

MEMORANDUM

THE ICJ's IMPENDING *MYANMAR* GENOCIDE DECISION LEGAL AND MILITARY IMPLICATIONS

15 September 2026

SUMMARY

1. The ICJ's jurisdiction under the Genocide Convention is increasingly being invoked in the context of armed conflicts. Five genocide cases have been lodged in the past four years—with more likely in the pipeline. What is novel about these cases is that the ICJ is being asked to make complex factual findings on criminal liability – a task the Court was not established to fulfil.
2. The definition of genocide under the Genocide Convention requires proof of an intention to commit genocide (known as *dolus specialis*). To date, the Court has set a very high standard: while such intention may be "deduced or inferred from certain types of conduct", the intention to destroy a group in whole or in part, as such, must be "the only reasonable inference".
3. The current case of *The Gambia vs Myanmar* may be a watershed. The judgment is due late October. Several NATO member states – United Kingdom, France, Germany, Netherlands, Denmark and Canada – are urging the Court to substitute strict textual interpretation with an expansive, "holistic" framework that effectively lowers the threshold for proving intent to commit genocide.
4. This approach dilutes the rigorous legal standard of *dolus specialis* – and urges the Court to apply that diluted standard to draw conclusions based on UN-produced evidence. A majority of the Court's judges may adopt that approach.
5. Adopting the "holistic" approach will set a very dangerous precedent for cases that will be decided subsequently, such as the *South Africa vs Israel* and *Nicaragua vs Germany* cases.
6. It threatens to severely compromise the conduct of legitimate, lawful military operations by NATO and other Western states —particularly those directed against non-state terrorist actors who systematically engage in hybrid warfare, exploiting civilians as human shields, and operating outside the bounds of international law. This will degrade the integrity of the Court and of the Genocide Convention itself.
7. The Court is currently preparing its *Myanmar* judgment—expected late October 2026. Time is of the essence. To prevent the Court setting a precedent that permanently degrades Western military operational capabilities and destabilizes established treaty law, intervenor states must act immediately to implement a unilateral withdrawal accompanied by a clear public statement.

SOME WESTERN STATES ARE URGING THE COURT TO BROADEN THE APPLICATION OF THE GENOCIDE COVENTION

8. The International Court of Justice (ICJ) will soon deliver its judgement in the case *The Gambia v. Myanmar* concerning the 1948 Genocide Convention. The case was launched in 2019. The written and oral phases have closed. The members of the Court are currently preparing their decision, which is likely to be delivered in late October 2026.
9. Several NATO member states (Germany Netherlands, Denmark, France, UK and Canada) submitted a joint intervention in this case under Article 63 ICJ in November 2023 (the “[Joint Intervention](#)”). In support of The Gambia’s claims, the Joint Intervention urges the Court to adopt a “holistic” approach to interpretation and application of the Genocide Convention. The “holistic” approach essentially lowers the evidentiary threshold, in order that the concept of “genocide” capture more situations than would be the case under existing ICJ jurisprudence.
10. Filed on November 15, 2023, the Joint Intervention is serving as a procedural stalking horse for subsequent cases. It suggests a coordinated effort to rewrite the Genocide Convention through the less contested *Myanmar* proceeding, in order that the Court will be more likely to find Israel in breach of the Convention.¹

Anatomy of a Flawed Doctrine: Refuting the Joint Intervention's Attack on Intent

11. The Joint Intervention starts from the premise that specific intent (*dolus specialis*) is the "essential characteristic" that distinguishes genocide from other international crimes, but that direct evidence—an explicit plan or admission—is rare. The absence of direct evidence, however, does not leave the Court without a means of establishing genocidal intent.
12. The Court's jurisprudence, in *Croatia v. Serbia*, recognizes that such intent may be inferred from a pattern of conduct and other circumstantial evidence, provided that the existence of genocidal intent is the “**only reasonable inference**” that may be drawn from the facts. This established and internationally accepted standard is critical: where the facts reasonably support an explanation other than an intent to destroy a protected group, genocidal intent cannot be

¹ Several matters show a strong connection between the cases launched by The Gambia and South Africa: the applicant states in both cases share legal counsel (Matrix Chambers); Navi Pillay serves as The Gambia's *ad hoc* judge while heading the UN Permanent Commission of Inquiry on Israel/Palestine which has already concluded that Israel is committing genocide – a clear conflict of interest; the Organisation of Islamic Cooperation (OIC) and its members have been instrumental in launching both cases (providing financial and other support to both The Gambia and South Africa); and The Netherlands, Belgium and Ireland have intervened in both cases - urging the Court to adopt the “holistic” approach.

inferred. It is precisely this safeguard that the Intervenor seek to dilute. To justify dismantling this established standard, the Intervenor advance three dangerous propositions:

- **Expanding Circumstantial Inference:** While relying on *Croatia v. Serbia* to argue that intent must be deduced or inferred from a pattern of conduct, the Intervenor use this mechanism to replace direct evidence of a genocidal plan with loose contextual assumptions.
- **Diluting the "Only Reasonable Inference" Standard:** The Intervenor openly attempt to erode the Court's established requirement that genocidal intent be the *only* reasonable inference. By arguing that this standard should be reduced to a flexible test of general "reasonableness," they seek to bypass the reality that legitimate military objectives—such as defeating non-state terrorist actors, rescuing hostages, and force protection—are entirely reasonable alternative explanations that legally preclude a finding of genocide.
- **Substituting Compartmentalized Proof with Cumulative Assumptions:** Citing ICTY jurisprudence (e.g., *Stakić*), they argue against assessing specific operational incidents on their merits, advocating instead for an uncritical, cumulative aggregation of war casualties to infer a genocidal mental state.

13. Building on this permissive framework, the Intervenor list several factors to urge the Court to adopt evidentiary shortcuts designed to infer genocidal intent where none exists:

- **Distorting the Meaning of Harm (*Krstić*):** They invoke *Krstić* to argue that a high death toll is not required to establish genocidal intent, thereby broadening the evidentiary significance of harm to encompass non-lethal consequences such as severe injuries and psychological trauma. This risks allowing the gravity of harm suffered by civilians to assume an evidentiary significance that cannot substitute for proof of the specific intent required by the Convention.
- **Weaponizing Contextual Atrocities:** They assert that high-intensity combat operations and sexual or gender-based violence within conflict zones should automatically serve as presumptive indicators of an intent to physically or biologically destroy a group.
- **Reframing Military Operations Targeting Human Shields:** They argue that child casualties carry heightened probative weight specifically to rebut legitimate state security defenses, disregarding how non-state actors systematically exploit civilians and children as human shields.
- **Converting Forced Displacement into Genocide:** Citing *Bosnia v. Serbia*, they attempt to recharacterize wartime civilian evacuations and displacement as evidence of *dolus specialis*, regardless of whether the operational intent was to clear combat zones or save civilian lives.

14. Crucially tied to this diluted intent framework, the Joint Intervention urges the Court to accord particular probative weight to UN-generated summaries, Fact-Finding Mission reports and NGO materials, characterizing them as evidence emanating from “disinterested witnesses” while discounting the evidentiary value of primary military reporting.
15. Yet the Intervenor gave no consideration to the procedural safeguards necessary to test such evidence effectively. Intervenor does not address the importance of subjecting the factual foundations, methodologies and conclusions of such reports to meaningful scrutiny through cross-examination of witnesses and experts where appropriate, the questioning of report authors, and the presentation of rebuttal expert witness evidence. This is not a minor procedural concern: where reports are relied upon to support an inference of genocidal intent, the absence of effective mechanisms for testing their evidentiary foundations raises serious due-process concerns. They show little concern for these safeguards, even as they advocate an evidentiary methodology that would give such material an enhanced role in establishing *dolus specialis*.
16. Taken together, the explicit thrust of the Joint Intervention is to replace rigorous judicial fact-finding with a cumulative, political inference of intent. It penalizes states facing complex hybrid warfare by treating the tragic operational consequences of urban combat as *per se* proof of genocide.
17. Far from a progressive evolution of treaty interpretation, this cumulative framework radically subverts the Genocide Convention. It strips sovereign states of their right to self-defense, exposes Western military operational capabilities to strategic lawfare, and creates the severe legal vulnerabilities examined below.

MILITARY IMPLICATIONS OF THE “HOLISTIC” APPROACH

18. Combined with the ICJ’s recent expansion of its authority to issue provisional orders, a lowered genocide threshold would raise a number of strategic threats to NATO defense capabilities:

Incentivizing Human Shields

19. In modern urban warfare against non-state actors, civilian casualties and mass displacement frequently occur when adversaries unlawfully hide behind human shields. Treating civilian suffering (such as proportionate numbers of children deaths, or displacement of civilians) as presumptive evidence of genocidal intent incentivizes terrorists to maximize such civilian casualties to trigger international legal sanctions against Western forces.

ICJ Micro-Management of Military Operations

20. Because the Genocide Convention is virtually the only treaty conferring mandatory ICJ jurisdiction over armed conflicts, activist litigants use genocide claims as a [tactical hook](#). The ICJ’s recent practice in ordering binding provisional measures (notably in [South Africa v. Israel](#)) relies on a low standard of proof based solely on the ‘plausibility’ of claimed rights. This

low threshold allows litigating states to secure operational restrictions on sovereign militaries long before any actual violations are proven on the merits, while leaving non-state terrorist groups unconstrained.

Criminal Exposure for Western and NATO Commanders, Officials, and Soldiers:

21. A diluted legal standard will also facilitate genocide allegations in non-ICJ venues, including universal jurisdiction prosecutions in foreign domestic courts, International Criminal Court (ICC) proceedings against Western commanders, and third-party claims targeting nations providing military assistance to allies (such as the ongoing Nicaragua's ICJ [action](#) against Germany, which will be briefly discussed later).

LEGAL AND POLICY IMPLICATIONS OF THE "HOLISTIC" APPROACH

22. There are a number of legal policy problems with the "holistic" approach:

Violation of Established Rules of Treaty Interpretation

23. The "holistic" approach departs from consistent precedents from the ICJ itself and customary international law on treaty interpretation as codified in Articles 31 and 32 of the Vienna [Convention](#) on the Law of Treaties (VCLT). In [Bosnia and Herzegovina v. Serbia and Montenegro \(2007\)](#), the ICJ established that state responsibility under the Genocide Convention must strictly follow general rules of treaty interpretation, focusing on the ordinary meaning of terms in their context and object. Introducing a flexible "holistic" framework without textual authorization transforms the ICJ from an adjudicative body interpreting treaties into a legislature creating new law *ex aequo et bono*. Under Article 38(2) of the ICJ Statute, the Court is prohibited from deciding a case based on equitable principles (*ex aequo et bono*) unless all parties to the dispute expressly agree to it.

Destruction of the *Dolus Specialis* Standard

24. Genocide is distinguished from war crimes and crimes against humanity by *dolus specialis*—contravention of the Convention depends on proof of the specific intent to destroy a protected group, in whole or in part, *as such*. To date ([Croatia v. Serbia, 2015](#)) the Court has consistently required "fully conclusive" evidence – this means that genocidal intent “must be the *only reasonable inference* that can be drawn from a pattern of conduct”. This protects lawful military actions from false genocide claims. The "holistic" assessment of wide contextual facts and infers intent directly from operational consequences, such as civilian displacement or child casualties, which are almost inevitable in protracted urban warfare with non-state actor groups.

Inversion of the Burden and Standard of Proof

25. Under established international jurisprudence, state responsibility for an explicitly criminal act such as genocide requires an evidentiary standard equivalent to "beyond a reasonable doubt".

In the *Bosnia* and *Croatia* cases, the ICJ required "fully conclusive" evidence and "persuasive and consistent" proof. Lowering this threshold for states while maintaining high standards for individual criminal liability at the ICC creates a dangerous legal paradox.

26. A lower initial threshold compels defending sovereign states to prove a negative—that their operations were *not* genocidal. When a state produces legitimate military documentation, such as After-Action Reviews (AARs) showing a lawful counter-terrorism objective under International Humanitarian Law (IHL), this must legally shift the burden of proof back to the applicant to prove beyond a reasonable doubt that genocidal intent was the sole motivation.

Systemic Bias in Evidentiary Weight: UN and NGO Reports vs. Military AARs

27. The proposed lower evidentiary framework relies heavily on UN agency summaries, Special Rapporteur statements, and advocacy NGO press releases as primary evidence of "contextual facts". This is highly problematic:
 - *Flaws in UN Fact-Finding Reports:* As legal scholars (including Prof. [Bassiouni](#), Dr. Dov [Jacobs](#), and Prof. William [Schabas](#)) have demonstrated, UN fact-finding missions operate under political mandates rather than judicial standards. They rely on unverified secondary sources, hearsay, unvetted witness interviews, and lack standard operating procedures for evidentiary verification.
 - *NGO Limitations:* NGO reports vary wildly in methodology, institutional integrity, funding sources, and political agendas. Most NGOs lack access to operational military intelligence and technical expertise in IHL targeting protocols.
 - *Marginalization of Professional Military Reporting:* Standard military After-Action Reviews (AARs) compiled by professional legal advisors in constitutional democracies provide direct, primary evidence of operational intent. Automatically discounting state military reports in favor of unverified UN/NGO narratives undermines reliable judicial fact-finding and disincentivizes military transparency. To possess genuine probative value, these forms of evidence must be subjected to standard adversarial testing—including the cross-examination of report authors, the submission of counter-expert assessments by respondent states, and the formal verification of factual witness testimony. Admitting unverified political summaries or NGO compilations without adhering to these essential procedural standards constitutes a clear breach of due process and violates the fundamental principle of equality of arms before international tribunals.
 - For NATO commanders operating in modern high-intensity urban warfare, this procedural breach creates an *immediate, asymmetric operational vulnerability*. If external tribunals accept unvetted NGO or UN narratives over primary military After-Action Reviews (AARs) without cross-examination, hostile non-state actors are

incentivized to engineer civilian casualties and exploit human shields specifically to generate lawfare claims. Subordinating rigorous evidentiary testing to political summaries directly degrades NATO force protection, restricts legitimate tactical targeting, and exposes field commanders to bad-faith international litigation for standard combat actions that comply fully with International Humanitarian Law (IHL).

Conflation of International Humanitarian Law (IHL) with the Law of Genocide

28. The Genocide Convention applies in peacetime and wartime, but the ICJ's jurisdiction under the treaty is limited strictly to genocide itself—not general alleged violations of IHL or the law of armed conflict. International Humanitarian Law (IHL) governs targeting, proportionality, and precautions in war. Simply accumulating violations constitute war crimes, but do not automatically constitute a genocide. The Genocide Convention applies strictly to acts done with specific genocidal intent. Infliction of heavy civilian losses in war does not equal genocide.
29. As Judge Barak observed in his [Separate Opinion on Provisional Measures](#) in *South Africa v Israel*:

“...if claims of genocide were to become the common currency of armed conflict, whenever and wherever that occurred, the essence of this crime would be diluted and lost.”

30. To reinforce the legal distinction between high civilian casualties in war and the specific intent required for genocide, Judge Barak cited the prescient commentary from the [1947 Draft Convention on the Crime of Genocide](#):

“[T]he infliction of losses, even heavy losses, on the civilian population in the course of operations of war, does not as a rule constitute genocide. In modern war belligerents normally destroy factories, means of communication, public buildings, etc. and the civilian population inevitably suffers more or less severe losses. It would of course be desirable to limit such losses. Various measures might be taken to achieve this end, but this question belongs to the field of the regulation of the conditions of war and not to that of genocide.”

MATERIALIZATION OF RISK: EXPANDING STATE EXPOSURE VIA AIDING AND ABETTING CLAIMS

31. The operational and litigation risks of an expanded genocide standard are no longer theoretical; they have already materialized in ongoing, abusive litigation directly targeting a Joint Intervention participant. Germany joined the Joint Intervention on 15 November 2023. Less than four months later, on 1 March 2024, Nicaragua instituted [proceedings](#) against Germany

before the ICJ—a clear attempt aimed at weaponizing the Genocide Convention to challenge Germany’s military assistance to Israel following the 7 October Hamas terrorist attacks.

32. By exploiting a lowered intent threshold, activist states can bypass jurisdictional limits and haul Western nations before the ICJ over standard defense cooperation. This sets a dangerous precedent where the Court itself is co-opted as an instrument for geopolitical lawfare, exposing Western democracies to bad-faith litigation whenever they provide security assistance to allies.

INTERVENING STATES SHOULD UNILATERALLY WITHDRAWAL

33. The procedural window to formally amend or modify the Joint Intervention has elapsed. The states participating in that intervention cannot alter the contents of the existing filing. However, as a matter of international procedural law, each of the states participating in the Joint Intervention (UK, France, Germany, Netherlands, Denmark Canada) could explore the possible, though still untested, legal route of executing a *unilateral withdrawal* of its Declaration of Intervention.
34. *Unilateral Withdrawal*: To ground this legal route doctrinally, they can rely on the General Principle of State Competence in the *Lotus* case (Turkey v France 1927) laid down by the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ. Under customary international law, sovereign states enjoy plenary freedom of action in international affairs unless restricted by explicit treaty rules or imperative norms of *ius cogens*. Limitations upon the freedom of actions of sovereign States cannot be presumed. Because neither the ICJ Statute nor the Rules of Court contain express provisions prohibiting the revocation of an Article 63 declaration, this legal route would allow a state like Germany and its fellow interveners to assert its sovereign capacity to notify the Court of its decision to revoke its intervention.
35. *Dual-Track Approach (Registry Filing / Public Statement)*: To navigate the untested nature of this step efficiently, a participant in the Joint Intervention is advised to lodge a concise, unreasoned formal withdrawal notification with the Registry. Concurrently, it can issue a separate public statement setting out its substantive legal reasoning for the benefit of the international community. As a matter of diplomatic practice, prior confidential consultations with fellow co-intervenors should precede any filing.
36. *Targeted Judicial Diplomacy*: Even if the Court decides not to issue a formal procedural order recognizing the withdrawal, official communications submitted to the Registry are circulated to all Members of the Court. Transmitting the notice irrevocably signals to the bench that a primary intervener no longer supports the diluted intent standard, encouraging a pivotal block of judges to safeguard the traditional *dolus specialis* requirement in their individual opinions.
37. *Public Relations*: Prominent citizens or civil leaders in countries participating in the Joint Intervention (eg. Germany) could also issue public statements criticizing their country’s participation in the *Myanmar* proceedings, and warning of the negative consequences. Such publications could potentially come to the attention of ICJ judges currently preparing their judgments, declarations and opinions.

