Corrigé
Corrected

CR 2026/23

International Court of Justice

THE HAGUE

Cour internationale de Justice

LA HAYE

YEAR 2026

Public sitting

held on Thursday 29 January 2026, at 3 p.m., at the Peace Palace,

President Iwasawa presiding,

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

VERBATIM RECORD

ANNÉE 2026

Audience publique

tenue le jeudi 29 janvier 2026, à 15 heures, au Palais de la Paix,

sous la présidence de M. Iwasawa, président,

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

COMPTE RENDU

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

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

M. Gautier, greffier

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

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

as Agent;

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

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

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

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

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

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

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

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

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

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

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

as Counsel and Advocates;

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

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

as Counsel;

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

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

Le Gouvernement de la République de Gambie est représenté par :

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

comme agent ;

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

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

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

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

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

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

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

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

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

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

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

comme conseils et avocats ;

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

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

comme conseils ;

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

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

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

Mr Yousuf Ali,

Ms Noor Begum,

Mr Mohammed Eliyas,

Ms Fatema Fatema,

Mr Nay San Lwin, Free Rohingya Coalition,

Mr Sayedul Karim, Rohingya Justice Initiative,

Mr Maung Tun Khin, Burmese Rohingya Organisation UK,

Mr Matthew Smith, Fortify Rights,

as Members of the Delegation;

Mr Khairul Amin, Interpreter,

Ms Amina Chaudary,

Ms Maisha Farzana, Interpreter,

Ms Rahima Khatun, Interpreter,

Ms Nancy Lopez, Foley Hoag LLP,

Mr Himel Biswas Manna, Interpreter,

Mr Jonathan Mercer,

Ms Jennifer Schoppmann, Foley Hoag LLP,

as Assistants.

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

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

as Agent;

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

as Alternate Agent;

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

as Lead Counsel and Advocate;

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

M. Yousuf Ali,

M^me^ Noor Begum,

M. Mohammed Eliyas,

M^me^ Fatema Fatema,

M. Nay San Lwin, Free Rohingya Coalition,

M. Sayedul Karim, Rohingya Justice Initiative,

M. Maung Tun Khin, Burmese Rohingya Organization UK,

M. Matthew Smith, Fortify Rights,

comme membres de la délégation ;

M. Khairul Amin, interprète,

M^me^ Amina Chaudary,

M^me^ Maisha Farzana, interprète,

M^me^ Rahima Khatun, interprète,

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

M. Himel Biswas Manna, interprète,

M. Jonathan Mercer,

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

comme assistants.

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

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

comme agent ;

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

comme agente suppléante ;

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

comme conseil principal et avocat ;

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

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

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

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

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

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

as Counsel and Advocates;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

M^me^ Alina Miron, professeure de droit international, membre du barreau de Paris, associée fondatrice du cabinet FAR Avocats,

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

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

comme conseils et avocats ;

M^me^ Khin Thidar Aye, chargée d'affaires par intérim/cheffe de mission, ambassade de la République de l'Union du Myanmar à Bruxelles,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Ms Mary Lobo, Legal Assistant,

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

as Members of the Delegation.

_____

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

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

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

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

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

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

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

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

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

M^me^ Mary Lobo, assistante juridique,

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

comme membres de la délégation.

_____

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

The Court meets this afternoon to hear the remainder of the second round of oral argument of Myanmar. I shall now give the floor to Professor Talmon. You have the floor, Sir.

Mr TALMON:

I. BURDEN AND STANDARD OF PROOF

1. Mr President, Madam Vice-President, distinguished Members of the Court, it is my task in the final speech of these hearings to respond to The Gambia's argument on burden and standard of proof and to provide answers to the related questions by Judges Charlesworth and Pillay, Gómez Robledo and Hmoud.

1. Burden of proof

2. Let me start with the question of the burden of proof.

3. The Gambia now agrees that it "has the burden of proving the facts to establish breaches of the [Genocide] Convention by Myanmar"[1]. It also agrees that it must prove one or more of the acts set out in Article II *(a)* to *(d)* of the Convention, that these acts were attributable to Myanmar and, more importantly, that Myanmar had the intent to destroy the Bengali Muslim group, in whole or in part, as such[2].

2. Standard of proof

4. Mr President, Members of the Court, let me now turn to the standard of proof.

5. The standard of proof determines the degree of certainty evidence must provide. The standard of proof is one of the decisive questions in the present case.

6. There is general agreement on the standard of proof[3]. The Court must be "fully convinced" that it has been clearly established that the crime of genocide or the other acts enumerated in Article III of the Genocide Convention have been committed[4]. The "fully convinced" standard of

---

[1] CR 2026/18, p. 21, para. 34 (Sands); CR 2026/8, p. 13, para. 7 (Talmon).

[2] See CR 2026/18, p. 21, paras. 34-36 (Sands).

[3] CR 2026/18, p. 19, para. 28; p. 23, para. 31; p. 23, para. 44 (Sands); CR 2026/8, p. 13, para. 9 (Talmon).

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

proof applies to the proof of the facts (including genocidal intent) and the existence of a pattern of conduct.

7. The Gambia agrees that "this is a relatively high standard of proof"[5]. The Court itself speaks of a "heightened standard of proof", reserved for charges of exceptional gravity such as allegations of genocide[6]. In any case, the "fully convinced" standard of proof requires "proof at a high level of certainty"[7].

A. The "fully convinced" or "beyond reasonable doubt" standard of proof

8. While the Parties agree on the applicable standard of proof, they fundamentally disagree on what that standard means in practice.

9. Myanmar has submitted that, although different wording is used, the "fully convinced" standard of proof is comparable to the "beyond reasonable doubt" standard, in the sense that they are similar in relevant ways[8]. While the Court may not have formally adopted the "beyond reasonable doubt" standard or its wording, the Court's "fully convinced" standard is informed by the "beyond reasonable doubt" standard[9].

10. The Gambia, on the other hand, tries to avoid the "beyond reasonable doubt" standard of proof like the plague, because it knows that if that standard is applied, it will not be able to prove its case. It therefore argues that the two standards are different and that the "beyond reasonable doubt" standard is of no relevance in the present case.

11. Let me address The Gambia's arguments one by one.

12. *First*, it argues that the "beyond reasonable doubt" standard is "an unattainably high bar" for the proof of genocidal intent[10]. As pointed out in the first round in another context[11], this standard has not prevented this Court and international criminal courts and tribunals from finding that

---

[5] CR 2026/1, p. 41, para. 4 (Reichler).

[6] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment, I.C.J. Reports 2024 (I)*, p. 127, para. 82.

[7] *Bosnia Genocide, 2007 Judgment*, p. 130, para. 210.

[8] Cambridge Dictionary, "comparable" (https://dictionary.cambridge.org/dictionary/english/comparable).

[9] See CR 2026/8, pp. 13-14, paras. 12-16 (Talmon).

[10] CR 2026/18, p. 13, para. 3 (Sands).

[11] CR 2026/8, p. 20, paras. 40-41 (Talmon).

genocide has been committed. The bar is not the standard of proof but the fact that there is no sufficient evidence to prove genocidal intent.

13. *Second*, The Gambia argues that the "beyond reasonable doubt" standard is a common law and a criminal law standard and that because the Court is neither common law nor a criminal court, it cannot apply that standard[12]. At the same time, however, counsel for The Gambia intimates that the "fully convinced" standard is a "civil law" standard when it tries to explain its meaning by reference to a Swiss law standard[13]. It has been rightly pointed out by Judge Greenwood in the *Pulp Mills* case that "[i]nternational courts and tribunals have avoided the distinction between criminal and civil standards of proof familiar to common law"[14]. While the "beyond reasonable doubt" standard might have its origin in the common law it has not prevented this Court and international criminal tribunals from adopting that standard.

14. *Third*, The Gambia asserts that "fully convinced" means something other than "beyond reasonable doubt". Myanmar has asked in the first round: what does it mean?[15] On Monday, counsel for The Gambia provided the answer: "'fully convinced' . . . means 'fully convinced'"[16]. A master piece of tautology, a literary stroke of genius!

15. But to be fair, later on, counsel for The Gambia offers you a layman's definition of the "fully convinced" standard, saying: "if you wake up in the morning and you are still worrying about whether the standard . . . has been met, then it has not been met"[17]. But why would you worry, if you did not have doubts about whether the standard has been met? Probably not just any doubts, but reasonable doubts. But how is that then different from the "beyond reasonable doubt" standard? How can you be fully convinced, if you have reasonable doubts?

16. Let me come to The Gambia's *fourth* argument why you should not be guided by the "beyond reasonable doubt" standard. No standard is needed because whether the Court is fully

---

[12] CR 2026/18, p. 23, para. 44 (Sands).

[13] CR 2026/18, p. 25, para. 51 (Sands).

[14] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, separate opinion of Judge Greenwood, p. 230, para. 25.

[15] CR 2026/8, p. 15, para. 17 (Talmon).

[16] CR 2026/18, p. 23, para. 44 (Sands).

[17] CR 2026/18, pp. 25-26, para. 51 (Sands).

convinced, The Gambia tells you, is "a matter of individual appreciation"[18]. Even if it is for each judge to form his or her own view on the evidence, that process must be guided by some standard. Otherwise, you would be following in the footsteps of a person who recently proclaimed not to need international law, not to need international standards, who is only guided by his own morality, his own mind. While every assessment of evidence is subjective, it is not arbitrary.

17. *Fifth*, The Gambia has advanced the rather curious argument that in this Court there will not be "weeks, months, years of witness testimony" and that consequences must follow from that[19]. What this in effect means is: if you do not have a proper evidentiary basis, just apply a lower standard of proof. This surely cannot be the case.

18. *Finally*, The Gambia claims that the high standard of "beyond reasonable doubt" is not necessary because the Court is dealing with State responsibility, not individual criminal responsibility. The Gambia essentially argues that this Court does not need to apply the "beyond reasonable doubt" standard because, as it says, "no one is going to jail" because of your judgment[20]. Counsel for The Gambia told you: "That necessarily means that the degree of scrutiny will not be the same, will not be as acute"[21].

19. The Gambia is wrong when it implies that in a case of State responsibility a lower standard of proof applies, especially in a case concerning "the crime of genocide"[22]. There is also a contradiction in The Gambia's position on the standard of proof. Only a few days earlier, we heard from another of The Gambia's counsel that the applicable standard of proof is "a relatively high standard of proof, and we feel that this is appropriate where allegations of genocide or other grievous international crimes are concerned"[23].

20. A finding of genocide both at the individual and at the State level always has grave consequences. While no one is going to jail because of the Court's judgment, a finding of genocide by this Court puts the stigma of being a *genocidaire* on the State and its people for centuries. A whole

---

[18] CR 2026/18, p. 26, para. 52 (Sands).

[19] CR 2026/18, p. 25, para. 50 (Sands).

[20] CR 2026/18, p. 24, para. 47 (Sands).

[21] *Ibid.*

[22] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948.

[23] CR 2026/1, p. 41, para. 4 (Reichler).

nation would be regarded, like the Germans, as a "nation of perpetrators". To affix on any person — natural or legal — a stigma of crime therefore requires a higher standard of certainty. This is even more true in the case of States, whose vital interests directly concern the welfare of millions of people, who all, each one of them, will be adversely affected by a decision based upon a misconception of facts[24].

21. Thus, instead of calling the "beyond reasonable doubt" standard of proof into question, The Gambia's arguments underscore its importance in the present case. Both on principle and on the basis of the Court's jurisprudence, allegations of genocide must be proven to a heightened standard of proof — irrespective of whether this standard is referred to as the "fully convinced" or the "beyond reasonable doubt" standard.

B. Answer to the question by Judge Hmoud

22. Mr President, the distinction between individual criminal responsibility and State responsibility for genocide, which I have just addressed, also gives rise to Judge Hmoud's question to the Parties. The Gambia tried to intermingle the judge's question with its argument concerning the "beyond reasonable doubt" standard of proof in order to create the false impression that Judge Hmoud shared The Gambia's view that the beyond reasonable doubt standard should not be applied in the present case[25].

23. Your Excellency, you asked in the first part of your question "whether the difference between the [two] régimes of . . . responsibility for genocide should be considered when assessing the circumstantial evidence that establishes the genocidal intent as the 'only reasonable inference'"[26]. The short answer, Your Excellency, is no.

24. While there are differences between individual criminal responsibility and State responsibility, these differences do not concern the applicable standards of proof when assessing circumstantial evidence in order to prove genocidal intent. It is exactly because of the gravity of the allegation and the grave consequences that follow from a finding of genocide, both for individuals

---

[24] See *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, dissenting opinion of Judge *ad hoc* Ečer, pp. 118-119.

[25] CR 2026/18, p. 24, para. 45 (Sands).

[26] CR 2026/12, pp. 47-48 (Judge Hmoud).

and for States, that the same high standard of proof applies. Before any inference can be drawn from circumstantial evidence, such evidence must have been established conclusively or, as Myanmar submits, beyond reasonable doubt. Otherwise, if the factual basis for an inference is tenuous, so is the inference itself.

25. The difference between individual criminal responsibility and State responsibility did not prevent this Court from applying the same standard for inference that is applied by international criminal tribunals and courts. Thus, in the *Croatia* case the Court expressly confirmed that when inferring the existence of genocidal intent from a pattern of conduct, it followed in substance the same approach as the International Criminal Tribunal for the former Yugoslavia in the *Tolimir* case[27].

26. Let me turn to the second part of Your Excellency's question. Assuming that other motives or objectives of a State, in addition to its genocidal intent, can be established by circumstantial evidence, you ask whether this would negate the possibility of proof of *dolus specialis* as the only reasonable inference. The short answer, Your Excellency, is yes. However, there seems to be a misunderstanding. Other motives or objectives of a State, or better intents, like the intent to destroy, need not be positively established by circumstantial evidence; that is, they must not be proven by circumstantial evidence. Inference is a technique of drawing conclusions from circumstantial evidence by deductive reasoning. If there is only one other reasonable alternative inference, then the inference of genocidal intent is not the only reasonable one and, therefore, genocidal intent is not established to the required standard of proof.

C. Genocidal intent as the only reasonable inference from a pattern of conduct

27. Mr President, Members of the Court, let me return to The Gambia's argument on the standard of proof. The Parties do not only disagree over what the standard of proof means in practice, they also disagree over how genocidal intent is established by inference from circumstantial evidence.

28. Myanmar's approach is to follow the Court in the *Bosnia* and *Croatia* cases, according to which genocidal intent is proven by way of inference from a pattern of conduct[28]. As I showed you

---

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

[28] *Bosnia Genocide, 2007 Judgment*, p. 129, para. 207, and pp. 194-198, paras. 370-376; *Croatia Genocide, 2015 Judgment*, p. 66, para. 145; also p. 67, para. 148.

last week, the Court first examines whether genocidal acts and other atrocities committed during an attack on a protected group have been established by conclusive evidence[29]. In a second step, the Court then examines on the basis of four factors, which are listed in the box on the left, whether these acts clearly establish a pattern of conduct. These four factors include the

> "scale and allegedly systematic nature of the attacks, the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity, the specific targeting of [members of the protected group] and the nature, extent and degree of the injuries caused to the [targeted group]"[30].

It is only in the third and final step that the Court examines whether genocidal intent can be inferred from the pattern of conduct[31].

29. While The Gambia pays lip service to the Court's "inference from a pattern of conduct" approach, it does not apply it. Neither does it establish, let alone prove by conclusive evidence, a "pattern of conduct" in line with the Court's jurisprudence, nor does it establish that genocidal intent is the only reasonable inference from such a pattern of conduct.

30. In the first round of oral argument, The Gambia tried to replace the Court's "inference from a pattern of conduct" approach with a new "indicators of genocidal intent" approach. I have dealt with this misconceived approach in my first-round presentation[32], and I am glad to say that it has been given less prominence in the second round.

31. It does however still feature — for example, in the presentation on what The Gambia refers to as "anti-Rohingya hate speech and propaganda"[33]. While in the first round, The Gambia asserted that such speech acts are indicators from which genocidal intent can be directly inferred, in the second round it has modified its position by arguing that the "Court *should* find these indicators to be part of the pattern of conduct" — that very pattern of conduct which then can serve as evidence of a general plan to destroy[34]. But, as I showed in my first-round presentation, there is no place for

---

[29] *Bosnia Genocide, 2007 Judgment*, p. 155, para. 277.

[30] *Croatia Genocide, 2015 Judgment*, p. 121, para. 413.

[31] *Bosnia Genocide, 2007 Judgment*, p. 142, para. 242.

[32] CR 2026/8, pp. 16-17, paras. 23-27 (Talmon).

[33] CR 2026/19, p. 21, para. 8 (Suleman).

[34] CR 2026/19, p. 21, para. 8 (Suleman) (emphasis added).

extraneous factors such as hate speech and propaganda in the pattern of conduct from which genocidal intent can be inferred[35].

32. In a variation on its indicator of genocidal approach theme, The Gambia now also argues that a pattern of conduct is not the only way to show that a general plan to destroy exists, and that such a plan could also be demonstrated by hate speech and propaganda[36]. There is no support for such proposition in the Court's case law. In any case, for hate speech to be accepted as evidence of a general plan to destroy, "it would have to be such that it could only point to the existence of such intent"[37].

33. In another twist of its argument, The Gambia asserted in the second round that "[a] pattern of conduct can thus be established, for instance, where 'widespread attacks' are carried out 'according to a generally similar *modus operandi*'"[38]. The Gambia thereby essentially equated "pattern of conduct" with "similar *modus operandi*"[39].

34. This fitted very well with The Gambia's expert, Professor Newton, who referred some 14 times to "*modus operandi*" during his witness testimony in court last week, and he did so without having been asked a question on *modus operandi*, nor having mentioned the term once in his two previous reports and his written statement. He also did not forget to give you the impression that they were both the same by referring several times to "*modus operandi* or pattern of conduct"[40].

35. Professor Newton's *modus operandi* thesis and the ten elements he identified as characterizing it are markedly different from the factors identified by the Court that establish a pattern of conduct from which genocidal intent can be inferred. As you can see on the screen now, Professor Newton's elements of the *modus operandi* on the left-hand side include: surrounding the Rohingya part of villages; surprise attacks; attacks from different angles; indiscriminate shooting at civilians; segregation of men and boys from women; mass rape of women; executions; shooting at fleeing refugees; burnings of Rohingya houses and areas; and bulldozing. The Court, on the other hand, used

---

[35] CR 2026/11, pp. 14-15, paras. 11-16 (Talmon).

[36] CR 2026/19, p. 20, paras. 5-6 (Suleman).

[37] *Bosnia Genocide, 2007 Judgment*, pp. 196-197, para. 373.

[38] CR 2026/19, p. 38, para. 2 (Loewenstein).

[39] CR 2026/20, p. 36, para. 14 (Reichler).

[40] CR 2026/16, pp. 23, 28, 29 (Newton).

the following factors in order to establish a pattern of conduct: the scale and systemic nature of attacks; excessive casualties and damage; specific targeting of members of a protected group; and the nature, extent and degree of the injury caused[41].

36. That the *modus operandi* or pattern of conduct as understood by Professor Newton and the Court's pattern of conduct, as defined in the *Croatia* case, are not the same is shown by Professor Newton's answer to the question put to him by Judge Brant. Asked whether the number of civilian casualties played any role in establishing a pattern of conduct, he replied: "I don't think so . . . Any number, Sir, I don't think it's a quantitative factor."[42] The Court, on the other hand, considered the number of persons killed as a proportion of the local population as part of the nature, extent and degree of injury caused — the fourth factor on the right establishing the existence of a pattern of conduct.

37. A *modus operandi* refers to the individual attacks, 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*, such attacks on their own do not establish a pattern of conduct[43].

38. The equation of *modus operandi* and pattern of conduct is yet another example of The Gambia trying to move the goalposts in order to show a pattern of conduct from which to infer genocidal intent, where there is no pattern of conduct as understood by the Court. There is, however, another problem with this approach: neither Professor Newton nor The Gambia show that their assertion of genocidal intent is the only reasonable inference to be drawn from this so-called similar *modus operandi*.

39. But, as Mr Blom-Cooper showed you earlier, there is not even a similar *modus operandi* across the alleged attacks in northern Rakhine State. As you can see from the table on the screen now, all there is are scattered isolated incidents which Professor Newton and The Gambia now declare to be a pattern of conduct.

40. There is also a more general problem with The Gambia's argument concerning pattern of conduct. Counsel for The Gambia told the Court that "you have to be fully convinced that the only

---

[41] *Croatia Genocide, 2015 Judgment*, p. 121, para. 413, and p. 120, para. 408.

[42] CR 2026/16, p. 42 (Newton).

[43] *Croatia Genocide, 2015 Judgment*, p. 121, para. 413, and p. 122, paras. 415-416; *Bosnia Genocide, 2007 Judgment*, pp. 196-197, para. 373.

reasonable inference to be drawn from the evidence and the conduct . . . is that Myanmar intended to destroy a part of the Rohingya group"[44]. Counsel for The Gambia here confused standard of proof with standard for inference. The Court must not be fully convinced of the only reasonable inference but of the genocidal intent. But in order to be fully convinced of the genocidal intent, that intent must be the only reasonable inference to be drawn from the pattern of conduct[45].

41. Mr President, Members of the Court, genocidal intent must be the only reasonable inference that can be drawn from a pattern of conduct. If there is only one — only one — other reasonable alternative inference, then the inference of genocidal intent is not the *only* reasonable one and, therefore, genocidal intent is not established to the required standard of proof[46]. The Gambia now claims that it has found a "contradiction" in Myanmar's position[47]. Myanmar has accepted, and does accept, that genocide can be committed during a counter-insurgency operation[48]. It is claimed by counsel for The Gambia that this is contradictory to the statement that if a counter-terrorism "'intention' was established, then the intention to destroy could not be established as the 'only reasonable intention'".

42. This statement is ascribed to me but no reference is given in the verbatim record. In fact, as you can see from the verbatim record, the statement was made up by counsel for The Gambia using snippets from what I had said in the first round. However, he even got the snippets wrong. I am quoted as saying that the "intention to destroy could not be established as the 'only reasonable intention'". The phrase "only reasonable *intention*" can be found nowhere in my speech. This is not surprising, because it would be wrong. The intention to destroy must be established as the "only reasonable *inference*". Counsel may be reminded that he is not writing another novel but is making legal submissions and, when doing so, his literary freedom is restricted. In any case, there is no contradiction.

43. The Gambia's submissions on the only reasonable inference standard are also revealing in another way. Counsel for The Gambia stated that "Myanmar can simultaneously be engaged in a

---

[44] CR 2026/18, p. 23, para. 43 (Sands).

[45] See CR 2026/8, pp. 18-19, para. 36 (Talmon).

[46] CR 2026/8, pp. 19-20, para. 39 (Talmon).

[47] CR 2026/18, p. 22, para. 37 (Sands).

[48] CR 2026/7, p. 33, para. 67 (Staker).

counter-insurgency operation against the Rohingya . . . and *also* have the intention to destroy" the Bengali Muslims in whole or in part[49]. If one can "*also*" have the intention to destroy, then the intention is not the only reasonable one to be inferred from the pattern of conduct. This Freudian slip on the part of counsel shows that not even The Gambia thinks that an intention to destroy is the only intention that can reasonably be inferred from the facts.

44. The Gambia asserts that Myanmar "has not argued" any other inferences than an intent to conduct counter-insurgency[50]. However, it is not for Myanmar to argue, let alone prove, other reasonable inferences that could be drawn from the conduct in question[51]; especially if such inferences are clear from the material before the Court. In my presentation in the first round, I identified several other such reasonable inferences[52].

45. But one feels reminded of the German poet Christian Morgenstern's work "The Impossible Fact": "that which must not, cannot be". In response to not just one but two leading questions by counsel for The Gambia, whether there were "any other alternative explanations" than that "these 'clearance operations' were conducted with the intent to destroy"[53], The Gambia's expert, Professor Newton, stated that there was no other alternative. And just to make sure that no one in the Great Hall of Justice and online missed the message, counsel asked specifically: "Could this have been ethnic cleansing?"[54] To which Professor Newton stated four times that this was not just ethnic cleansing[55].

46. It was only too bad that the account of The Gambia's witnesses was not fully in line with this narrative. For example, Witness MN said in his witness statement of 12 May 2020, at paragraph 32: "We knew that *the military did this to force us out of the country*. So we left, we came to Bangladesh."[56]

---

[49] CR 2026/18, p. 22, para. 37 (Sands) (emphasis added).

[50] CR 2026/18, p. 22, para. 38 (Sands).

[51] See CR 2026/8, p. 21, para. 44 (Talmon).

[52] CR 2026/8, p. 22, para. 45 (Talmon).

[53] CR 2026/16, pp. 32-33 (Reichler).

[54] CR 2026/16, p. 33 (Reichler).

[55] CR 2026/16, p. 33 (Newton).

[56] CR 2026/13, p. 46 (MN); Witness Statement No. 003, para. 32, MG, Vol. X, Annex 340 (emphasis added).

47. This is one of the victims speaking with first-hand experience after the events. But even now, five years later, Witness MN reconfirmed his belief that the military had burned down his home in order to force him and his family to flee.

48. When Judge Nolte asked: "[W]hat made you think that the military did this to force you and your group out of the country? And did other people, in addition to your family and yourself, have the same view that the military did this to 'force us out of the country'? Did other people think the same thing?"[57], Witness MN replied: "That's why I thought *just to force us to leave to another country*, the military did that."[58]

49. Judge Nolte double-checked and asked whether "other people had the same view that the military was doing that to force . . . the Rohingya group, out of the country"[59]. Witness MN replied: "I think so, maybe, they also had the same view."[60]

50. But Witness MN is not alone. In response to a question by the Vice-President, Witness MN said: "Yes, I could see they did to me either to kill me or *to persecute me so that I leave that country* . . . According to them, we didn't have the right to stay in that land. That's why *they were systematically persecuting us so that we flee from that country*."[61]

51. Sorry, I referred twice to Witness MN, but there is another witness, and that is Witness NJ. Witness NJ, when asked by counsel for The Gambia, "why did you leave your home in Myanmar?", Witness NJ replied: "So from Myanmar, we have faced discrimination and we were targeted as a community. *The Myanmar military forced us to leave our homeland*, so we had to forcefully leave to Bangladesh from Myanmar."[62]

52. While it may not suit The Gambia's case, first-hand witness testimony shows that the Bengali Muslims on the ground thought that the intention of the military was not to destroy them as a people as such but to force them out of the country. There is thus at least one other inference that can reasonably be drawn from the conduct.

---

[57] CR 2026/13, p. 46 (Judge Nolte).

[58] CR 2026/13, p. 46 (MN) (emphasis added).

[59] CR 2026/13, p. 46 (Judge Nolte).

[60] CR 2026/13, p. 47 (MN).

[61] CR 2026/13, p. 42 (MN) (emphasis added).

[62] CR 2026/14, p. 13 (NJ) (emphasis added).

53. And this is not the only one. As Mr Blom-Cooper has already shown, before he took the witness stand in the Great Hall of Justice, even Professor Newton was not so categorical in his answers. In both his reports, he wrote that the conduct in question warranted "the inference that the objective is not to defeat an insurgency, but *to punish or destroy* the civilian population"[63]. Punish or destroy — so here we have another inference drawn from the conduct. One can only wonder why he did not mention this in his oral testimony.

D. Answer to the second question of Judge Gómez Robledo

54. Mr President, let me now move on to the questions put to Myanmar by Judge Gómez Robledo, the second of which deals with probative value and the standard for inference. To remind you, His Excellency asked:

> "What conclusions, including with respect to the weight and inferences of evidence provided by the Applicant, should the Court draw from the refusal of the authorities of Myanmar to co-operate with the bodies mandated by the United Nations to investigate the facts underlying the Gambia's allegations?"[64]

55. Professor Miron has already shown that there is no duty to co-operate with the FFM and the IIMM, and has also explained why Myanmar chose not to co-operate with the two bodies.

56. I will focus on the general questions of whether non-co-operation with fact-finding bodies can have any consequences with respect to the probative value of reports produced by such bodies and with respect to the inferences that can be drawn from such reports. The Gambia asserts that non-co-operation undermines the ability to challenge the probative value of such reports and the inferences that those bodies have drawn from the facts in their reports[65]. Myanmar disagrees. I will deal with the two questions in turn.

(a) ***Legal consequences of non-co-operation for the probative value of evidence presented***

57. Let me start with the legal consequences of non-co-operation on the probative value of the reports. The answer is, Your Excellency, that non-co-operation with fact-finding bodies has no effect at all on the probative value of their reports.

---

[63] RG, Vol. IV, Annex 67, p. 5, para. 9; MG, Vol. XI, Annex 359, p. 4, para. 8 (emphasis added).

[64] CR 2026/12, p. 46 (Judge Gómez Robledo).

[65] CR 2026/18, p. 23, para. 40 (Sands).

58. The probative value of evidence depends on the specific piece of evidence in question. The probative value of each piece of evidence must be assessed on its own terms. For example, hearsay evidence is not to be given any greater probative value just because a State that is under no duty to co-operate did not co-operate with a body that recorded that hearsay evidence — hearsay evidence remains hearsay evidence. Similarly, press articles and extracts from publications, which the Court does not regard as evidence capable of proving facts[66], do not become evidence simply because a party to a dispute has not co-operated with the body that includes such press reports in its reports.

59. Non-co-operation with fact-finding bodies is not an evidentiary discount factor. The Court must decide a case on the basis of the evidence available in the case file and each piece of evidence is to be given the weight that is due to it according to the methods of evidence.

60. The Court also cannot apply a presumption that evidence which is unavailable due to alleged non-co-operation would, if produced, have supported a particular party's case; still less a presumption of the existence of evidence which has not been produced[67].

61. Ultimately, it is the party seeking to establish a fact who bears the burden of proving it; and in cases where evidence is not forthcoming, a submission must be rejected as unproven[68].

(b) ***Legal consequences of non-co-operation for the inferences that can be drawn from the evidence provided***

62. Let me turn to the second part of the question concerning the legal consequences of non-co-operation for the inferences that can be drawn from the evidence provided. The answer in short is that non-co-operation does not have any consequences for the inferences to be drawn from the evidence provided.

63. In cases of alleged genocide, the Court applies a heightened standard of proof; namely, that evidence must be "fully conclusive"[69]. In order to prove genocidal intent fully conclusively by circumstantial evidence, genocidal intent must be the only reasonable inference from a pattern of

---

[66] *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Judgment, I.C.J. Reports 2024 (I)*, p. 155, para. 178.

[67] See *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening), Judgment, I.C.J. Reports 1992*, p. 399, para. 63.

[68] See *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 55, para. 119.

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

conduct[70]. As I outlined during the first round of oral argument, the requirement that a certain conclusion must be the only reasonable inference from a pattern of conduct describes the standard for inference that is applied whenever the heightened standard of fully conclusive proof must be met[71].

64. Non-co-operation with fact-finding bodies can neither lower the standard of proof in cases of charges of exceptional gravity such as genocide, nor can it lower the corresponding standard for inference. It is for the applicant to establish on the basis of the available evidence that there is a pattern of conduct from which the only reasonable inference is genocidal intent.

65. Non-co-operation with fact-finding bodies as such cannot dispel other reasonable inferences that can be drawn from a pattern of conduct that has been established on the basis of the available evidence. It also cannot be presumed that evidence which is unavailable due to alleged non-co-operation would, if produced, have established a different pattern of conduct from which then different inferences could be drawn.

E. Answer to the first question by Judges Charlesworth and Pillay

66. Mr President, let me finally address the first question of Judge Charlesworth also on behalf of Judge Pillay. Although the question was addressed to The Gambia, Myanmar would like to offer some observations, especially in light of The Gambia's answer to the question[72].

67. Their Excellencies asked how the Court should approach the FFM's evidence given that the Court has previously applied a so-called "fully conclusive" standard of proof in cases involving allegations of genocide, while the FFM applied a "reasonable grounds" standard of proof in making factual determinations[73].

68. This question is crucial for the understanding of Myanmar's position on why the Court cannot rely on the factual findings, let alone the legal conclusions reached in the reports by the FFM.

69. It is perhaps helpful to outline the different standards of proof at the outset. The Court applies a "fully conclusive" standard of proof that Myanmar says is comparable to the "beyond

---

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

[71] CR 2026/8, p. 19, para. 37 (Talmon).

[72] CR 2026/18, pp. 26-28, paras. 53-57 (Sands).

[73] CR 2026/12, p. 44 (Judge Charlesworth).

reasonable doubt" standard. This standard applies to proving the facts, the existence of a pattern of conduct and questions of attribution[74]. The standard is applied by the Court in order to establish the legal responsibility of a State for genocide.

70. The "reasonable grounds" standard of proof, on the other hand, is used by fact-finding bodies in making factual determinations on individual cases, incidents and patterns of conduct[75]. This standard is considered met when a sufficient and reliable body of primary information, consistent with other information, would allow an ordinarily prudent person to reasonably conclude that an incident or pattern of conduct occurred[76]. This standard of proof is lower than the standard of proof required in criminal proceedings — the "beyond reasonable doubt" standard. It is also lower than the "fully conclusive" standard employed by the Court, however defined. The evidence produced, using the "reasonable grounds" standard, can provide a competent prosecutorial body with "sufficient elements to proceed with a criminal investigation and prepare a case for adjudication on such charges"[77].

71. The two standards are thus very different. They serve different purposes and therefore require different degrees of certainty when establishing facts and drawing conclusions from circumstantial evidence.

72. The two standards are different not only with regard to the standard of proof but also with regard to the standard for inference. As you can see on the screen, the Court's standard of proof requires that an inference is the only reasonable one that can be drawn from a pattern of conduct. The "reasonable grounds" standard of proof, on the other hand, only requires that there are reasonable grounds for an inference or a reasonable inference[78]. Inferences are drawn not just from a pattern of

---

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

[75] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, MG, Vol. II, Annex 40, p. 7, para. 10.

[76] *Ibid.*, p. 7, para. 10; and Report of the independent international fact-finding mission on Myanmar, 12 September 2018, MG, Vol. II, Annex 39, p. 3, para. 6.

[77] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, MG, Vol. II, Annex 40, p. 351, para. 1386.

[78] See Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, MG, Vol. II, Annex 40, p. 359, para. 1418; p. 363, para. 1434; and Report of the independent international fact-finding mission on Myanmar, 2 September 2019, MG, Vol. II, Annex 47, p. 14, para. 90; Detailed findings of the Independent International Fact-Finding Mission on Myanmar, 16 September 2019, MG, Vol. II, Annex 49, p. 68, para. 211; p. 73, para. 223.

conduct, but from "all of the evidence taken together"[79]. The latter is a much lower standard for inference than the one used by the Court and by international criminal courts and tribunals.

73. As the FFM used a lower standard of proof and a lower standard for inference, no reliance can be placed on the factual findings in the FFM reports by the Court, which is to decide on the basis of the "fully conclusive" evidence standard. This is one of the major differences between the FFM reports and the judgments of the International Criminal Tribunal for the former Yugoslavia in the *Bosnia* and *Croatia* cases. The International Criminal Tribunal had established the facts in accordance with the "beyond reasonable doubt" standard of proof and the same standard for inference as applied by the Court.

74. The Gambia has submitted that the Court is not bound by the factual findings of the FFM[80]. Myanmar agrees. At the same time, however, The Gambia calls on the Court to place extensive reliance on the FFM findings. It says the Court can do so because the FFM is an independent body, that it is acting pursuant to a mandate given by the United Nations, that it is led by individuals with strong credentials, and that it has applied the stringent UN fact-finding standards[81]. This may all be true, but it is immaterial. The Gambia completely ignores the different standards on which the FFM's findings are based. A court that must be fully convinced cannot find a breach of the Genocide Convention on the basis of material that in a criminal trial would not even suffice for the confirmation of charges, because a confirmation of charges would require the higher standard of "substantial grounds"[82]. Just think about this: how could you come up with a historic judgment finding that a State committed genocide on the basis of evidence that would not be sufficient for the judges at the International Criminal Court just down the road to even confirm a charges sheet? That is unbelievable.

---

[79] Report of the detailed findings of the Independent International Fact-Finding Mission on Myanmar, 17 September 2018, MG, Vol. II, Annex 40, p. 357, para. 1415.

[80] CR 2026/18, p. 26, para. 54 (Sands).

[81] CR 2026/18, p. 27, para. 55 (Sands).

[82] See Rome Statute of the International Criminal Court, 17 July 1998, Article 61 (https://www.icc-cpi.int/sites/default/files/2024-05/Rome-Statute-eng.pdf).

3. Conclusion

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

76. The difference between the régimes of individual criminal responsibility and State responsibility has no bearing on the assessment of circumstantial evidence when establishing genocidal intent by inference. If other intents, in addition to genocidal intent, can reasonably be inferred from circumstantial evidence, then genocidal intent is not the only reasonable inference and the "fully conclusive" standard of proof is not met.

77. Non-co-operation with fact-finding bodies has no effect on the probative value of their reports, and no effect on the inferences to be drawn from the evidence provided by an applicant State.

78. Finally, evidence produced by a fact-finding body applying a "reasonable grounds" standard of proof and an equivalent standard for inference cannot be relied on by the Court, which must apply a "fully convinced" standard of proof when deciding on allegations of genocide.

79. That ends my presentation, and I would like to thank the judges for their kind attention. We, on our side of the Bar, we have worked hard to provide you with a comprehensive picture of the facts, and to present you with solid legal arguments. It is now for you to draw the conclusions. Our work has ended — your work continues. And while you meet, read, write and deliberate, I want to offer you once piece of advice from a man called Charles Dickens — a man that has been mentioned many times in this Great Hall over the last three weeks. Mr Jaggers' advice in Charles Dickens' *Great Expectations*: "Take nothing on its looks; take everything on evidence. There's no better rule." Thank you very much for your kind attention.

80. Mr President, may I now ask you to call on the Agent of Myanmar to present Myanmar's concluding remarks and final submissions.

The PRESIDENT: I thank Professor Talmon. I now give the floor back to His Excellency Mr Ko Ko Hlaing, Agent of Myanmar. You have the floor, Excellency.

Mr HLAING:

II. CLOSING STATEMENT BY THE AGENT OF THE REPUBLIC OF THE UNION OF MYANMAR

1. Esteemed President, honourable Madam Vice-President and distinguished Members of the Court, it is an honour for me to stand before the Court again to present Myanmar's final submissions. Before I do, I would like to make some short remarks.

2. We are coming to the close of a long three-week hearing. It will have been exhausting for everyone involved. I understand that it has been a long time since the Court has had such a long hearing. The pleadings in this case are also very lengthy. Myanmar appreciates that the Court is presented with a demanding task to consider all of the evidence and arguments that have been presented by both of the Parties in these proceedings. It is all the more demanding, given that this hearing comes at a time when the Court's docket is busier than ever. Myanmar appreciates that the Court is prepared to give so much time and attention to this case.

3. But that time and attention is merited. This is an extremely significant case. It is an extremely significant case for Myanmar and for the people of Myanmar. This case is being closely followed back home in Myanmar. Anyone following this case for these three long weeks — whether in Myanmar or elsewhere in the world — will now realize the complexity of the issues which it raises, not least how does a State defend itself when faced with the gravest of allegations? What is the nature and the quality of the evidence which can be used to bring a case which has the potential to impact the vital interests of a State and its people for many generations to come? As counsel for Myanmar said yesterday in respect to The Gambia's witnesses — three witnesses do not make a case.

4. During these proceedings, Myanmar has raised these types of question. It has raised questions about the interpretation of the Genocide Convention. It has raised questions challenging the facts. It has done so on the basis that these proceedings provide an opportunity for Myanmar to present its side of the story. It has done so knowing that it will be heard fairly and impartially by this Court.

5. Before closing, I would like to extend my thanks to the Registrar and all members of the Registry, and the interpreters and the security staff, and everyone else associated with these hearings, whose dedicated work has enabled the hearing to be conducted so smoothly. I would also like to

thank you, Mr President, Madam Vice-President and all the Members of the Court, for listening so attentively to both Parties.

6. It now falls to me, in accordance with Article 60, paragraph 2, of the Rules of Court, to read the final submissions of the Republic of the Union of Myanmar. These are as follows:

> "The Republic of the Union of Myanmar respectfully requests the International Court of Justice to adjudge and declare that:
>
> (1) all requests in the submissions of the Republic of The Gambia relating to alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide are rejected as lacking any basis in law or in fact;
>
> (2) all requests in the submissions of the Republic of The Gambia relating to an alleged failure to implement the Order indicating provisional measures issued by the Court on 23 January 2020 are rejected as lacking any basis in law or in fact; and
>
> (3) all requests in the submissions of the Republic of The Gambia relating to remedies sought by the Republic of The Gambia, and all other requests in the submissions of the Republic of The Gambia, are rejected as lacking any basis in law or in fact."

7. Mr President, Madam Vice-President, Members of the Court, that concludes the arguments of Myanmar at this hearing of the merits of the case. I thank you.

The PRESIDENT: I thank the Agent of Myanmar, whose statement brings these hearings to a close. The Court has taken note of the conclusions submitted by the Parties. I would like to thank the Agents, counsel, advocates, witnesses and expert for their statements. In accordance with practice, I shall request both Agents to remain at the Court's disposal to provide any additional information it may require. With this proviso, I declare closed the oral proceedings on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 11 States intervening)*.

The Court will now retire for deliberation. The Agents of the Parties will be advised in due course of the date on which the Court will deliver its Judgment.

Since the Court has no other business before it today, the sitting is closed.

The Court rose at 4.10 p.m.

_____