence de cette absence de coopération, car rien dans la convention, rien dans le droit processuel ne la conduit à adopter des inférences négatives d'une décision qui relève pleinement du pouvoir d'appréciation de l'État défendeur. Et c'est *a fortiori* le cas lorsque l'absence de coopération résulte de motifs aussi légitimes et fondés que ceux que je viens d'exposer.

## **2. L'obligation de punir en droit**

20. J'aborde maintenant l'obligation de punir. En droit, je n'ai pas grand-chose à ajouter à ce que j'ai dit au premier tour. De fait, nos collègues de l'autre côté de la barre ont esquivé le débat juridique, en préférant répondre à des arguments que le Myanmar n'a pas avancés et en déformant grossièrement ceux que le Myanmar a formulés<sup>20</sup>.

21. Égarés dans ces chemins de traverse, nos collègues se sont laissés, de leurs propres aveux, peu de temps pour discuter le droit<sup>21</sup>. Certes, il y a des points de convergence importants. Au moins deux : nous sommes d'accord que l'obligation de punir n'est déclenchée que si la Cour conclut qu'un

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<sup>19</sup> CMM, par. 7.7-7.9 ; DM, par. 6.12-6.15 ; CR 2026/8, p. 35, par. 11 (Staker) ; CR 2026/10, p. 45, par. 40 (Staker).

<sup>20</sup> CR 2026/11, p. 28-29, par. 22-24 (Miron) ; CR 2026/19, p. 70-71, par. 25-26 (d'Argent).

<sup>21</sup> CR 2026/19, p. 71, par. 27 (d'Argent).

génocide a été commis<sup>22</sup>. En cela, ce chef de responsabilité joue effectivement un rôle subsidiaire. Nous sommes aussi d'accord que l'obligation de punir inclut une obligation d'enquêter et, le cas échéant, de poursuivre et de juger. Dans les deux cas, l'État territorial bénéficie d'une marge d'appréciation<sup>23</sup>.

22. Mais les divergences demeurent nombreuses et la Cour devra probablement en trancher quelques-unes :

- a) Sur le plan théorique : l'impunité et la destruction des preuves seraient-elles à même d'étayer le *dolus specialis*<sup>24</sup> ? La Gambie continue à le postuler, sans apporter d'élément au soutien de sa thèse<sup>25</sup>.
- b) Quelles sont les conditions dans lesquelles l'obligation d'enquêter est déclenchée ? Y a-t-il un seuil ou un standard de déclenchement, comme vous l'avez établi dans d'autres affaires<sup>26</sup> ? La Gambie n'en a dit mot au second tour, alors qu'elle a proposé plusieurs standards au cours de la procédure : à l'écrit, elle s'est référée à l'existence d'« éléments suffisants pour savoir qu'un génocide s'est produit » (version originale en anglais : « sufficient basis for knowledge that genocide has occurred »)<sup>27</sup>, elle a également avancé un autre standard, celui des « preuves suffisantes de l'existence d'actes de génocide » (en anglais : « sufficient evidence of genocidal acts »)<sup>28</sup>. À l'audience, elle nous a parlé du standard des « motifs raisonnables » (« reasonable grounds »)<sup>29</sup>. Et dans ses conclusions finales, la Gambie utilise encore un autre concept, puisqu'elle soutient que le Myanmar devrait traduire en justice les membres de ses forces de sécurité et autres personnes relevant de sa juridiction « sur lesquels pèse *une forte présomption* d'avoir commis des actes de génocide » (en anglais original : « suspected on *probable grounds* of having committed acts of genocide »)<sup>30</sup>. En droit, on ne sait plus à quel standard se vouer. En

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<sup>22</sup> CR 2026/19, p. 65, par. 7 (d'Argent).

<sup>23</sup> CR 2026/11, p. 30, par. 29 (Miron) et CR 2026/19, p. 69, par. 20 (d'Argent).

<sup>24</sup> CR 2026/11, p. 22, par. 2, et p. 23, par. 5 (Miron).

<sup>25</sup> CR 2026/19, p. 64-65, par. 4-6 (d'Argent).

<sup>26</sup> CR 2026/11, p. 30-32, par. 30-36 (Miron).

<sup>27</sup> MG, par. 4.70.

<sup>28</sup> *Ibid.*

<sup>29</sup> CR 2026/6, p. 15-16, par. 15 (Jones).

<sup>30</sup> CR 2026/20, p. 58, par. 8, point (6) (A) (iii) (Jallow) (les italiques sont de nous).

pratique, on ne sait si, selon la Gambie, il suffit que des accusations de génocide soient formulées par des ONG ou même le FFM pour que l'obligation de punir soit déclenchée.

c) Et troisième question, qui nous oppose encore. Faut-il par ailleurs que l'État qui se prévaut de la violation de cette obligation ait identifié au préalable les personnes sur lesquelles l'État territorial est censé enquêter ? Comme je l'ai dit au premier tour, votre jurisprudence va en ce sens. Mais au débat juridique, M. Pierre d'Argent a préféré l'exclamation rhétorique : « faut-il vraiment répondre à cet argument ? »<sup>31</sup>. La Cour le dira.

23. Je note toutefois que, dans ses pièces écrites, la Gambie avait nommément identifié six personnes, en exigeant que le Myanmar engage des poursuites à leur rencontre, sur le fondement spécifique de la responsabilité du supérieur hiérarchique<sup>32</sup>. Ces six personnes étaient par ailleurs nommément visées dans ses conclusions formulées durant la phase écrite<sup>33</sup>. À l'oral, M. d'Argent s'est livré à des insinuations quant aux raisons pour lesquelles on mettait en doute l'existence d'une responsabilité du supérieur hiérarchique dans la convention. Il n'en reste pas moins que les noms des six commandants ont disparu des conclusions finales lues à la fin de l'audience par l'agent de la Gambie<sup>34</sup>. Il faut en déduire que la Gambie a renoncé aux demandes spécifiques les concernant.

### **3. L'obligation d'enquêter dans les faits**

24. Voilà pour l'obligation de punir en droit. Qu'en est-il dans les faits ? Le Myanmar avait étayé à l'écrit, y compris dans le cadre des rapports périodiques sur l'exécution des mesures conservatoires, ses efforts en matière d'enquête et de poursuites, ainsi que les obstacles rencontrés. Les railleries de la Gambie m'obligent à revenir sur ce point et je le ferai en examinant trois organes, dont les travaux sont imbriqués : la commission d'enquête indépendante, l'organe chargé des enquêtes et des poursuites pénales, et les cours martiales.

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<sup>31</sup> CR 2026/19, p. 70, par. 24 (d'Argent).

<sup>32</sup> MG, par. 10.2-10.8 ; RG, par. 8.13-8.14.

<sup>33</sup> RG, p. 347, par. 2) A) ii).

<sup>34</sup> CR 2026/20, p. 57-59, par. 8 (Jallow).

## A. Les investigations préalables de la commission d'enquête indépendante

25. D'abord, la commission d'enquête indépendante. Elle a été créée en 2018 par le Gouvernement du Myanmar. Il s'agissait d'une commission hybride de quatre membres : deux experts internationaux et deux ressortissants du Myanmar<sup>35</sup> — et je me permets de les nommer :

- M<sup>me</sup> Rosario Manalo, ancienne ambassadrice des Philippines, ancienne présidente et rapporteuse du Comité pour l'élimination de la discrimination à l'égard des femmes (CEDAW). Elle fut la présidente de la commission ;
- M. Kenzo Oshima, ancien ambassadeur du Japon et Secrétaire général adjoint des Nations Unies aux affaires humanitaires.

Voilà pour les membres extérieurs. Pour les membres nationaux :

- M. le juge U Mya Theinn, ancien président de la Cour suprême du Myanmar ; et
- M. le professeur Aung Tun Thet, coordonnateur en chef de l'entreprise de l'Union pour l'assistance humanitaire, la réinstallation et le développement dans l'État de Rakhine<sup>36</sup>.

26. La commission était assistée par des experts juridiques et techniques nationaux et internationaux sélectionnés sur la base de leurs connaissances et de leur expérience.

27. La Gambie en a vigoureusement contesté l'indépendance. Je ne pense pas nécessaire de faire étalage des CV respectifs de leurs membres pour vous convaincre du sérieux de cette commission. Son travail parle pour elle-même.

28. Le mandat de la commission était bien plus englobant — et moins partial, il faut le dire — que celui du FFM. En effet, il n'y avait pas de parti pris de responsabilité puisqu'elle devait

« investigate allegations of human rights violations and related issues following the terrorist attacks by the Arakan Rohingya Salvation Army in Rakhine State with a view to seeking accountability and formulating recommendations on steps to be taken to ensure peace and stability in Rakhine State »<sup>37</sup>.

29. La commission n'avait pas le pouvoir d'établir les faits d'une manière définitive, ni d'engager elle-même des poursuites. Elle devait réunir et recouper des informations de sources différentes pour faire des recommandations aux organes compétents. Ces recommandations devaient

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<sup>35</sup> CMM, par. 12.104.

<sup>36</sup> MG, par. 11.87, note 1547.

<sup>37</sup> « Republic of the Union of Myanmar, *Independent Commission of Enquiry, Mandate* », MG, vol. VI, annexe 164. Voir aussi « Republic of the Union of Myanmar, *Independent Commission of Enquiry, Executive Summary* », 21 janvier 2020, p. 1, MG, vol. VI, annexe 167 (ci-après, « MG, vol. VI, annexe 167 »).

se poursuivre par des investigations plus poussées, en vue du déclenchement des poursuites. La commission a bénéficié du pouvoir d'enquête étendu, y compris en matière de recherche de documents, de convocation de témoins ou encore d'inspections *in situ*.

30. Les enquêtes ont porté prioritairement sur six allégations graves : les tueries de masse, les viols, les destructions de biens, les pillages, la torture et les déplacements forcés<sup>38</sup>. La commission a mis en place deux groupes de travail<sup>39</sup>. Le premier s'est concentré sur des entretiens avec des témoins dans 13 lieux spécifiques (qui englobaient à peu près une soixantaine de villages) où des incidents majeurs avaient été signalés<sup>40</sup>. Elle a interrogé plus de 1 000 résidents<sup>41</sup>. La seconde équipe a mené des entretiens avec 298 témoins, dont 249 villageois et 49 officiers de sécurité (à la fois des militaires et des policiers)<sup>42</sup>.

31. Elle a lancé des appels à contributions en anglais, en langue du Myanmar, en langue rakhine et en bengali. Et elle a recueilli des déclarations provenant de diverses communautés : musulmanes, mais aussi d'autres minorités ethniques<sup>43</sup>, et également de la part des membres des forces de sécurité (à la fois la Tatmadaw et la police)<sup>44</sup>. Certains entretiens, notamment auprès de personnes qui se trouvaient dans des camps de réfugiés au Bangladesh, ont toutefois dû être menés par téléphone, car ni le Bangladesh ni les organisations internationales compétentes ne lui ont fourni l'assistance nécessaire pour organiser son travail dans le camp<sup>45</sup>.

32. La commission a souligné par ailleurs l'importance de recouper les déclarations recueillies avec d'autres informations, en notant que les témoins ne se souviennent pas toujours de toute la vérité ou que ces témoins peuvent être sous influence<sup>46</sup>. Les équipes se sont rendues sur les lieux des incidents pour vérifier les allégations formulées<sup>47</sup>. Outre les témoignages, la commission a intégré

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<sup>38</sup> MG, vol. VI, annexe 167, p. 5-6.

<sup>39</sup> *Ibid.*, p. 5.

<sup>40</sup> *Ibid.*

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*, p. 7.

<sup>43</sup> *Ibid.*, p. 7.

<sup>44</sup> *Ibid.*

<sup>45</sup> *Ibid.*, p. 8.

<sup>46</sup> *Ibid.*, p. 11.

<sup>47</sup> *Ibid.*, p. 5-7. Voir aussi « Final Report of ICOE », annexe 16, p. 1, accessible à l'adresse suivante : <https://www.legal-tools.org/?search=rdo4i9ld> ; *ibid.* annexe 19, p. 18.

des données administratives, des rapports de police et des informations sur les tactiques de l'ARSA pour formuler ses conclusions<sup>48</sup>.

33. Preuve de son impartialité, la commission a estimé que de graves violations des droits de l'homme avaient été commises durant les opérations, dont certaines impliquaient vraisemblablement des membres des forces de sécurité du Myanmar<sup>49</sup>. L'onglet n° 1.5 du dossier des juges reproduit les extraits les plus significatifs du résumé analytique de cette commission. Le résumé a été publié sur le site de la présidence du Myanmar le 20 janvier 2020<sup>50</sup>, ensemble avec les annexes 16 à 28 qui résument la situation localité par localité<sup>51</sup>. Le rapport final de la commission, ainsi que les annexes 1 à 15 et 29 à 31 sont restés confidentiels, mais les documents qui sont disponibles permettent déjà de juger du sérieux du travail de la commission.

34. Après avoir mis en évidence les possibles violations, la commission a conclu que ces faits devaient

« be further investigated, verified, and thereafter prosecuted by Myanmar's national legal processes, in particular its military justice system. ... The incidents in the 13 areas contained in the main report will require more comprehensive investigations by the Myanmar authorities and Myanmar's Defence Services. »<sup>52</sup>

35. Voici l'un des organes que la Gambie qualifie d'institution « bidon »<sup>53</sup>. L'est-elle ? Vraiment ? J'ose la comparaison avec le FFM à l'aune des trois critères utilisés par la Gambie pour jauger la crédibilité d'un rapport — ces trois critères étant, vous vous rappelez peut-être, le soin mis dans sa préparation, la diversité de ses sources et l'indépendance des personnes chargées de son élaboration<sup>54</sup>. Des éléments dans la composition hybride de la commission la rendraient-ils moins indépendante que le FFM ? Lesquels ? Ses méthodes de travail seraient-elles moins fiables ? Pourquoi ? Ses sources seraient-elles moins diversifiées ? Au contraire, car le FMM s'est appuyé

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<sup>48</sup> MG, vol. VI, annexe 167, p. 4-5.

<sup>49</sup> Premier rapport du Myanmar sur les mesures conservatoires (ci-après, « premier rapport »), par. 83.

<sup>50</sup> MG, vol. VI, annexe 167.

<sup>51</sup> Myanmar President Office, « Annexes 16-28 to the Final Report of the Independent Commission of Enquiry (ICOE) », 25 janvier 2020, *Facebook*, accessible à l'adresse suivante : <https://www.facebook.com/100064686607274/posts/2640375802676806/>. Voir aussi « Final Report of ICOE », annexes 16-28, accessible à l'adresse suivante : <https://www.legal-tools.org/?search=rdo4i9ld>.

<sup>52</sup> MG, vol. VI, annexe 167, p. 10. Voir aussi CMM, par. 12.107 ; DM, par. 12.25.

<sup>53</sup> CR 2026/19, p. 68, par. 16 (d'Argent). Voir aussi MG, par. 11.4, 12.101, 11.87-11.95.

<sup>54</sup> CR 2026/18, p. 36, par. 20 (Reichler).

quasi exclusivement sur des témoignages recueillis dans les camps, alors que la commission a mobilisé une variété de sources de tous bords, y compris des témoignages recueillis dans les camps, même si ce n'était pas dans des situations idéales. Quant au résultat final, il montre l'impartialité de l'approche retenue par la commission.

36. Contrairement au FFM, la commission n'a pas instruit uniquement à charge, mais a examiné les responsabilités possibles de tous les côtés. Dans ce contexte, les reproches que lui fait la Gambie, en reprenant d'ailleurs celles que lui fait l'IIMM, sont dérisoires et témoignent hélas d'un double standard<sup>55</sup> : un membre de la commission aurait fait des déclarations litigieuses et un membre du Secrétariat aurait fait partie de l'équipe CIJ du Myanmar, ce qui attesterait selon la Gambie d'un conflit d'intérêts majeur<sup>56</sup>. Que dire alors du fait que le président de l'IIMM a fourni un *affidavit* au soutien de la position de la Gambie<sup>57</sup> et que des membres des ONG qui ont fourni des éléments de preuve à la Gambie sont également membres de sa délégation devant la Cour ?

## **B. Les enquêtes et poursuites de l'organe chargé des enquêtes et des poursuites pénales**

37. Les conclusions de la commission ont servi de base à la création en 2020 de l'organe chargé des enquêtes et des poursuites pénales (*Criminal Investigation and Prosecution Body*)<sup>58</sup>. La composition et le mandat de cet organe sont reproduits à l'onglet n° 1.6 du dossier des juges. Il est composé de représentants des autorités civiles responsables du maintien de l'ordre et des poursuites, incluant la police du Myanmar et le département des poursuites du bureau de l'*Attorney General*. Sa compétence s'étend aux membres et collaborateurs de l'ARSA, à la police et à des civils. En revanche, elle ne s'exerce pas à l'égard des membres de la Tatmadaw ayant agi dans le cadre de leurs missions, qui relèvent du système de justice militaire — et j'y reviendrai juste après.

38. Concrètement, l'organe doit traiter les 139 cas identifiés par la commission d'enquête indépendante. L'état de ses travaux est le suivant — et je m'excuse un peu pour cette énumération :

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<sup>55</sup> MG, par. 11.93 ; IIMM, « Efforts to Investigate and Punish Sexual and Gender-Based Crimes Committed Against Rohingya: Evidence Analysis », 27 mars 2024, par. 72, RG, vol. II, annexe 8 ; MG, par. 11.92.

<sup>56</sup> MG, par. 11.92.

<sup>57</sup> Dossier de plaidoiries de la Gambie, 12 janvier 2026, projections PR-13 et PR-14.

<sup>58</sup> CMM, par. 12.110.

- Sur les 87 dossiers concernant les membres de l'ARSA, 12 affaires ont abouti à des condamnations à des peines d'emprisonnement allant de 10 à 20 ans<sup>59</sup>. Onze dossiers ont été classés sans suite faute de preuves<sup>60</sup>.
- Sur les 29 dossiers concernant les civils, trois affaires ont abouti à des condamnations à des peines d'emprisonnement<sup>61</sup>. Et, en mai 2020, cinq hommes ont été condamnés à dix ans d'emprisonnement pour l'incendie volontaire du village de Chut Pyin<sup>62</sup>.
- Vingt-trois dossiers concernent la police : certains ont été classés sans suite, tandis que pour d'autres les poursuites ont été suspendues<sup>63</sup>. Deux affaires ont abouti à des sanctions disciplinaires<sup>64</sup>. Et donc, sur ce point, je confirme que le décompte fait par M. d'Argent de ces derniers cas — concernant la police — était juste<sup>65</sup>. Mais ce décompte laisse sous silence les autres investigations et les raisons pour lesquelles certaines investigations sont bloquées, à savoir le fait que des policiers visés sont en fuite et l'instabilité sécuritaire dans le nord de l'État rakhine rend difficiles par ailleurs d'autres investigations *in situ*<sup>66</sup>. L'organe continue néanmoins ses travaux.

### C. Les poursuites devant les cours martiales

39. Des militaires ont été poursuivis devant les cours martiales, et je ne reviens pas ici sur les fondements de la compétence de ces cours à l'égard des militaires<sup>67</sup>. Je ne reviens pas non plus sur les condamnations des quatre officiers et trois soldats pour le massacre d'Inn Din<sup>68</sup>.

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<sup>59</sup> Troisième rapport, par. 29 ; quatrième rapport, par. 42.

<sup>60</sup> Quatrième rapport, par. 42.

<sup>61</sup> *Ibid.*, par. 44 ; sixième rapport, par. 26.

<sup>62</sup> Deuxième rapport, par. 48.

<sup>63</sup> *Ibid.*, par. 47 ; cinquième rapport, par. 44.

<sup>64</sup> Troisième rapport, par. 30 ; quatrième rapport, par. 39.

<sup>65</sup> CR 2026/4, p. 57, par. 37 (d'Argent).

<sup>66</sup> Douzième rapport, par. 23.

<sup>67</sup> Voir DM, par. 12.19, note 1870 ; premier rapport, par. 87.

<sup>68</sup> DM, par. 12.19, note 1870, et CMM, par. 9.62-9.63.

<sup>68</sup> CMM, par. 9.62-9.63.

40. Sur les recommandations de la commission d'enquête indépendante<sup>69</sup>, la cour martiale a jugé et condamné d'autres militaires. Je résume rapidement l'état de ces condamnations, mais à nouveau je confirme l'exactitude du décompte de M. Pierre d'Argent<sup>70</sup>.

41. Pour l'affaire de Gu Dar Pyin : le verdict a établi qu'un adjudant avait violé les règles d'engagement et que deux officiers avaient manqué à leur devoir de supervision. Ces personnes ont été condamnées à un an de prison (avec travaux forcés) et l'officier supérieur a été sanctionné par le retrait d'une année de service pour le calcul de sa retraite<sup>71</sup> — donc sanction disciplinaire.

42. Pour Maung Nu : un officier a été condamné pour négligence et deux soldats pour vol et usage criminel de la force contre des femmes, et les peines respectives ont été d'un et deux ans de prison avec travaux forcés<sup>72</sup>.

43. Pour Chut Pyin, l'affaire est restée au stade de l'enquête préliminaire. Une commission spéciale d'enquête a été reconstituée et s'est rendue à Buthidaung en février-mars 2023 pour recueillir des témoignages de civils (à la fois bengalis et rakhine)<sup>73</sup>. La commission d'enquête a contacté les administrateurs locaux pour obtenir plus d'informations. Il a été établi que les habitants de ce village et des environs ne sont pas revenus et ne vivent pas à proximité, ce qui empêcha l'enquête de progresser<sup>74</sup>. Le dossier reste toutefois ouvert.

44. La Cour jugera si nécessaire, sur la base de cet état des poursuites, si les enquêtes menées ont été « bidon ». En revanche, dans son plaidoyer, M. Pierre d'Argent ne s'est pas référé à ces enquêtes mais il a conclu en mettant en avant « l'impunité totale des commanditaires »<sup>75</sup> présumés. Il ne s'est pas attardé sur les raisons juridiques et factuelles d'une obligation de punir à leur égard.

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<sup>69</sup> MNA, « Tatmadaw releases statement on ICOE's Final Report », *The Global New Light of Myanmar*, 23 janvier 2020, p. 10, vol. IX, annexe 437. Voir également MNA, « Tatmadaw releases statement on ICOE Report », *The Global New Light of Myanmar*, 9 mai 2020, p. 2, vol. IX, annexe 438 ; Tatmadaw True News Information Team, « Press Statement of Tatmadaw True News Information Team about allegations regarding villages in Maungdaw area », *The Global New Light of Myanmar*, 15 septembre 2020, p. 3, vol. IX, annexe 440.

<sup>70</sup> CR 2026/4, p. 58, par. 40-42 (d'Argent).

<sup>71</sup> Premier rapport, par. 103 ; deuxième rapport, par. 52-53 ; troisième rapport, par. 32.

<sup>72</sup> Deuxième rapport, par. 54-55 ; troisième rapport, par. 34-36.

<sup>73</sup> Septième rapport, par. 31-33.

<sup>74</sup> Huitième rapport, par. 65 ; neuvième rapport, par. 26 ; dixième rapport, par. 42.

<sup>75</sup> CR 2026/4, p. 59, par. 44 (d'Argent).

#### **D. La question commune des juges Charlesworth et Pillay**

45. Après ce tour d’horizon des organes impliqués dans le processus de répression, je peux tenter de répondre plus directement à la question commune des juges Charlesworth et Pillay, reproduite à l’écran. Elle concerne les mesures prises par le Myanmar pour enquêter sur les allégations de violences sexuelles et leur résultat<sup>76</sup>.

46. Les enquêtes judiciaires concernant les allégations de violences sexuelles progressent difficilement, en l’absence de plaintes de victimes (surtout pour celles qui se trouvent en dehors du territoire du Myanmar) ou lorsque des plaintes ont été déposées longtemps après les faits. Sur ce point précis, je note aussi que la commission d’enquête indépendante n’avait pas reçu d’informations concluantes durant ses investigations puisque, selon le résumé analytique qui se trouve à l’onglet n° 1.5 de votre dossier d’audiences :

« Rape:

There were no credible statements on allegations of gang rape committed by Myanmar’s security forces. Although some interviewees mentioned rape cases, these were all second-hand information heard from someone else. Additionally, some female witnesses noted that they were searched by male Myanmar’s Defence Services personnel as a part of the operations. This behavior may amount to constitute sexual violence. »<sup>77</sup>

47. Pour répondre donc plus précisément — encore que ce n’est pas suffisamment précis —, selon les informations que le Gouvernement du Myanmar nous a transmises en vue de répondre à votre question, je peux dire à la Cour qu’une plainte a été déposée contre un caporal et un soldat pour inconduite sexuelle. L’incident s’est produit le 27 août 2017 à Maung Nu. À l’issue de l’enquête, le caporal a été relevé de ses fonctions et condamné à trois ans d’emprisonnement. Le soldat a été condamné à un an d’emprisonnement dans une prison militaire. En outre, une mesure disciplinaire a été ordonnée à l’encontre du major du quartier général du commandement de Yangon, qui était commandant de colonne lors de l’incident. Cette information nous a été fournie par lettre du ministère de la défense et le Myanmar se tient à la disposition de la Cour pour lui transmettre un document à l’appui, si nécessaire.

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<sup>76</sup> CR 2026/12, p. 44, par. 4 (Charlesworth).

<sup>77</sup> MG, vol. VI, annexe 167, p. 6. Voir aussi *ibid.*, note 51 *supra*, annexe 17, p. 5 ; *ibid.*, annexe 18, p. 11 ; *ibid.*, annexe 19, p. 11-12, 21 ; *ibid.*, annexe 20, p. 32 ; *ibid.*, annexe 21, p. 5 ; *ibid.*, annexe 24, p. 6 ; *ibid.*, annexe 25, p. 4 ; *ibid.*, annexe 27, p. 2 ; *ibid.*, annexe 28, p. 7, 13, 26, 28.

48. La justice — toujours à propos des violences sexuelles — a également instruit une plainte pour viol d'une femme rakhine par trois soldats, mais l'incident serait survenu dans le township de Rathedaung en 2020, donc dans une période qui ne concerne pas directement les opérations. Je mentionne toutefois que, selon les informations fournies par le Myanmar dans un des rapports sur l'exécution des mesures conservatoires, les soldats ont été traduits devant une cour martiale pour des infractions de violences sexuelles et condamnés à 20 ans d'emprisonnement assortis de travaux forcés<sup>78</sup>. Voilà pour la réponse à la question concernant les investigations relatives aux violences sexuelles.

#### 4. Destruction des villages

49. Monsieur le président, j'en viens maintenant au dernier thème de ma présentation qui concerne la destruction de villages. Cela me permettra de répondre à la question commune des juges Charlesworth et Pillay, portant sur le décompte des destructions de villages et les responsabilités respectives<sup>79</sup>. En réalité, c'est moins une réponse qu'une explication de l'impossibilité pour le Myanmar de vous apporter une réponse précise que je suis amenée à donner.

50. Le décompte fait par la Gambie des villages détruits se base sur un document, fourni par l'UNOSAT<sup>80</sup>, qui décompte 392 villages bengalis qui auraient été partiellement ou totalement détruits dans le nord de l'État rakhine entre août 2017 et mars 2018<sup>81</sup>. La date de la fin de collecte des données est donc mars 2018, et non octobre 2018, qui est la date de la publication de la carte — mais ceci n'a pas d'incidence majeure. Je reviendrai sur ce document dans quelques instants.

51. Permettez-moi toutefois de rappeler que le Myanmar n'a jamais nié l'existence de villages affectés durant les opérations menées contre l'ARSA. Les informations collectées par le gouvernement *in situ* restent toutefois incomplètes. Immédiatement après les incidents, la commission nationale des droits de l'homme a effectué une visite sur le terrain entre le 24 et le

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<sup>78</sup> Deuxième rapport, par. 94 ; troisième rapport, par. 58.

<sup>79</sup> CR 2026/12, p. 44, par. 2 (Charlesworth).

<sup>80</sup> United Nations Institute for Training and Research (UNITAR), « Affected settlements in Buthidaung, Maungdaw and Rathedaung Townships of Rakhine State in Myanmar », 18 octobre 2018. MG, vol. III, annexe 70.

<sup>81</sup> RG, par. 1.10 et 9.79, et MG, fig. 1.3 ; voir aussi RG, par. 1.11 et 9.52 ; CR 2026/3, p. 24-25, par. 48 (Loewenstein) et CR 2026/19, p. 48-49, par. 32 (Loewenstein).

27 septembre 2017<sup>82</sup>. Cependant, la dégradation de la situation sécuritaire dans la région, à partir de 2019, et surtout 2021, a rendu impossibles la poursuite et l'approfondissement des enquêtes.

52. Ainsi, pour en revenir aux travaux de la commission, en septembre 2017, la commission nationale des droits de l'homme a décompté 192 villages ou quartiers détruits partiellement ou totalement. Le rapport mentionne aussi 29 000 habitations détruites sur 104 000 existantes. Cela étant, le décompte ne vaut que pour le district de Maungdaw, alors que l'UNOSAT inclut aussi Buthidaung et Rathedaung. De plus, le rapport de la commission décompte les villages bengalis, ethniques et mixtes, tandis que l'UNOSAT ne répertorie que les villages bengalis.

53. La Cour est également en possession du rapport sommaire de la commission d'enquête indépendante dont je vous ai déjà parlé. On y apprend notamment ceci :

« Many witnesses stated that those houses and other structures were deliberately set on fire by Myanmar's security forces personnel and even by local ethnic nationals (local vigilantes). It was also noted that witnesses stated that ARSA-fighters themselves torched their own houses and other Muslims' houses. Interviewees' information suggests that most destroyed village structures were burned down after ARSA-fighters and Muslim residents left. »<sup>83</sup>

54. Ce constat découle des témoignages qui ont été recueillis par la commission d'enquête indépendante dans les 13 localités où des incidents majeurs ont eu lieu en août 2017 dans les cantons de Maungdaw, Buthidaung et Rathedaung. Parmi ces localités se trouvent notamment les trois « localités principales » — Min Gyi, Maung Nu et Chut Pyin.

55. Les travaux de la commission permettent donc de constater la difficulté d'identifier les responsables des incidents. D'une manière générale, tandis que les témoins rakhine, hindous ou Mro pointent du doigt la responsabilité de l'ARSA ou des Bengalis, les témoins musulmans accusent à leur tour les forces de sécurité ou des civils rakhine. Pour d'autres, c'est l'ARSA qui est responsable des ravages. Ainsi, selon deux témoins musulmans du nord de Maungdaw — et je cite à nouveau une des annexes disponibles de la commission :

« ARSA terrorists were heard to have torched Thet Ke Pyin and Nang Da Khali villages, during the first week of September. Village elders from the two villages had

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<sup>82</sup> Myanmar National Human Rights Commission, « Field Visit Report by the Commission's team on the terrorist attack incidents in Maungdaw and Buthidaung Townships in Rakhine State », 2 octobre 2017. DM, vol. III, annexe 62.

<sup>83</sup> MG, vol. VI, annexe 167, p. 6.

provided a list of villagers who participated in the attack on the police outpost, and ARSA burnt the two villages as a revenge. »<sup>84</sup>

56. Les documents sur lesquels s'appuie la Gambie n'apportent pas plus de lumière, que ce soit sur les responsabilités ou sur les chiffres exacts avancés. La Gambie n'en affirme pas moins que le document fourni par l'UNOSAT du 18 octobre 2018 constitue la preuve incontestable de ses allégations et elle ajoute : « Did Myanmar present expert testimony showing that UNOSAT was wrong? No ».

57. Avant de répondre à cette question, demandons-nous d'abord en quoi consiste le travail de l'UNOSAT. Tout simplement à comparer des images satellites d'une même localité à des dates différentes, afin d'interpréter les différences constatées. L'UNOSAT n'a pas vocation à se prononcer sur les éventuelles responsabilités concernant ses constats. On lit sur la légende de la carte de 2018 : « Satellite analysis combined with information on certain locations indicate that approximately 392 villages from a total number of 993 were affected. » Pas d'attribution de responsabilité.

58. Dès lors, ce constat fait par l'UNOSAT ne nous apprend strictement rien sur les responsabilités de ces destructions.

59. Les conseils de la Gambie ne s'embarrassent pas d'un tel détail. Selon eux, les autorités du Myanmar sont nécessairement à l'origine de tous les dégâts causés par les incendies. Ils considèrent que tout village touché d'une façon ou d'une autre par un incendie est la conséquence des opérations militaires et donc imputable au Myanmar.

60. Pourtant, nous venons de voir que les investigations et les témoignages recueillis sur le terrain ne permettent pas tant de certitude. Loin de là. Le document de l'UNOSAT utilisé par la Gambie elle-même va dans le même sens.

61. L'encadré agrandi que vous avez sous les yeux montre deux images satellite de Hpaw Ti Kaung, la première le 16 septembre 2017 et la deuxième le 25 septembre 2017. On voit que ce village est resté intact au moins jusqu'au 16 septembre 2017.

62. De la même manière, dans un autre document fourni par l'UNOSAT, les données de détection des incendies dans la zone indiquée dans l'encadré montrent deux épisodes

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<sup>84</sup> « Incident 13: Northern Maungdaw » (Thayet Oat village tract incident), ICOE, annexe 28, p. 46-47, accessible à l'adresse suivante : <https://www.legal-tools.org/doc/qlsogi/>, dernière consultation le 26 janvier 2026.

d'intensification<sup>85</sup>. Le premier épisode entre le 25 août et le 29 août — donc durant la période des opérations — et le deuxième entre le 14 septembre et le 18 septembre 2017.

63. Or, le Myanmar a démontré que les opérations militaires ont pris fin le 5 septembre 2017<sup>86</sup>. La destruction du village que l'on vient de voir et le deuxième épisode d'incendies intenses sont donc postérieurs à ces opérations. Sur quels fondements la Gambie se fonde-t-elle pour les imputer au Myanmar ?

64. Ses conseils ont tenté d'esquiver cette difficulté par un raisonnement circulaire : puisqu'il y a eu des incendies, c'est que les opérations militaires ont continué, dès lors, ces incendies sont imputables au Myanmar<sup>87</sup>...

### 5. La loyauté des débats et le contradictoire

65. Quelques mots maintenant de l'injonction systématique faite au Myanmar de prouver le contraire de chacun des fruits du raisonnement circulaire de la Gambie, que celle-ci présente comme une vérité intangible.

66. Ainsi, selon les conseils de la Gambie, les chiffres avancés par l'UNOSAT sont forcément vrais parce que c'est l'UNOSAT qui le dit. Ces chiffres sont d'autant plus vrais que l'IIMM les reprend à son compte. Ils sont tellement vrais que la Gambie y assoit l'essentiel de ses plaidoiries sur ce sujet<sup>88</sup>.

67. Mais au-delà même de la contestation des faits et des chiffres avancés, c'est fondamentalement, il me semble, une question de loyauté des débats et de plein respect du principe du contradictoire qui se pose ici.

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<sup>85</sup> UNOSAT et UNITAR, « Fire Detection in Buthidaung, Maungdaw, and Rathedaung Townships of Rakhine State in Myanmar », 18 décembre 2017, accessible à l'adresse suivante : <https://unosat.org/products/1195>.

<sup>86</sup> CMM, par. 3.87, 13.105, 13.107 ; CMM, vol. VI, annexe 239, Myawady in English, « The stance on the terrorist attacks of the extremist Bengalis in Buthidaung-Maungdaw region in Rakhine State », 25 octobre 2017, p. 18, par. 5, vol. VIII, annexe 413 ; CR 2026/11, p. 57, par. 60 (Blom-Cooper) ; « Speech delivered by H.E. Daw Aung San Suu Kyi, State Counsellor of the Republic of the Union of Myanmar on Government's efforts with regard to National Reconciliation and Peace », post *Facebook*, 19 septembre 2017, accessible à l'adresse suivante : <https://www.facebook.com/state.counsellor/posts/speechdelivered-by-her-excellency-daw-aung-san-suu-kyi-state-counsellor-of-the-/1121130291354519>, 2018 FFM Detailed Findings, par. 969 (fn. 2189).

<sup>87</sup> CR 2026/4, p. 76, par. 66 (Suleman).

<sup>88</sup> CR 2026/3, p. 28, par. 59 (Loewenstein) ; CR 2026/4, p. 40, par. 30 (Al Ameen) ; CR 2026/4, p. 76, par. 65-66 (Suleman).

68. C'est cet état d'esprit qui a conduit la Gambie à présenter comme preuve ultime le résumé analytique de l'IIMM du 29 septembre 2025<sup>89</sup>, une synthèse consacrée précisément à « la destruction et la spoliation des terres et des biens des Rohingyas lors des opérations de 2017 ».

69. Concernant les villages touchés, cette synthèse se réfère quasi exclusivement à un rapport confidentiel de l'UNOSAT intitulé : « Satellite Imagery-Based Damage and Security Assessment on Behalf of the Independent Investigative Mechanism for Myanmar »<sup>90</sup>. Pourquoi confidentiel — s'agissant d'images satellite ? Nous ne le saurons jamais, mais il est cité pas moins de 34 fois dans le résumé analytique de l'IIMM.

70. Pourtant selon ses auteurs, le résumé du 29 septembre 2025, « is intended to facilitate proceedings in national, regional or international courts ». D'ailleurs, le rapport complet serait lui « available to national and international authorities to facilitate investigations and judicial proceedings ».

71. Nous y sommes pourtant. Nous y sommes, mais nous devons nous contenter d'un résumé renvoyant à un rapport confidentiel. Nous y sommes, mais le Myanmar doit répondre à un document dont la plupart des références sont soit caviardées soit inaccessibles.

72. Les conseils de la Gambie en ont fait la pièce maîtresse pour imputer l'ensemble des destructions au Gouvernement du Myanmar. On les a entendus dire « the answer is clear and provided in the IIMM report itself », « Myanmar had next to nothing to say in response »<sup>91</sup>. Si c'est l'idée que les conseils de la Gambie se font de la preuve loyale et du débat contradictoire, nous avons peut-être une autre divergence. Mais elle échappe à l'objet de la présente procédure. Nous pourrions continuer ce débat dans d'autres instances le cas nécessaire. Je peux dès lors conclure ici ma présentation. Permettez-moi, avant de céder ma place, de remercier mes collègues pour leur professionnalisme bonhomme, le personnel de la Cour pour ses prévenances et, bien sûr, vous remercier, vous, Mesdames et Messieurs les juges, pour votre écoute attentive et bienveillante. Je

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<sup>89</sup> IIMM, « The Destruction and Dispossession of Rohingya Land and Property During the 2017 Clearance Operations », Public Summary, 29 septembre 2025.

<sup>90</sup> UNOSAT, « Satellite Imagery-Based Damage and Security Assessment on Behalf of the Independent Investigative Mechanism for Myanmar », Confidential Report.

<sup>91</sup> CR 2026/19, par. 34 (Loewenstein) ; voir aussi CR 2026/18, p. 30, par. 3 (Reichler) ; CR 2026/18, p. 51, par. 63 (Reichler).

vous prie, Monsieur le président, de bien vouloir donner la parole à M. Blom-Cooper, si vous le souhaitez.

Le PRÉSIDENT : Je remercie la professeure Miron pour sa déclaration. I now invite Mr Sam Blom-Cooper to address the Court. You have the floor, Sir.

Mr BLOM-COOPER:

## **II. GENOCIDE HAS NOT BEEN ESTABLISHED**

### **1. Introduction**

1. Mr President, distinguished Members of the Court, good morning. My presentation this morning will respond to The Gambia's further oral submissions last week claiming that genocide has been proved. Myanmar maintains that nothing submitted by The Gambia in either its oral submissions, nor during the course of the witness evidence heard last week, disturbs the position that The Gambia has failed to prove to the requisite standard of proof either the *actus reus* of genocide or the *dolus specialis*.

### **2. *Actus reus* has not been established**

2. At this stage of proceedings, no one thanks an advocate for unnecessary repetition — so, I do not intend to say anything further about the *actus reus*, as Myanmar has already set out, in full, its position in respect of each of paragraphs (a) to (d) of Article II, such that the *actus reus* of genocide has not been established.

### **3. *Dolus specialis*: genocidal intent has not been established**

3. Instead, my intention is to focus on the issue of the *dolus specialis*. More specifically, I will address the newly emerged theory on genocidal intent advanced by The Gambia for the first time through its expert witness and in its second round of oral argument.

4. The Gambia, following in the footsteps of the FFM<sup>92</sup>, has previously tried to establish a new “indicators of genocidal intent” approach. The Gambia sought to use seven so-called indicators

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<sup>92</sup> 2019 Detailed FFM Findings, p. 73, para. 224, MG, Vol. III, Annex 49.

which were said to establish the genocidal intent<sup>93</sup>. For the reasons given by Professor Talmon during the first round<sup>94</sup>, this approach is plainly wrong. The Gambia's scant reference to it during the second round very much suggests that he was right.

#### 4. Background to a new theory of "*modus operandi*"

5. In this newly formulated approach, Professor Newton now claims that a genocidal intent is to be found from what he suggests to be a consistent "*modus operandi*"<sup>95</sup> to the military operations and that "replicates itself in over 54 documented instances"<sup>96</sup> and is "so consistent across all . . . places"<sup>97</sup> throughout northern Rakhine State.

6. As Professor Newton stated in terms: "My factual findings were based on what the FFM said, and the findings there with respect to a *modus operandi*, they identified 54 corroborated instances and another 22". "I had no fact-finding ability so I relied on the facts as stated in the FFM, the full FFM."<sup>98</sup>

7. Before turning to address this new theory in substance, I recall two important points of Professor Newton's expert opinion. *First*, in the absence of independent fact-finding by Professor Newton, he is no better placed than this Court in assessing the facts as contained in those FFM reports or determining what inferences may properly be drawn from the circumstances and the facts. However, those tasks — namely what weight, if any, this Court can properly place on the statements of fact contained in those reports, and what inferences may properly be drawn — are of capital importance in this case. You have received comprehensive submissions from Dr Staker on this issue<sup>99</sup>, and in Chapter 6 of Myanmar's written pleadings. There is nothing that Professor Newton can say that adds weight to the facts contained within those FFM reports.

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<sup>93</sup> See e.g. CR 2026/1, p. 37, para. 39 (Sands); MG, paras. 1.43, 4.50, 4.51, 5.3, 5.15, 12.3, 12.26, 12.27, 12.74, 12.78, 12.79, 12.104, 12.124, 12.125, 12.126, 12.127; RG, paras. 3.39, 3.46, 3.47, 6.38, 9.27, 9.36, 9.61.

<sup>94</sup> CR 2026/8, pp. 16-17, paras. 22-30 (Talmon).

<sup>95</sup> CR 2026/16, pp. 23 and 26-33 (Newton).

<sup>96</sup> CR 2026/16, p. 32 (Newton).

<sup>97</sup> CR 2026/16, p. 27 (Newton).

<sup>98</sup> CR 2026/16, p. 26 and p. 17 (Newton).

<sup>99</sup> CR 2026/8, pp. 31-46, paras. 1-56.

8. The *second* point concerns the various opinions that have been expressed by Professor Newton on whether genocide has been established. You were addressed by Mr Hooper yesterday on this, and I suspect I would struggle to improve upon the submissions that he made over Professor Newton's conclusions<sup>100</sup>. As highlighted by Mr Hooper, the evolution of his expert opinion over time is revealing: from a complete absence of mention of ARSA to a recognition that it represented "a serious insurgency"<sup>101</sup>. However, one matter stands out from his evolved opinion. A matter that The Gambia has quietly side-stepped in this case. And it is this.

9. In May 2024, some three and a half years after providing his first expert report, Professor Newton provided his second expert report. In it he describes having reviewed the Counter-Memorial of Myanmar, having considered Myanmar's rules of engagement and having noted that such rules of engagement largely reflect internationally recognized standards; and finally, he described having examined "[i]ndiscriminate attacks on Rohingya civilians"<sup>102</sup> and the alleged widespread physical and sexual violence<sup>103</sup> said to have characterized such alleged attacks.

10. Having done so, Professor Newton then says this:

"[W]idespread and indiscriminate attacks directed at entire segments of a civilian population are so obviously incompatible with genuine COIN that they warrant the inference that the government's objective is not to defeat an insurgency, but *to punish* or destroy the civilian population in whole or in part."<sup>104</sup>

11. This is The Gambia's own witness. Their expert apparently telling this Court that one reasonable inference to be drawn from widespread physical and sexual violence, as part of indiscriminate attacks on a civilian population, is an intent to *punish* that civilian population. If that is right, then an intent to destroy the protected group in whole or in part would *not* be the sole reasonable inference to draw and genocidal intent will not be established. The Gambia's claim would fail for the same reasons the Court gave in the *Croatia* case<sup>105</sup>. Professor Newton, of course, ultimately stated that it must be genocide, but that is a conclusion — as Mr Hooper noted

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<sup>100</sup> CR 2026/21, pp. 44-150, paras. 106-138 (Hooper).

<sup>101</sup> CR 2026/16, p. 24 (Newton).

<sup>102</sup> Second Expert Report of Michael A. Newton ("Second Expert Report"), pp. 6-9, RG, Vol. IV, Annex 67.

<sup>103</sup> *Ibid.*, paras. 20 and 28, RG, Vol. IV, Annex 67.

<sup>104</sup> *Ibid.*, para. 9, RG, Vol. IV, Annex 67 (emphasis added).

<sup>105</sup> *Croatia Genocide, 2015 Judgment*, pp. 125-126, para. 430.

yesterday — that is little short of a “quantum leap” in unsupported logic, and one that took him outside of his military expertise.

**A. Professor Newton’s new theory of “*modus operandi*”**

12. Mr President, Members of the Court, let me now turn directly to the live testimony of Professor Newton and his new theory of a consistent “*modus operandi*”, allegedly reflecting the manner in which all counter-terrorism operations were conducted throughout northern Rakhine State during August 2017, and from which it is said a genocidal intent may be inferred.

13. Professor Talmon will address the Court this afternoon on the legally misconceived method by which Professor Newton and The Gambia now invite an inference of genocidal intent. For the reasons to be given, not only does this proposed new approach not accord with the Court’s own case law, but it improperly seeks to short-circuit the Court’s task.

14. This Court has previously held that an examination of all the facts is required in order to assess whether the applicant has established a consistent pattern of conduct arising from factors identified by the Court: namely the scale and systematic nature of alleged attacks; whether excessive casualties and damage were caused; whether there was specific targeting of the protected group; and the nature and extent of injury caused<sup>106</sup>.

15. It is only once the Court is “fully convinced”<sup>107</sup> that such a pattern of conduct is established that the Court proceeds to consider whether a genocidal intent may be inferred from the established pattern, and whether it is the only reasonable inference to be drawn<sup>108</sup>.

16. A *modus operandi* refers simply to the individual attacks themselves, while the pattern of conduct looks at the bigger picture. While a pattern of conduct *may* consist of widespread attacks according to a “generally similar *modus operandi*”<sup>109</sup>, such attacks on their own do not establish a pattern of conduct<sup>110</sup>. In short, “*modus operandi*” is not to be conflated with “pattern of conduct”.

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<sup>106</sup> *Croatia Genocide, 2015 Judgment*, p. 119, para. 407; p. 150, para. 510.

<sup>107</sup> *Croatia Genocide, 2015 Judgment*, p. 117, para. 401, p. 146, para. 499.

<sup>108</sup> *Bosnia Genocide, 2007 Judgment*, p. 129, para. 209; *Croatia Genocide, 2015 Judgment*, p. 74, para. 178.

<sup>109</sup> *Croatia Genocide, 2015 Judgment*, p. 122, para. 416; CR 2026/19, p. 38, para. 2 (Reichler).

<sup>110</sup> *Croatia Genocide, 2015 Judgment*, p. 121, para. 413, p. 122, paras. 415-416; *Bosnia Genocide, 2007 Judgment*, p. 133, para. 373.

17. At the outset, you will know that it is specifically to the alleged “*modus operandi*” said to characterize the August 2017 counter-terrorism operations that I must, and will, direct my submissions. That is because Professor Newton did not find *any* such “*modus operandi*” characterizing operations of October and November 2016. His instructions, such as were provided over the telephone<sup>111</sup>, conspicuously directed him to “assess the *modus operandi*, the pattern of practice post-25 August against the established counter-insurgency doctrine”<sup>112</sup>.

18. Neither Professor Newton, nor The Gambia, has seriously attempted to explain how events in October and November 2016 were characterized by any form of *modus operandi* at all, let alone by the one that Professor Newton now claims is applicable to the August 2017 operations.

19. More importantly, and consistent with the case law of this Court, there is no sense in which the military operations of 2016 formed any part of a “pattern of conduct” from which a genocidal intent could properly be inferred. The Court will, nevertheless, recall that The Gambia’s case in respect of those operations is that they took place within a tightly confined geographical scope and lasted just two days in each month, during which a total of 47 killings are alleged to have taken place across 11 different locations<sup>113</sup>. How the 2016 operations fit into any part of The Gambia’s case theory is frankly a mystery and it remains unsolved at the end of these hearings.

20. Turning now to examine the details of Professor Newton’s new theory for the seven days in late August 2017, two matters are of note: *first*, that during more than five years since he was first engaged as an expert, and having submitted two expert reports in October 2020<sup>114</sup> and May 2024<sup>115</sup>, and a written affidavit as recently as November 2025<sup>116</sup>, it is only last week, during his live testimony, that Professor Newton referred — for the first time — to the existence of the alleged “*modus*

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<sup>111</sup> CR 2026/16, p. 17 (Newton).

<sup>112</sup> CR 2026/16, p. 23 (Newton).

<sup>113</sup> CR 2026/9, p. 65, para. 64; p. 66, para. 71; p. 67, para. 78; p. 68, para. 84; p. 70, para. 101 (Lawrie); CR 2026/11, p. 60, para. 74 (Blom-Cooper); MG, paras. 8.58, 8.64, 8.67.

<sup>114</sup> First Expert Report of Michael A. Newton (October 2020), para. 8, MG, Vol. XI, Annex 359 (“First Expert Report”).

<sup>115</sup> Second Expert Report, para. 8, RG, Vol. IV, Annex 67.

<sup>116</sup> Statement of Professor Michael A. Newton, annexed to the letter of the Agent of The Gambia dated 18 November 2025.

*operandi*” characterizing the 2017 operations, and from which he now suggests an inference of genocidal intent should be drawn<sup>117</sup>.

21. *Second*, not only does the term “*modus operandi*” not once appear in any of his previous reports, but nor does the list of *ten* specific elements which are said to define the so-called “*modus operandi*”.

22. In any event, aside from the fact there is no legal basis underpinning this newly formulated theory, the theory fails — on its own terms — as the evidence simply does not show what Professor Newton says it does.

### **B. “*Modus operandi*”: the ten elements**

23. Professor Newton claims that the following *ten* elements define the alleged *modus operandi* that characterized each of the August 2017 operations. They are: (1) surrounding Bengali villages, or parts thereof<sup>118</sup>; (2) surprise attacks<sup>119</sup>; (3) attacks from different angles<sup>120</sup>; (4) indiscriminate shooting at civilians<sup>121</sup>; (5) segregation of men and boys from women<sup>122</sup>; (6) mass rape of women<sup>123</sup>; (7) executions<sup>124</sup>; (8) shooting at fleeing refugees<sup>125</sup>; (9) burning houses or areas<sup>126</sup>; and (10) bulldozing<sup>127</sup>.

24. Having identified these ten elements, Professor Newton then concludes categorically and emphatically: “That *entire* pattern replicates itself in over 54 documented instances and *that’s* the basis of my opinion”<sup>128</sup>. That conclusion, however, is obviously wrong, and unsupported by the very evidence from which he claims it to emerge.

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<sup>117</sup> CR 2026/16, p. 26 (Newton).

<sup>118</sup> CR 2026/16, p. 28 (Newton).

<sup>119</sup> CR 2026/16, p. 32 (Newton).

<sup>120</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>121</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>122</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>123</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>124</sup> CR 2026/16, p. 32 (Newton).

<sup>125</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>126</sup> CR 2026/16, pp. 29, 32 (Newton).

<sup>127</sup> CR 2026/16, pp. 29, 38 (Newton).

<sup>128</sup> CR 2026/16, p. 32 (Newton).

25. To demonstrate this, Myanmar has reviewed once more the entirety of the FFM's 2018 and 2019 reports. The following table lists all ten alleged elements of the *modus operandi* that are said by Professor Newton to be present in more than "54 locations", and based upon the FFM reports. You have within your folders at tab 2.2 what is now broadcast onto the screens. The locations examined by the FFM are listed vertically for each of the three townships.

26. Contrary to Professor Newton's contention that the "entire pattern" of all ten elements is present in more than 54 locations, there is in fact not a single location where all 10 elements are present. Only one location, namely Min Gyi, is alleged to be characterized by nine elements. The large majority only have one or two elements allegedly present, and even then, the represented elements are not even generally consistent across multiple locations.

27. In short, analysis of the FFM reports demonstrates that the *modus operandi* as claimed by Professor Newton did not exist.

### **C. Questions posed by the Court to Professor Newton**

28. Mr President, before leaving the testimony of Professor Newton altogether, it is also instructive to examine the answers that he gave in response to questions of the Court. In particular, his answer to the question posed by Judge Hmoud as to how any military force might legitimately deal with insurgents who are not readily distinguishable from the population from which they are drawn<sup>129</sup>.

29. In response, Professor Newton acknowledged that the situation faced by Myanmar was "a serious insurgency"<sup>130</sup>, and that such pernicious and difficult situations may well "require[] partially military solutions"<sup>131</sup>.

30. Professor Newton identified two key approaches to counter-insurgency to be pursued alongside such military solutions. The *first* feature identified was "getting better intelligence collection"<sup>132</sup>. Myanmar agrees with that proposition. It is precisely what Myanmar sought to do in respect of ARSA.

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<sup>129</sup> CR 2026/16, p. 44 (Newton).

<sup>130</sup> CR 2026/16, p. 24 (Newton).

<sup>131</sup> CR 2026/16, p. 44 (Newton).

<sup>132</sup> CR 2026/16, p. 45 (Newton).

31. As the evidence shows, Myanmar consistently took concrete steps over many months seeking to gather intelligence and build up a clearer understanding of ARSA and its operations. It did this through a network of informants within local communities. Indeed, the FFM devotes an entire section of its 2018 report to the issue of “Killing of Rohingya informants”<sup>133</sup>. While it is clear that Myanmar used this network of intelligence sources to understand the reach, capabilities and activities of ARSA, it is equally clear that ARSA repeatedly resorted to extreme and widespread measures, including killing dozens of informants, to prevent information about its intended violence becoming known to the security services.

32. As the FFM stated, ARSA

“used threats and intimidation, including violence, against the population to protect its plans and activities and to ensure secrecy. Informants, known locally as ‘*tabbe*’, were present within the Rohingya community and provided information to the Myanmar authorities. ARSA took steps to control them, including through beatings and killings.”<sup>134</sup>

33. In the period following ARSA’s attacks of October 2016, up to June 2017, the evidence suggests that no fewer than 50 informants were killed by ARSA<sup>135</sup>. A good example is U Shey Kya village tract, in Maungdaw Township. Here, the names of eight local ARSA members were given to the Border Guard Police<sup>136</sup>. Acting proportionately upon the intelligence received, the Border Guard Police carried out targeted night raids and arrested those suspected of the ARSA-related activity<sup>137</sup>. However, two Bengali informants were killed by ARSA as a result<sup>138</sup>.

34. The most important example, however, concerns the third of The Gambia’s three “main locations”, namely Maung Nu. Events at Maung Nu also contradict Professor Newton’s assertion that there was a failure by Myanmar to use discriminate force.

35. Witness P1496<sup>139</sup> describes how “there were three people in Maung Nu who were in charge of ARSA”, one of whom was a man called Zahed Hussein. Two to three days before ARSA’s August

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<sup>133</sup> 2018 FFM Detailed Findings, paras. 1052-1055, CMM, Vol. VI, Annex 239.

<sup>134</sup> *Ibid.*, para. 1052, CMM, Vol. VI, Annex 239.

<sup>135</sup> *Ibid.*, paras. 1053, 1136, 1272, CMM, Vol. VI, Annex 239.

<sup>136</sup> *Ibid.*, para. 1054, CMM, Vol. VI, Annex 239.

<sup>137</sup> *Ibid.*, para. 1052, CMM, Vol. VI, Annex 239.

<sup>138</sup> International Crisis Group, *New Muslim Insurgency*, p. 16, CMM, Vol. VII, Annex 296.

<sup>139</sup> RM, para. 8.161; IIMM, Witness Statement No. IIMM0019628625, paras. 52-53, 80-81, RM, Vol. IV, Annex 131.

attacks, Zahed Hussein and other ARSA members captured three informants, during daylight hours, and in front of their families and neighbours. One was murdered shortly afterwards, his throat cut.

36. Then, of events on 25 August 2017 itself, P1496 describes how “Zahed Hussein proudly carried . . . bombs and told a crowd of people watching them that they were going to test these weapons”<sup>140</sup>. It was thus widely known within the village by this stage that Zahed Hussein was centrally implicated in the murder of local villagers and was parading bombs openly in Maung Nu.

37. And this is the context in which the testimony of Witness MN falls to be considered, alongside the observations of Mr Hooper from yesterday. While Witness MN denied any knowledge of ARSA, it is noteworthy that, out of a population of some 4,600 people in Maung Nu<sup>141</sup>, the one house that he immediately went to when told of the military’s presence was that of Zahed Hussein<sup>142</sup>. As you now know, that house was the location to which the army headed directly after its initial clash with ARSA<sup>143</sup>. Far from targeting the general population of Maung Nu, the security services concentrated on Zahed Hussein and upon his home address<sup>144</sup>. This confirms the focused, rather than indiscriminate, nature of the military operation at Maung Nu. This was not the conduct of a genocidal plan.

38. Thus, when Professor Newton stated that during the military operations there was “no effort whatsoever to determine an ARSA location, or an ARSA house, or a safehouse or an IED factory — none whatsoever”<sup>145</sup>, it is an assertion contradicted by the available evidence. This is not merely in respect of some secondary or tertiary location, but one of The Gambia’s three main locations.

39. The Gambia’s own evidence likewise controverts his related assertion that the military carried out “surprise attacks . . . with no notice, with no warning . . . Indiscriminate shooting from

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<sup>140</sup> IIMM, Witness Statement No. IIMM0019628625, para. 81, RM, Vol. IV, Annex 131.

<sup>141</sup> 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, Findings, p. A16, CMM, Vol. X, Annex 465.

<sup>142</sup> CR 2026/13, p. 19 (Witness MN).

<sup>143</sup> Myanmar Defence Services, No. (15) Mobile Operation Command Headquarters, Zwe Mhann Hone Operation, Daily operation report No. (240/2017), 27 August 2017, p. 5, para. 16, CMM, Vol. IV, Annex 118; Witness Statement of MN, 13 July 2020, para. 17, MG, Vol. X, Annex 340.

<sup>144</sup> CR 2026/13, p. 20 (Witness MN).

<sup>145</sup> CR 2026/16, p. 32 (Newton).

the get-go”<sup>146</sup>. Again, the evidence of MN is that the military went to the house of Zahed Hussein and called for him to come out. There was no “shooting from the get-go”, or even, on the account of MN, for some hours.

40. The Gambia tells the Court that there was no attack by ARSA upon Maung Mu itself and therefore no reason for the military to go to the village at all. As such, The Gambia asks you, the Court, to ignore ARSA’s attack upon the border guard police post at Hpaung Taw Pyin<sup>147</sup>, which should merely be considered “*peripheral events* taking place . . . at *some distance*”<sup>148</sup>. The “peripheral events” in question being the murder of two police officers whose throats were cut; and the “some distance” in question being not much more than 500 m away. It is a matter for the Court to consider whether those events might be relevant to what happened in Maung Nu.

41. Mr President, the focus upon targeting ARSA, and not the wider Bengali population, is similarly borne out by The Gambia’s own evidence in respect of Min Gyi, the first of its main locations.

42. In the early hours of 22 August 2017, a week prior to the events in question, “the Border Guard Police and Police came to [Min Gyi]. They went house by house, collecting all the people in the village and forcing them to go to a meeting which was held in the compound of the old mosque.” Present at the meeting were the chairman and the head of police, who warned them that there were “bad people” in Min Gyi and instructed them not to do something bad themselves<sup>149</sup>, nor to provide shelter and support to the “bad people”<sup>150</sup>. Another witness further describes local Bengalis being directed to dismantle — not destroy — three particular houses in the village that belonged to “people affiliated with ARSA”<sup>151</sup>.

43. Two to three days prior to 30 August, the head of police convened yet another meeting, this time involving both Rakhine and Bengali villagers. He beseeched “both the Rakhine and the

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<sup>146</sup> CR 2026/16, p. 32 (Newton).

<sup>147</sup> 2018 FFM Detailed Findings, para. 801, MG, Vol. II, Annex 40; Myanmar Defence Services, No. (15) Mobile Operation Command Headquarters, Zwe Mhann Hone Operation, Daily operation report No. (240/2017), 27 August 2017, p. 4, para. (14), CMM, Vol. IV, Annex 118; Witness Statement No. IIMM0019628625, para. 75, RM, Vol. IV, Annex 131.

<sup>148</sup> CR 2026/19, p. 36, para. 37 (Ho) (emphases added).

<sup>149</sup> Witness Statement No. 008, signed on 30 August 2020, MG, Vol. X, Annex 345, paras. 12-14.

<sup>150</sup> Witness Statement No. 010, signed on 14 September 2020 (with exhibits), MG, Vol. X, Annex 347, para. 14.

<sup>151</sup> *Ibid.*; Witness Statement No. 009, signed on 13 September 2020 (with exhibit), MG, Vol. X, Annex 346, paras. 13-14.

Rohingya people that they would not attack one another. This agreement was made on paper and signatures were taken from both parties.”<sup>152</sup> Professor Newton appears to have been unaware of these attempts to de-escalate rising intercommunal tensions, which is at odds with The Gambia’s narrative of a carefully choreographed genocidal plan.

44. Here again, the evidence shows targeted law enforcement steps, focused on ARSA and the risk of further violence; it reveals warnings to the Bengali population not to harbour or support terrorist activity; it sought the dismantling of just three specific structures within Min Gyi that were reasonably believed to be used by suspected terrorists. Nothing wider. This is precisely the intelligence-centred, targeted approach that Professor Newton commends. Such proportionate, calibrated and intelligence-led counter-terrorism steps were, however, soon submerged — as you now know — when ARSA’s campaign of violence began its sweep down the Pyuma river valley from Kha Maung Seik to Min Gyi, and as described in my presentation to the Court last week<sup>153</sup>.

45. The *second* approach to counter-terrorism advanced by Professor Newton relates to the need for recourse to municipal criminal justice, in his words, “to arrest and prosecute and build criminal cases against the key leadership”<sup>154</sup>. Prior to ARSA’s 2017 attacks, again, this is precisely what Myanmar sought to do.

46. The Court is already aware that following ARSA’s 2016 attacks, far from a resort to unfettered destruction, those reasonably suspected of involvement in ARSA’s attacks were arrested, investigated, charged, prosecuted, acquitted and released, or convicted and sentenced<sup>155</sup>. Not just one or two token gestures, but at least 416 defendants.

47. For the nine months that followed the 2016 attacks, The Gambia does not allege that any acts of genocidal violence took place at all. Law enforcement and criminal justice continued as Myanmar’s means of dealing with ARSA’s criminality. Here again, this is in relation to one of The Gambia’s main locations that provides insight into the mindset of Myanmar in these circumstances.

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<sup>152</sup> Witness Statement No. 008, signed on 30 August 2020, MG, Vol. X, Annex 345, paras. 12-14.

<sup>153</sup> CR 2026/9, pp. 16-19, paras. 23-31 (Blom-Cooper).

<sup>154</sup> CR 2026/16, p. 45 (Newton).

<sup>155</sup> IIMM, *Evidence Related to Detention of Rohingya in Buthidaung Prison and Other Locations*, 15 May 2024, paras. 28-30, RG, Vol. II, Annex 10; CR 2026/11, pp. 64-65, paras. 91-94 (Blom-Cooper).

48. In mid-July 2017, just weeks prior to ARSA's attacks, security services arrested eight men in Chut Pyin, of whom four were later released, with the remainder detained on terrorism charges<sup>156</sup>. In parallel, Myanmar similarly sought to de-escalate intercommunal violence and intervened during an armed stand-off between groups of Rakhines and Bengalis<sup>157</sup>. Rather than seeking to imperil life, Myanmar sought the opposite, and did so in respect of Chut Pyin.

#### **D. Sexual violence: nature and extent**

49. Mr President, Members of the Court, I turn now to deal with one particular element of the alleged "*modus operandi*": that concerns the claim of pervasive sexual violence. I do so because it has attracted extensive reference by The Gambia in its oral pleadings and is said by their expert to characterize the "*modus operandi*" present in all 54 locations identified by the FFM.

50. As you heard on Monday, however, in answer to questions posed by Judge Charlesworth, The Gambia acknowledges that Professor Newton was wrong in his assessment. The Gambia now says that, on the basis of its review of the FFM reports, that instances of sexual violence took place in *ten* places across northern Rakhine State, not the mass sexual violence claimed in more than 54 by Professor Newton<sup>158</sup>. It is to be recalled that that is out of 509 locations in northern Rakhine State inhabited by Bengalis in 2017. Even with reference to those ten places, little detail is provided in the FFM to identify when or in what circumstances many of these alleged instances of sexual violence are said to have occurred.

51. The allegation of widespread sexual violence is denied by Myanmar, and I ask the Court to treat with extreme caution The Gambia's sweeping characterizations of such evidence that you have heard in this case. You will recall that The Gambia has variously told this Court that mass sexual violence took place in "dozens" of locations<sup>159</sup> or that it took place in "scores"<sup>160</sup> of villages across northern Rakhine State. It now revises its claim once more: to assert that it "certainly occurred in a great *many* locations"<sup>161</sup>. There is a reason why The Gambia cannot identify from where, or in what

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<sup>156</sup> 2018 FFM Detailed Findings, para. 1162, MG, Vol. II, Annex 40.

<sup>157</sup> 2018 FFM Detailed Findings, para. 1163, CMM, Vol. VI, Annex 239.

<sup>158</sup> CR 2026/19, p. 45, para. 22 (Loewenstein).

<sup>159</sup> MG, para. 9.1.

<sup>160</sup> CR 2026/1, pp. 44, 48, 51, 57, paras. 13, 31, 41, 58 (Reichler).

<sup>161</sup> CR 2026/19, p. 45, para. 22 (Loewenstein).

circumstances, so many of its serious allegations of sexual violence derive, because the underlying evidence itself which The Gambia discourages you, the Court — from examining, is often so vague and so generalized.

52. There is a further specific aspect of the generalized nature of this alleged criminality, both in terms of the *quantitative* aspect and its purported geographical distribution, that requires both comment and consideration by the Court. It concerns evidence from the US State Department<sup>162</sup> that has repeatedly been called upon, yet misrepresented, perhaps misunderstood, in support of a claim of a pattern of conduct.

53. Even the most cursory review of this data, however, reveals that it is evidentially worthless. Not only does the underlying survey data upon which it is based not record and present the actual number of instances of sexual violence, but it covers a period of some 25 months, not merely the four days in 2016, and the seven days in late August 2017. In short, 98 per cent of the time frame from which the data is drawn, and then presented by The Gambia to establish a pattern of conduct, has no bearing on the period of alleged genocidal conduct claimed by The Gambia. This evidence is a prime example of why careful scrutiny of the evidence is so necessary.

#### **E. Opportunity to destroy the targeted part of the group**

54. Mr President, Members of the Court, I come now to a different issue, but one which again requires careful examination of numbers and figures; which ones are relevant; which are not; what those numbers mean in the context of drawing inferences; and how, ultimately, they bear upon the issue of *dolus specialis*. It concerns the issue of opportunities to destroy the targeted part of the group.

55. On Tuesday, you were presented with a blizzard of statistics<sup>163</sup> relating to a host of matters, such as: the population size of northern Rakhine State; the numbers of villages; populations of different townships; numbers of refugees; ethnic composition of different parts of the region; their respective sizes; the fractions and percentages of fire-damaged locations, and so on. And to what end? Why does The Gambia present 37 different statistics for the Court's consideration? It is, in fact, clear why they do this. To attempt to artificially shrink the "size of the targeted part of the protected

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<sup>162</sup> CR 2026/19, p. 45, para. 23 (Loewenstein); US Department of State, *Documentation of Atrocities in Northern Rakhine State* (August 2018), pp. 14-15. MG, Vol. VII, Annex 194.

<sup>163</sup> CR 2026/20, pp. 19-24, paras. 7-22 (Sands).

group” as creatively as possible, while simultaneously inflating the unproven number of alleged victims.

56. As discussed in my presentation last week, in the context of genocide, numbers do matter. I appreciate that that may sound like a somewhat clinical statement, but it is one based upon the jurisprudence which we are all bound by and all have to apply. In the *Croatia* case, this Court expressly considered that it is “relevant to compare the size of the targeted part of the protected group with the number of Croat victims, in order to determine whether the JNA and Serb forces availed themselves of opportunities to destroy that part of the group”<sup>164</sup>. That is why those two particular figures are relevant.

57. Contrary to what was suggested by The Gambia on Tuesday<sup>165</sup>, I did not say — and indeed never have said — that the alleged death of 10,000 human beings is not “substantial”. That, of course, would be offensive. What I said was that, in remarkably similar circumstances to the *Croatia* case, the number of alleged victims in the present case is “small in relation to the size of the targeted part of the group”<sup>166</sup> and as such, as here, The Gambia has failed “to show that the perpetrators of the acts which form the subject of the principal claim availed themselves of opportunities to destroy a substantial part of the protected group”<sup>167</sup>.

58. On a similarly emotive subject, I must also address repeated reference by The Gambia to other numbers in this case, namely to what it claims — that between 734 and 2,109 children under the age of five died during the military operations or were killed during flight to Bangladesh<sup>168</sup>. That is incorrect. These numbers in fact derive from crude, highly unscientific statistical extrapolations from healthcare data, and interviews with just 81 unknown persons<sup>169</sup>, which cannot possibly substantiate the numbers presented to you as concrete fact during these proceedings. It is because of these kinds of representations that Myanmar has descended into the details, because it is only through careful analysis that an accurate picture may emerge.

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<sup>164</sup> *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

<sup>165</sup> CR 2026/20, p. 22, para. 18 (Sands).

<sup>166</sup> *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

<sup>167</sup> *Croatia Genocide, 2015 Judgment*, p. 127, para. 437.

<sup>168</sup> CR 2026/4, p. 30, para. 14 (Loewenstein); CR 2026/19, p. 46, para. 26 (Loewenstein).

<sup>169</sup> Médecins Sans Frontières, *No one was left*, p. 5, MG, Vol. IV, Annex 110.

59. The blizzard of statistics from The Gambia to which I have just referred is irrelevant. The Gambia has already repeatedly confirmed, and unambiguously stated, that “the *entire Rohingya population* was targeted”<sup>170</sup>. Indeed, The Gambia is echoing the FFM’s own contention that “[t]he operations targeted and terrorised the *entire Rohingya population*”<sup>171</sup>. That includes the 126,000 “Rohingya” living in the IDP camps in Sittwe — immediately adjacent to Rathedaung Township. The Gambia in its pleadings has never sought to argue that they — that group of “Rohingya” — do not belong to the “*entire Rohingya population*”, and indeed it expressly points to the *actus reus*, namely the commission of Article II (c), as having been inflicted upon “all [the] Rohingya in Internally Displaced Person (‘IDP’) camps”<sup>172</sup>. Yet through its statistics, The Gambia now tries to argue that that same group are not to be counted as part of the targeted group for the purpose of assessing *dolus specialis*<sup>173</sup>. It is a flawed logic. And it is wrong.

60. So, if reference to the fact that 126,000 “Rohingya” living in the IDP camps were entirely unharmed during 2016 and 2017 and remain so today, is “a terrible argument”<sup>174</sup>, that is a matter for counsel for The Gambia to take up with his own colleagues and not to address to Myanmar.

61. In the present case, the alleged targeted part of the protected group living in Rakhine State prior to October 2016 stood at just under 1.4 million people<sup>175</sup>. And it is against this figure that the number of proven victims falls to be considered.

62. Irrespective of the inferences to be drawn from these facts and figures, they do not stand alone. As Dr Staker reminded you yesterday, there are also undisputed facts that are inconsistent with any intention to destroy the protected group as such<sup>176</sup>. These include the fact that the security forces time and time again eschewed numerous opportunities for such destruction while many made their way to Bangladesh in huge numbers. In its second round, The Gambia placed emphasis on the alleged shooting of fleeing refugees crossing into Bangladesh<sup>177</sup>. That is categorically denied and there is

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<sup>170</sup> MG, paras. 1.25, 1.53, 12.112; CR 2026/5, pp. 34, 35, paras. 10, 11 (Reichler).

<sup>171</sup> MG, para. 1.25; 2018 Detailed FFM Findings, para. 751.

<sup>172</sup> RG, paras. 3.22, 4.52, 9.66-9.68.

<sup>173</sup> CR 2026/20, p. 24, para. 17 (Sands).

<sup>174</sup> CR 2026/20, p. 24, para. 20 (Sands).

<sup>175</sup> CMM, paras. 13.134; 13.150-13.152.

<sup>176</sup> CR 2026/21, p. 27, para. 50 (Staker).

<sup>177</sup> CR 2026/20, p. 25, para. 23 (Sands); pp. 35, 39, paras. 13, 23 (Reichler).

simply no credible evidence that exists to substantiate that claim. It is based, like so many of The Gambia's claims, on vague and generalized materials, and it stands in stark contrast to the witness testimony to the contrary<sup>178</sup>.

## 5. Conclusion

63. Mr President, Members of the Court, that concludes my presentation. Throughout these hearings, a number of my colleagues have already strained the goodwill and forbearance of those working hard in the interpreters' booth to populate the transcripts with various literary references or nods to flora and fauna from their home countries. So, I will end here, instead, with a simple expression of my sincere gratitude to the distinguished Members of this Court before whom it has been my distinct privilege to appear.

64. Mr President, I kindly ask you next to call upon Professor Talmon to address the Court on the legal consequences of alleged breach of the Convention. But, perhaps, after the short adjournment.

The PRESIDENT: I thank Mr Blom-Cooper. 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 11.40 a.m. to 11.55 a.m.*

The PRESIDENT: Please be seated. The sitting is resumed. I now give the floor to Professor Stefan Talmon. You have the floor, Sir.

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<sup>178</sup> RM, 13.144-13.145; See for example: (1) P1496, IIMM, Witness Statement No. IIMM0019628625, para. 120, RM, Vol. IV, Annex 131; (2) P2892, IIMM, Witness Statement No. IIMM0028048879, paras. 80-82, RM, Vol. IV, Annex 141; (3) P2499, IIMM, Witness Statement No. IIMM0027999848, paras. 101-102, RG, Vol. IV, Annex 59; (4) P1548, IIMM, Witness Statement No. IIMM0027997604, paras. 120-126, RG, Vol. IV, Annex 60; (5) P1492, IIMM, Witness Statement No. IIMM0027995869, paras. 130-131, RM, Vol. IV, Annex 138; (6) P1495, IIMM, Witness Statement No. IIMM0027992867, para. 99, RM, Vol. IV, Annex 136; (7) P0806, IIMM, Witness Statement No. IIMM0019627993, para. 76, RM, Vol. IV, Annex 129; (8) P2334, IIMM, Witness Statement No. IIMM0027971404, paras. 118, 132, RG, Vol. IV, Annex 55; (9) P2101, IIMM, Witness Statement No. IIMM0019915259, para. 142, RM, Vol. IV, Annex 151; (10) P1622, IIMM, Witness Statement No. IIMM0019922078, paras. 69, 71, RM, Vol. IV, Annex 133; (11) P1547, IIMM, Witness Statement No. IIMM0019629302, paras. 77-81, RM, Vol. IV, Annex 134.

Mr TALMON:

### **III. ALLEGED LEGAL CONSEQUENCES**

1. Mr President, Madam Vice-President, distinguished Members of the Court. My task this morning is to respond to the argument in the second round on the remedies claimed by The Gambia for the alleged violations of the Genocide Convention and the provisional measures Order of 23 January 2020, and to respond to the second question put to both Parties by Judge Cleveland.

#### **1. Remedies claimed for alleged breaches of the Genocide Convention**

2. Let me start with the remedies claimed by The Gambia. There was nothing new in the second round of oral argument that Myanmar has not already addressed in either its first-round presentation<sup>179</sup> or in Chapter 15 of its Counter-Memorial<sup>180</sup> and Rejoinder<sup>181</sup>. Actually, I was surprised to hear counsel for The Gambia say so little, with so many words. I therefore spare the Court a repetition of Myanmar's existing position. Myanmar is confident that under international law, there is no basis for the remedies claimed by The Gambia other than declaratory relief and an order to cease ongoing violations.

#### **2. Answer to the second question of Judge Cleveland**

3. Mr President, let me take the time saved to provide Myanmar's answer to the second question by Judge Cleveland<sup>182</sup>.

4. Her Excellency asked whether there are decisions of other international courts, tribunals or bodies that either Party considers relevant to the propriety or appropriate scope of remedies, including reparations, assurances and guarantees of non-repetition, if, but only if, the Court were to find that Myanmar's international responsibility were engaged.

5. The question essentially consists of three parts:

- (1) What are to be considered "relevant" decisions for present purposes;
- (2) What do these decisions, if any, have to say about the "propriety" of remedies; and

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<sup>179</sup> CR 2026/12, pp. 30-43 (Talmon).

<sup>180</sup> CMM, Vol. I, pp. 615-642.

<sup>181</sup> RM, Vol. I, pp. 553-568.

<sup>182</sup> CR 2026/12, p. 47 (Judge Cleveland).

(3) What do these decisions, if any, have to say about the “appropriate scope” of such remedies.

6. Let me start with the relevance of decisions.

#### **A. Relevant decisions for the question of remedies**

7. The question does not concern just any decision dealing with remedies, but decisions that are relevant for the purposes of the present case. The present case concerns a claim for remedies by a non-injured State for breaches of obligations *erga omnes partes* under a multilateral treaty, in the interest of the beneficiaries of the obligation breached. The beneficiaries in the present case are natural persons that are not nationals of the State bringing the claim. Relevant decisions are thus decisions in inter-State proceedings, where a non-injured State has brought a claim for remedies in the interest of the beneficiaries of obligations *erga omnes partes*. As the Genocide Convention does not include an express provision on remedies, the legal basis of such remedy claims would have to lie outside the treaty establishing the rights benefiting the natural persons.

8. To the best of Myanmar’s knowledge there is no decision of an international court, tribunal or body that has adjudicated a remedy claim by a non-injured State against another State in the interest of the beneficiaries of obligations *erga omnes partes*. Such claims could in theory be adjudicated under regional human rights treaties like the European Convention on Human Rights<sup>183</sup>, the American Convention on Human Rights<sup>184</sup> and the African Charter on Human and Peoples’ Rights<sup>185</sup>. While there have been a very limited number of inter-State complaints under these Conventions, there is no case in which a remedy claim was brought by a State in the interest of beneficiaries that were not its nationals. In any case, such cases would not be relevant for the present case as remedy claims under human rights instruments have an express legal basis in the treaty establishing the primary obligation breached and are for that reason considered “as *lex specialis* in relation to the general rules and principles of international law”<sup>186</sup>. Such a legal basis is missing in the Genocide Convention.

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<sup>183</sup> European Convention on Human Rights, Article 47.

<sup>184</sup> American Convention on Human Rights, Article 63.

<sup>185</sup> African Charter on Human and Peoples’ Rights, Articles 49 and 52.

<sup>186</sup> ECtHR, *Cyprus v. Turkey* [GC], no. 25781/94, Judgment (Just satisfaction), 12 May 2014, para. 42.

9. In addition, if, as Myanmar submits, such claims in the interest of the beneficiaries depend on the beneficiaries themselves being able to bring a claim for the violation of such obligations, the question also extends to decisions on remedy claims brought by beneficiaries, including remedy claims brought by beneficiaries against their own State of nationality. There are, of course, countless decisions on such remedy claims brought by individual beneficiaries against States, including their own State. However, all these remedy claims are based on special provisions in the treaty establishing the primary obligation breached. Again, there is no such provision in the Genocide Convention and therefore such decisions are not relevant in the present case.

10. That there is no legal basis in general international law for remedy claims by individuals against a State outside a treaty framework<sup>187</sup> has recently been confirmed by the Court in its *Climate Change Advisory Opinion*<sup>188</sup>.

11. In sum, there is no decision by an international court, tribunal or body that is directly relevant to the question on remedies in the present case.

#### **B. Propriety of remedies claims by non-injured States in the interest of beneficiaries of *erga omnes partes* obligations breached**

12. Let me move on to the question of the propriety of a remedy claim by a non-injured State in the interest of beneficiaries of *erga omnes partes* obligations. As no such claims have been adjudicated, there is no judicial authority on this question. States that have concerned themselves with this question have mainly focused on practical considerations. It was pointed out that there is no institutional or procedural framework for the performance of any obligation of reparation in the interest of a collective. Breaches of obligations *erga omnes partes* would allow more than one State to claim remedies and non-injured States could formulate inconsistent or even contradictory requests for reparation<sup>189</sup>. The United Kingdom, for example, has asked whether a State, which claims performance of the obligation of reparation in the interest of the beneficiaries of the obligation

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<sup>187</sup> Cf. *Aegean Sea Continental Shelf (Greece v. Turkey)*, Judgment, *I.C.J. Reports 1978*, separate opinion of Judge Lachs, p. 52.

<sup>188</sup> *Obligations of States in respect of Climate Change, Advisory Opinion of 25 July 2025*, para. 111.

<sup>189</sup> *UNGA Official Records, 55th Session, Sixth Committee, Summary record of the 17th meeting, 27 October 2000*, UN doc. A/C.6/55/SR.17, 14 November 2000, p. 13, para. 75, CMM, Annex 200. See also International Law Commission, Comments and observations received from Governments, UN docs. A/CN.4/515 and Add.1-3, 19 March, 3 April, 1 May and 28 June 2001, respectively, *Yearbook of the International Law Commission (YILC)*, 2001, Vol. II, Part One, pp. 81-82, CMM, Annex 203.

breached, could demand reparation to be made to itself and subsequently make over all or part of the fruits of reparation to the beneficiaries. Given its lack of control over, and access to, the beneficiaries, the non-injured State could not ensure that any reparation was applied to the benefit of the beneficiaries. Alternatively, it was asked whether the State could demand that reparation be made directly to the beneficiaries of the obligation. In the latter case, this would raise further questions of to whom and how compensation payments would be distributed<sup>190</sup>.

13. Remedy claims by non-injured States in the interest of the beneficiaries of the obligations breached may also raise issues of equity and transitional justice, especially if such claims are brought against the State of nationality or residence of the beneficiaries. Much more could be said but that would go beyond the scope of this answer.

### **C. Appropriate scope of such remedies**

14. Let me therefore move to the third part of the question: the appropriate scope of such remedies. Here, there is indeed some limited judicial authority. The Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (the ICTY) held that the violation of an obligation *erga omnes* under the general prohibition of torture in international law “gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued”<sup>191</sup>. There is also a second case that may shed some light on the question of appropriate remedies. In the *Blaškić* case, the Appeals Chamber of the ICTY was concerned with legal interests arising from *erga omnes partes* obligations under the UN Charter. It held that each Member of the United Nations may act upon the legal interest and, consequently, “may request the State to terminate its breach” of the UN Charter<sup>192</sup>. While this is only limited authority, it indicates that claims for compliance and cessation are generally considered appropriate remedies for non-injured States in cases of breaches of obligations *erga omnes* or obligations *erga omnes partes*.

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<sup>190</sup> International Law Commission, Comments and observations received from Governments, UN docs. A/CN.4/515 and Add.1-3, 19 March, 3 April, 1 May and 28 June 2001, respectively, *YILC*, 2001, Vol. II, Part One, pp. 81- 82, CMM, Annex 203.

<sup>191</sup> ICTY, *Furundžija*, IT-95-17/1-T, Judgement, 10 December 1998, para. 151, CMM, Annex 15.

<sup>192</sup> ICTY, *Blaškić*, IT-95-14-108, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997, para. 36, CMM, Annex 14.

### **3. Conclusion**

15. This concludes Myanmar's answer to Judge Cleveland's question and its presentation on the alleged legal remedies. I thank the Court for its careful attention.

16. Mr President, may I ask you now to call on Dr Staker to present Myanmar's observations on the evidential weight of the material before you.

The PRESIDENT: I thank Professor Talmon for his statement. I now call Mr Christopher Staker to the podium. You have the floor, Sir.

Mr STAKER:

## **IV. THE EVIDENCE RELIED ON BY THE GAMBIA**

### **1. Introduction**

1. Mr President, Madam Vice-President, Members of the Court, I addressed you in the first round on the evidential weight of FFM reports and other material relied on by The Gambia — that is to say, the subject-matter of Chapters 6 and 7 of each of Myanmar's two written pleadings.

2. In this second round, I propose to deal with the following two additional matters.

3. First, I will provide Myanmar's response to the first of the two questions asked by Judge Cleveland at the end of the first round.

4. And secondly, I will respond to the arguments made by The Gambia on this topic in its second round.

### **2. Response to Judge Cleveland's first question**

5. I begin with Judge Cleveland's first question. I will respond as helpfully as I can, by addressing each of its four paragraphs.

6. The first paragraph of the question notes the following:

“In its written and oral pleadings, Myanmar has emphasized that ‘none of the . . . FFM . . . material[], has been accepted by Myanmar’, that reports by NGOs ‘such as Fortify Rights and Amnesty International [are] by definition mere hearsay’, and that the Court ‘should not give weight to such [FFM and NGO reports] at all’. Myanmar also contends that the media articles in the record ‘are not methods of proof “capable of proving facts”’. ”<sup>193</sup>

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<sup>193</sup> CR 2026/12, p. 46 (Judge Cleveland).

7. I would like to explain Myanmar's position on this a little more precisely.

8. As I said in the first round, Myanmar does not take the extreme position that reports of United Nations bodies or NGOs can never have evidential weight, and they have been given certain evidential weight in previous cases<sup>194</sup>. However, the Court exercises due care before relying on them<sup>195</sup>. Both Ms Cordone and I referred you to the jurisprudence on this<sup>196</sup>.

9. What Myanmar says is that, in this particular case, such material should not be given any evidential weight, in relation to the core facts of this case. The core facts include most pertinently the claims of atrocities, the claim that they were widespread and the claim that they followed a consistent pattern. As I said yesterday, such material also cannot be relied on for opinions stated in them, such as the opinion that a genocidal intent is the only reasonable inference.

10. The various reasons for this lack of evidential weight are set out in the written pleadings, and I addressed them in the first round. It is the cumulative effect of all of these reasons that lead to this conclusion in this particular case. In the *Armed Activities* case, the Court declined to give evidential weight to materials found to be "uncorroborated, based on second-hand reports, or not in fact saying what they are alleged to say . . . or . . . partisan"<sup>197</sup>. In addition to such reasons, there are even more specific reasons in the present case, which are these.

11. First, there is the high standard of proof in this case, and the fact that the organizations producing these reports lacked the expertise, resources or mandates to produce material suitable for use in judicial proceedings with such a high standard of proof, and the fact that these organizations did not purport to apply that standard of proof. Second, there is the fact that the reports of the FFM and NGOs are merely second-hand descriptions of other material that the Court has not seen: the Court should expect to see the material on which these reports are based rather than the reports. Third, there is the fact that, even if all the material on which these reports were based was before the Court, that would still not be sufficient to establish the core facts to the requisite standard of proof. I took the Court in the first round to the example of the one FFM interview note that is available to

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<sup>194</sup> CR 2026/7, p. 29, para. 51 (Staker).

<sup>195</sup> *Ibid.*

<sup>196</sup> CR 2026/7, p. 29, para. 51 (Staker); CR 2026/8, pp. 24-25, paras. 11-12 (Cordone).

<sup>197</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 225, para. 159.

the Parties, and I explained that according to the jurisprudence of the Court, no evidential weight could be given to such an interview note<sup>198</sup>. If that is so, it follows that no evidential weight can be given to an FFM report that merely contains second-hand descriptions of such interview notes to which no evidential weight could be given<sup>199</sup>.

12. In proceedings before a domestic court or international criminal court — in a serious criminal case or a high stakes civil case — it is to be expected that reports such as these would not be accepted as proof of core facts. Rather, it would be expected that reports such as these could be used by a party as initial information to suggest potential lines of enquiry for forensic investigations with a view to generating evidence for use in judicial proceedings. Such forensic investigations would involve tracing the persons interviewed by the organizations that produced the reports, and taking witness statements from them in a form suitable for use in judicial proceedings and collecting primary documentation for use as documentary evidence.

13. That can hardly be said to be expecting too much of a party to proceedings before this Court, particularly so in the case of a party that has the duty of care borne by a State purporting to act in the common interest of all States parties to the Genocide Convention<sup>200</sup>.

14. In the present case, the Human Rights Council in fact constituted a special body, the IIMM, to do precisely this: to take the materials produced by the FFM and NGOs, and to use this material as a basis for further investigations for the purpose of producing formal witness statements and other material suitable for use in judicial proceedings. The very creation of the IIMM with this particular mandate stands as proof that even the Human Rights Council considered that the FFM and NGO material was deficient for probative purposes.

15. Yet, despite this, in the more than seven years of the IIMM's existence, it has only been able to produce some 42 witness statements relevant to events in northern Rakhine State in 2016 and 2017 and, of these, The Gambia has found only 12 to be of sufficient assistance to its case as to be worthy of being annexed to its written pleadings. Obviously, these 12 witness statements are not capable of proving genocide.

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<sup>198</sup> CR 2026/8, pp. 36-40, paras. 15-29 (Staker).

<sup>199</sup> CR 2026/8, pp. 40-42, paras. 30-38 (Staker), especially p. 41, para. 35.

<sup>200</sup> CR 2026/7, p. 19, paras. 11-15 (Staker).

16. In its second round, The Gambia pointed to passages in certain other IIMM witness statements that were put into evidence by Myanmar rather than The Gambia. The Gambia said that these passages and in these other IIMM witness statements were helpful to The Gambia's case. However, it is simply unrealistic to suggest that The Gambia would not have annexed all of the IIMM witness statements to its pleadings if it considered that all of them were useful. Witness statements often contain a mix of evidence that is both helpful and unhelpful to a party's case. The fact that The Gambia can point to isolated examples of passages in other witness statements that are consistent with its case does not mean that the witness statements as a whole are of any assistance to it. The fact that The Gambia annexed only 12 of the witness statements to its written pleadings self-evidently shows that overall, it considered the other witness statements were not helpful to its case.

17. It is precisely because of this that The Gambia now continues to rely on the FFM and NGO reports, like it did when it introduced this case some seven years ago. Now, I suggest that, if a mechanism specially established to get evidence for purposes of judicial proceedings cannot uncover evidence of a fact, that is a reason for disregarding earlier material suggesting that the fact occurred — where that earlier material was never intended to be usable in judicial proceedings. That is all the more so in judicial proceedings where the high standard of proof applies. And it is precisely because of this that evidential weight should *not* be given to the FFM and the NGO reports.

18. As I said yesterday, there is a very important principle in this case concerning the evaluation of evidence by the Court. Can the Court simply rely on a fact-finding mission report as proof of the core facts in a case in which the high standard of proof applies especially in the circumstances that I have just described? I have made clear what Myanmar's position is on that.

19. The second paragraph of Judge Cleveland's question says this: "In its Rejoinder, Myanmar states that 'Myanmar itself . . . does not rely on material of the FFM or the IIMM as evidence of any of the substantive facts of this case.'"<sup>201</sup>

20. The third paragraph of the question goes on to observe that, despite taking this position, Myanmar

“[relies] extensively on FFM reports, NGO reports — including Amnesty International and Fortify Rights, and on media articles, among others, to establish Myanmar's

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<sup>201</sup> CR 2026/12, p. 46.

allegations regarding the organization and strength of ARSA and its activities in northern Rakhine State, and to suggest an alternative reasonable inference from the evidence”<sup>202</sup>.

21. Here, another explanation of Myanmar’s position is necessary. Myanmar’s position is that it is not required to prove the organization and strength of ARSA and its activities in northern Rakhine State, and that it, Myanmar, is not required to suggest or prove an alternative reasonable inference from the evidence.

22. Rather, it is The Gambia that bears the burden of proof, the burden of proving all legal elements of the claimed breaches of the Convention, and The Gambia is subject to the high standard of proof.

23. Furthermore, in cases where the applicant seeks to prove facts through the drawing of inferences, it is the applicant that must allege and prove the facts from which the inference is asked to be drawn, and it is the applicant that must persuade the Court that there is only one reasonable inference to be drawn from those facts. There is no burden on the other party to provide alternative inferences. In *Bosnia and Croatia*, the Court did not require the respondent to do so<sup>203</sup>. In *Croatia*, the Court said that “it is for Croatia to demonstrate the existence of the facts put forward in support of its claims, and the Court cannot demand of Serbia that it provide explanations of the facts alleged by the Applicant”<sup>204</sup>.

24. As to ARSA, its existence, and the fact of its attacks in 2016 and 2017 are not in dispute. Mr Hooper took you yesterday to what Professor Newton said about ARSA. He accepts that “there was an insurgency”<sup>205</sup>, and even “an armed conflict not of international character at least as of 25 August”<sup>206</sup> 2017. He accepted that ARSA had made attacks in 2016<sup>207</sup> and 2017<sup>208</sup>. He said that “everything the Government did subsequent to . . . the October 2016 attacks, was counter-insurgency”<sup>209</sup>. He furthermore accepted that “Myanmar had an absolute sovereign right to

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<sup>202</sup> CR 2026/12, p. 46.

<sup>203</sup> CR 2026/7, pp. 30-31, para. 57 (Staker).

<sup>204</sup> *Croatia Genocide, 2015 Judgment*, p. 74, para. 175.

<sup>205</sup> CR 2026/16, p. 22 (Newton).

<sup>206</sup> CR 2026/16, pp. 22 and 25 (Newton).

<sup>207</sup> CR 2026/16, p. 23 (Newton).

<sup>208</sup> CR 2026/16, p. 25 (Newton).

<sup>209</sup> CR 2026/16, p. 23 (Newton).

conduct military operations directed against the counter-insurgents”<sup>210</sup>. Counsel for The Gambia also accepted this<sup>211</sup>.

25. These matters should therefore be taken as undisputed. If The Gambia then alleges, for instance, that “the ‘clearance operations’ were, by several orders of magnitude, far out of proportion to what was needed to defend against ARSA”<sup>212</sup>, then that is a fact alleged by The Gambia that The Gambia must prove. Similarly, if The Gambia alleges that ARSA in reality posed no serious threat to the Government, that it was poorly equipped and poorly trained, then that is also something else that is alleged by The Gambia and that The Gambia must prove. By asserting that ARSA posed no serious threat, The Gambia cannot thereby shift the burden of proof to Myanmar to establish otherwise.

26. With these clarifications, I return to the third paragraph of the question asked by Judge Cleveland. It is not inconsistent for Myanmar to refer to the FFM and NGO reports, even though Myanmar says that they have no evidential weight. The reasons are as follows.

27. First, if The Gambia presents insufficient evidence to discharge its burden of proof, in accordance with the applicable standard of proof, then Myanmar does not in fact need to present any evidence in rebuttal, since The Gambia has failed to prove its allegation in any event. Myanmar’s references to FFM reports and NGO reports to that extent are unnecessary.

28. Secondly, where The Gambia relies on FFM and NGO reports in claimed support of its case, Myanmar is of course entitled to refer to the same or other parts of that material, or to similar material, either to show that it does not say what The Gambia says it does or to show that it contains other content that is in fact inconsistent with The Gambia’s case. Not only is Myanmar entitled to do this, it would be expected to do this. Furthermore, if Myanmar can show that The Gambia has presented such material selectively, and given only a partial account of the content of such documents, that reflects on The Gambia’s case as a whole. For The Gambia to place central reliance on the FFM reports, and to then exclude from its Memorial the pages of those reports dealing with ARSA, is no small matter.

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<sup>210</sup> CR 2026/16, pp. 25 and 39 (Newton).

<sup>211</sup> CR 2026/1, p. 58, para. 61 (Reichler).

<sup>212</sup> CR 2026/1, p. 58, para. 61 (Reichler).

29. Thirdly, it must be noted that even where Myanmar does itself positively assert facts that it itself must prove, it is not subject to the same standard of proof as The Gambia. The Gambia must prove facts to a high standard of proof, equivalent to the standard of “beyond reasonable doubt”. Myanmar therefore need only establish sufficient possibility of facts as to raise a reasonable doubt.

30. I come then to the fourth paragraph of Judge Cleveland’s question, which asks:

“Does Myanmar contend that the evidence it invokes to describe ARSA and its activities in northern Rakhine State, including FMM and NGO reports and media accounts, form part of the ‘best available evidence’ in this case? To what extent should the Court consider reliable, and give weight to, such sources of evidence referenced by Myanmar?”<sup>213</sup>

31. My answer is this. It follows from what I have said that the burden of proof is not on Myanmar to describe ARSA and its activities in northern Rakhine State. Rather, the burden is on The Gambia to establish that the operations in 2016 and 2017 were far out of proportion to what was needed to defend against ARSA, if that is what The Gambia wants to contend. And of course, even if The Gambia were to prove that, The Gambia does not thereby prove genocide. In deciding whether or not The Gambia has established a fact, the Court will, of course, also take into account any evidence filed by Myanmar. The evidence cited by Myanmar is in fact a mix of material, including material emanating from the Government as well as citations to material of the kind referred to in Judge Cleveland’s question. Myanmar obviously considers that material emanating from the Government is better evidence than material to which it says no evidential weight can be attached. However, Myanmar is conscious of the fact that The Gambia is always dismissive of evidence emanating from the Government, claiming that it is self-serving and should be given no evidential weight<sup>214</sup>. Myanmar has, therefore, also referred to some of the very materials relied on by The Gambia — or other material of a similar kind — to show that even this material is inconsistent with The Gambia’s claim. What can be the basis for any objection by The Gambia for the Court considering this material for this purpose, when The Gambia itself relies on this material, or material of this kind?

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<sup>213</sup> CR 2026/12, p. 47 (Judge Cleveland).

<sup>214</sup> CR 2026/3, p. 41, para. 34 (Pasipanodya); CR 2026/3, p. 65, para. 32 (Ngum); CR 2026/4, p. 73, para. 54 (Suleman); CR 2026/16, pp. 34-35 (Newton); CR 2026/18, p. 39, para. 29, p. 41, para. 33 and p. 60, paras. 97-98 (Reichler); CR 2026/19, pp. 36-37, para. 40 (Ho); CR 2026/19, p. 60, para. 31 (Suleman).

### 3. Response to arguments in The Gambia's second round

32. Mr President, Members of the Court, I move on now to address certain arguments made by The Gambia in the second round of its oral argument.

33. First, The Gambia says that Myanmar provides no basis for its claim that none of the members and staff of the FFM “appear to have had qualifications in forensic investigations or litigations”<sup>215</sup>. In fact, I referenced paragraph 1 of the 2018 FFM Detailed Findings itself for that statement<sup>216</sup>. This paragraph states that the core staff of the FFM consisted of “a coordinator, fact-finding team leader and five human rights officers, legal adviser/reporting officer, military adviser, sexual and gender-based violence adviser, security officer, two language assistants and administrative support”. There is no reference to forensic investigators or trial attorneys or litigators. Counsel for The Gambia took you to the CV of one single person who worked for the FFM, and you can form your own view of that<sup>217</sup>. The point remains: the FFM was in no way resourced with the qualified investigators and litigators that it would have needed to enable it to collect evidence from so many people in a way suitable for use in judicial proceedings with this high standard of proof. The point also remains that it cannot be assumed that the FFM followed OHCHR guidance merely because it said it did<sup>218</sup>. When Myanmar points to an example of where it apparently did not<sup>219</sup>, The Gambia would claim that that is “nit-picking”<sup>220</sup>.

34. The Gambia's argument appears to be that the members and staff of the FFM were qualified and suitable to do the work of the FFM<sup>221</sup>. But that is not the point. The point is that the FFM was not qualified or resourced to produce evidence for use in judicial proceedings in which the high standard of proof applies. Contrary to what The Gambia claims, the objective of producing reports suitable for use in judicial proceedings is not explicit in the FFM's mandate<sup>222</sup> and, if it had been in its mandate, then it would have lacked the resources to fulfil that mandate.

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<sup>215</sup> CR 2026/18, p. 30, para. 5 (Reichler).

<sup>216</sup> CR 2026/8, p. 34, para. 8, fn. 124 (Staker); 2018 FFM Detailed Findings, para. 1, MG, Vol. II, Annex 40.

<sup>217</sup> CR 2026/18, p. 31, para. 7 (Reichler).

<sup>218</sup> CMM, paras. 6.35-6.36. Compare CR 2026/18, p. 30, para. 5, and pp. 33-34, para. 13 (Reichler).

<sup>219</sup> CMM, para. 6.36.

<sup>220</sup> CR 2026/18, p. 30, para. 4 (Reichler).

<sup>221</sup> CR 2026/18, pp. 30-32, paras. 5-9 (Reichler).

<sup>222</sup> CR 2026/18, p. 32, paras. 8-9 (Reichler).

35. The Gambia tries to take issue with Myanmar's interpretation of what is stated in paragraph 53 of the affidavit of the head of the IIMM. I apologize for taking the Court back to this yet again. It states:

“The Mechanism has extensively utilised the information received from the FFM. From the commencement of the [IIMM's] activities, it used the FFM archives *as a starting point for incident identification and prioritisation*, as well as preliminary crime pattern analysis . . . The Mechanism also used FFM witness interviews as *one means of identifying potentially relevant witnesses for further engagement with the [IIMM]*. Contemporaneous documentation collected by the FFM has also been incorporated into the [IIMM's] analytical products.”<sup>223</sup>

36. I made the point earlier that reports like those of the FFM could be used as initial information to suggest potential lines of enquiry for forensic investigations with a view to generating evidence suitable for use in judicial proceedings. The affidavit of the head of the IIMM indicates that this is how they have used the materials produced by the FFM. There is no endorsement here of the suitability of FFM reports themselves for use in judicial proceedings.

37. The Gambia points out that the quote from Professor Bassiouni that I presented was from 2001<sup>224</sup>. However, there is also more recent material indicating that “[m]ost fact-finding missions have in fact very limited resources”, often deliberately so<sup>225</sup>, and that according to one survey of staff members of relevant UN mandates, “just 11.70% of respondents agreed that the recruitment yielded staff with the requisite expertise and skills”<sup>226</sup>, and that “[t]he *ad hoc* and urgent origins of UN mandates have, in the past, generated problems with the specifications of the mandate, the investigation's time frame, the stability of financing, and the adequacy of staffing”<sup>227</sup>.

38. The Gambia suggests that there were good reasons why a fact-finding mission would maintain the anonymity of its interviewees<sup>228</sup>. But that misses the point. This may be appropriate for a fact-finding mission, but it is not appropriate for a court of law. In the first round, I asked the

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<sup>223</sup> Affidavit of Nicholas Koumjian, 17 November 2025, para. 53 (emphasis added), filed with the letter of the Agent of The Gambia dated 18 November 2025, maintained in the case file by decision of the Court communicated to the Parties on 15 December 2025; quoted in CR 2026/18, pp. 32-33, paras. 10-11 (Reichler).

<sup>224</sup> CR 2026/18, p. 33, para. 12 (Reichler).

<sup>225</sup> RM, para. 6.29; F. D'Alessandra, “The Accountability Turn in Third Wave Human Rights Fact-Finding”, *Utrecht Journal of International and European Law*, Vol. 33 (2017), p. 68, RM, Vol. II, Annex 42.

<sup>226</sup> RM, para. 6.30; F. D'Alessandra *et al.*, “Anchoring Accountability for Mass Atrocities” (Oxford Institute for Law, Ethics and Armed Conflict, 2022), p. 41, RM, Vol. V, Annex 167.

<sup>227</sup> *Ibid.*, p. 31.

<sup>228</sup> CR 2026/18, p. 34, paras. 14-15 (Reichler).

rhetorical question, “would any municipal court that observes the rule of law convict a person of the gravest crime, or find against a defendant in the highest stakes civil case, on the basis of a report prepared by a third party that simply states facts attributed to anonymous persons?”<sup>229</sup> The Gambia does not suggest a positive answer to that question.

39. Ultimately, The Gambia now appears to accept, as it must, that the FFM reports are hearsay<sup>230</sup>. I think that we can now take it as undisputed that information in FFM reports is second-hand hearsay. The Gambia contends that hearsay evidence may nonetheless be admitted and given weight for certain purposes in various jurisdictions<sup>231</sup>. However, would any jurisdiction find the core facts of the gravest and most serious accusation to be proved to the highest standard of proof on the basis of hearsay? Again, The Gambia does not even suggest that a positive answer could be given to that question. The Gambia cites a decision of the International Criminal Court but does not suggest that the ICC would find a crime to be proved on the basis of such hearsay material. How could it<sup>232</sup>?

40. Furthermore, contrary to what The Gambia contends<sup>233</sup>, Myanmar does not accept that the FFM’s sources were comprehensive. We have already explained that Myanmar was not required to co-operate with it and did not do so, so that it gives only one side of the story. Myanmar also does not accept that the FFM reports were produced with “care” in the way that The Gambia implies. Its reports were produced quickly, with limited resources, under time pressure. And I have already noted that the Government of Myanmar does not accept the independence of the FFM.

41. It may well be true that the “best evidence” rule does not require production of the “best evidence *imaginable*”<sup>234</sup>. But it does require the best evidence that ought to have been reasonably available. The interview notes and other materials on which the FFM reports were based would have been better evidence than the FFM reports themselves. However, these materials are not available for the very reason that the IIMM, which currently has them, has declined to make them available. It appears to be that the reason for this is because, from the perspective of the Human Rights Council

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<sup>229</sup> CR 2026/7, pp. 28-29, para. 50 (Staker).

<sup>230</sup> CR 2026/18, p. 35, para. 17 (Reichler).

<sup>231</sup> CR 2026/18, pp. 35-36, paras. 17-20 (Reichler).

<sup>232</sup> RM, para. 5.72.

<sup>233</sup> CR 2026/18, p. 36, para. 20 (Reichler).

<sup>234</sup> CR 2026/18, p. 40, para. 32 (Reichler).

and the IIMM at least, IIMM witness statements are meant to be even better evidence than the FFM materials, and it is thus the IIMM materials that have been made available to the Parties. However, it also appears to be accepted that the IIMM materials themselves are incapable of supporting a finding of genocide. Mr President, Members of the Court, I am sorry, I am becoming repetitive. You have the point. What is supposed to be the best evidence does not prove The Gambia's case, so The Gambia instead seeks to rely on evidence other than the best evidence, and this is contrary to the very purpose of the best evidence rule.

42. Mr President, Members of the Court, I take the opportunity to mention one other form of evidence that would have been expected in this case but is lacking, namely photographic and video evidence of the events themselves. The absence of such evidence is striking given the ubiquity in northern Rakhine State at the time of smartphones with cameras, even in rural areas<sup>235</sup>.

43. For example, the evidence indicates that smartphones were present in Min Gyi<sup>236</sup>, but no photographs or videos of that incident are produced by any witness. Other witnesses who refer to phones in their evidence make excuses for not producing video recordings or photos — they claim their phones were lost prior to arrival in Bangladesh<sup>237</sup> or that their phones have otherwise been lost, or that their phones have stopped working<sup>238</sup>, or that they no longer have a phone, or that the relevant data has been deleted<sup>239</sup>. It is remarkable that not a single witness seems to have any video recordings of the claimed events at issue.

44. The absence of photographs or videos is all the more remarkable given the apparent access by various organizations, and international news agencies and NGOs, to thousands of witness accounts and hundreds of thousands of potential sources of evidence from within the camps in Bangladesh.

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<sup>235</sup> CMM, paras. 3.100-3.107; Statista website, linking to an article by L. von Kameka, "Smartphone penetration in Myanmar from 2015 to 2016, by region", 3 January 2023, CMM, Vol. IX, Annex 464; P. Heijmans, "The Unprecedented Explosion of Smartphones in Myanmar", *Bloomberg*, 17 July 2017, CMM, Vol. VIII, Annex 388.

<sup>236</sup> See e.g. IIMM, Witness Statement No. IIMM0027992990, para. 44, RG, Vol. IV, Annex 51. See also Legal Action Worldwide, Witness Statement No. 037, paras. 8-9, RG, Vol. IV, Annex 47; IIMM, Witness Statement No. IIMM0019629206, para. 91, RG, Vol. IV, Annex 50.

<sup>237</sup> IIMM, Witness Statement No. IIMM0019629265, para. 97, RG, Vol. IV, Annex 53.

<sup>238</sup> IIMM, Witness Statement No. IIMM0027992990, para. 44, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0019629206, para. 188, RG, Vol. IV, Annex 51; IIMM, Witness Statement No. IIMM0027995869, para. 139, RM, Vol. IV, Annex 138.

<sup>239</sup> IIMM, Witness Statement No. IIMM0028059734, para. 67, RM, Vol. IV, Annex 143.

45. It is perhaps telling that the only photos which The Gambia has produced during the present hearings are two photographs of the incident at Inn Din — which is an incident that Myanmar does not dispute.

46. One other matter is that The Gambia in its second round did nothing to dispel the concerns about pervasive witness anonymity.

47. Judge Tomka asked a question of The Gambia, seeking clarification of whether there have been any safeguards to ensure that multiple statements relied on as corroborative do not in fact originate from the same individual.

48. The Gambia in fact gave only half an answer to this question. The answer related to the 44 witness statements provided by Legal Action Worldwide, the one by Fortify Rights, the two from journalists, and the 42 received from the IIMM<sup>240</sup>. The Court was informed that The Gambia was aware of all of the identities of the witnesses providing the 44 Legal Action Worldwide statements and the Fortify Rights statement, although the identities of only 14 of these were made known to the Court and Myanmar. However, with one exception, not even The Gambia knows the identities of the IIMM witnesses.

49. The Gambia admits that it was “challenging” for it to work out whether any of the Legal Action Worldwide witnesses were the same people who had given redacted IIMM witness statements<sup>241</sup>. It identified that two were the same, but only after filing its Reply, in which it had already claimed that different statements were mutually corroborative, not realizing that they were given by the same person<sup>242</sup>. It appears that The Gambia has to rely on Legal Action Worldwide to tell it whether or not any of its other witnesses have spoken to the IIMM<sup>243</sup>. These experiences with the witness statements from Legal Action Worldwide and the IIMM show that the problems of anonymous witness statements are not purely hypothetical.

50. What is, however, striking is that The Gambia gives no response to Judge Tomka’s question as far as the FFM reports and the NGO reports are concerned. To justify its reliance on FFM

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<sup>240</sup> CR 2026/18, p. 58, para. 91 (Reichler).

<sup>241</sup> CR 2026/18, p. 59, para. 93 (Reichler).

<sup>242</sup> RM, para. 7.22 (1) and (2).

<sup>243</sup> CR 2026/18, p. 59, para. 93 (Reichler).

reports, counsel for The Gambia emphasizes that the FFM interviewed “more than 1,200 witnesses and victims”<sup>244</sup>, but provides no information about safeguards to ensure that the interviewees referred to in the FFM reports are not the same persons referred to in the various NGO reports, and are not the same persons giving FFM or Legal Action Worldwide witness statements. It remains the case that the pervasive body of hundreds or possibly even thousands of eyewitness accounts given in the FFM reports and NGO reports might all be given by the same people — and that those eyewitness accounts might also be given by the same people giving FFM or Legal Action Worldwide witness statements.

51. Finally, I note that if any reliance could be placed on FFM and NGO reports — which I say it cannot — it would be necessary to look carefully at what the report actually says in relation to each fact in support of which it is cited. For instance, during the first round of hearings, counsel for The Gambia told you that<sup>245</sup> “Médecins Sans Frontières estimates that between 734 and 2,109 children died during the ‘clearance operations’ or were killed during flight to Bangladesh. And those are just children under the age of five.”<sup>246</sup>

52. However, this statement is taken from a report by Médecins Sans Frontières which is stated to be “primarily based on the results of the six *health* surveys that MSF conducted in Cox’s Bazar district in November 2017”<sup>247</sup>. A *health survey* is obviously not designed to determine in a forensic way very specific factual events. The methodology section of the report indicates that the primary function of the health surveys was to estimate crude mortality rates, and that most of the eight secondary functions of the health surveys related to demographic, health and nutrition matters<sup>248</sup>. It is only the seventh and eighth secondary functions of the health surveys that related to “iidentif[y]ing] *major* causes of death” and to “gain[ing] knowledge of violence-related events”<sup>249</sup>. It is clear that the

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<sup>244</sup> CR 2026/18, p. 30, para. 3 (Reichler).

<sup>245</sup> CR 2026/4, p. 30, para. 14 (Loewenstein).

<sup>246</sup> Médecins Sans Frontières, “*No one was left*”: *Death and Violence Against the Rohingya in Rakhine State, Myanmar* (2018), p. 5, fn. 6. MG, Vol. IV, Annex 110.

<sup>247</sup> *Ibid.*, p. 6 (emphasis added). MG, Vol. IV, Annex 110.

<sup>248</sup> *Ibid.*, p. 25 (not included in the extract at MG, Vol. IV, Ann. 110), CMM, Vol. VII, Ann. 307.

<sup>249</sup> *Ibid.* (emphasis added).

MSF health surveys were not designed to investigate specific factual events, but at most sought only to obtain generalized information about violence for purposes of a study focused on health issues.

53. Where a report of an NGO is cited as evidence of a fact, it cannot simply be assumed that the cited report necessarily supports that fact, much less that it proves that fact.

54. Mr President, Members of the Court, that brings me to the end of my final presentation at this hearing. It has been a great honour to appear before you. I thank the members of my legal team for their professionalism and diligence. And Members of the Court, I thank you all for your very careful and patient attention to the presentations that I have given. Mr President, if that is an appropriate time for the lunch break, when the hearing resumes this afternoon, I would invite you to call on Professor Talmon again, who will address you on further matters.

The PRESIDENT: I thank Mr Staker for his statement, whose statement brings this sitting to a close. The oral proceedings in the case will resume this afternoon at 3 p.m., to hear the remainder of Myanmar's second round of oral argument.

The sitting is closed.

*The Court rose at 12.50 p.m.*

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