

MEMORANDUM

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

— UPDATE OCTOBER 2026

29 October 2026

This memorandum updates thinc.'s Memorandum of 15 September 2026, which serves as its basis. For the sake of integrity and transparency, it retains the structure and much of the text of the original, revised in light of subsequent developments, new commentary and further work by thinc., in particular on the interaction between the laws of war and the Genocide Convention.

EXECUTIVE 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 seven years, against only two in the Convention's first fifty. The ICJ is being asked to make complex factual findings about the conduct of hostilities, a task it was not established to fulfil and over which it otherwise has no compulsory jurisdiction.
2. Genocide requires proof of a specific intent to destroy a protected group, in whole or in part, as such (*dolus specialis*). The Court has set a very high standard: such intent may be inferred from a pattern of conduct, but only where it is "the only reasonable inference" that can be drawn (*Bosnia v. Serbia*, 2007; *Croatia v. Serbia*, 2015), and the charge must be proved by "fully conclusive" evidence.

3. *The Gambia v. Myanmar* may be a watershed. The judgment is expected in the second half of November 2026. It will be the Court's first merits judgment in a genocide case since 2015, and there is no appeal: its reasoning will not be corrected, it will be cited. Six NATO member States (Canada, Denmark, France, Germany, the Netherlands and the United Kingdom) have urged the Court to adopt an expansive, "holistic" framework that in practice lowers the threshold for proving genocidal intent.
4. In practice, the "holistic" approach adds up casualties, destruction and displacement across an entire conflict, gives heightened weight to UN and NGO reports never tested in court, and treats the overall picture as proof of intent. A majority of the Court's judges may adopt it.
5. Whatever the merits of the Myanmar case on its own facts, the reasoning will travel. The Rohingya case concerns clearance operations against an unarmed minority, with no organised armed adversary embedded in the population. Transposed to urban warfare against an armed group operating from within civilian infrastructure, as in *South Africa v. Israel* and, through it, *Nicaragua v. Germany*, the same reasoning would treat the tragic consequences of lawful combat as evidence of genocide.
6. **The core answer is the laws of war.** In armed conflict, genocidal intent can only be inferred from conduct whose character has first been established under the rule of international humanitarian law (IHL) that governs it: attacks under the rules on targeting, proportionality and precautions; sieges and restrictions on aid under the rules on starvation and humanitarian relief; displacement under the rules on evacuation. This is how the Court itself proceeded in *Croatia v. Serbia*, and it is how the laws of war judge commanders: on the information available at the time, not on the aggregate outcome. A legitimate military aim does not by itself exclude genocidal intent; but where it reasonably explains the conduct, genocidal intent is not the only reasonable inference.
7. The consequences reach far beyond Israel. Any urban warfare campaign against a non-State armed group, including counter-terrorism operations and peace operations, could be recast as genocide. The approach rewards the use of human shields, discourages honest military record-keeping, and, as Fiji's Ambassador to the United Nations warned, would lead small troop-contributing States to stop volunteering for peace operations. The risk has already materialised: Germany, one of the six intervening States, has itself been sued by Nicaragua over its military assistance to Israel.

8. **Time is of the essence.** The intervening States can still withdraw their declarations of intervention before the judgment, as Colombia did in *South Africa v. Israel* on 18 September 2026. Each should do so, in coordination where possible and alone if necessary, through a short notification to the Registry accompanied by a clear public statement.

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

9. The International Court of Justice (ICJ) will soon deliver its judgment in *The Gambia v. Myanmar* concerning the 1948 Genocide Convention. The case was launched in 2019. The merits hearings closed on 29 January 2026, and the Court is now deliberating. The judgment is expected in the second half of November 2026.
10. On 15 November 2023, six NATO member States (Canada, Denmark, France, Germany, the Netherlands and the United Kingdom) filed a joint declaration of intervention under Article 63 of the ICJ Statute (the "Joint Intervention"). In support of The Gambia's claims, the Joint Intervention urges the Court to adopt a "holistic" approach to the interpretation and application of the Genocide Convention. In practice, that approach lowers the evidentiary threshold, so that the concept of genocide captures more situations than it would under the Court's existing case law.
11. The Joint Intervention is not only about Myanmar. Its reasoning on genocidal intent is designed to apply generally, and it will be invoked in the cases that follow, above all *South Africa v. Israel*, where the political drive to erode the genocide threshold is ultimately directed. Ireland has intervened in both cases, urging an expansive approach to intent in each.

ANATOMY OF A FLAWED DOCTRINE: REFUTING THE JOINT INTERVENTION'S ATTACK ON INTENT

12. 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, such as 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.

13. The Court's case law recognises that such intent may be inferred from a pattern of conduct and other circumstantial evidence, provided that genocidal intent is the "only reasonable inference" that may be drawn from the facts (*Croatia v. Serbia*, 2015). This standard is critical: where the facts reasonably support an explanation other than an intent to destroy a protected group, genocidal intent cannot be inferred. It is precisely this safeguard that the Joint Intervention would dilute, through three propositions:
- **Expanding circumstantial inference.** While relying on *Croatia v. Serbia* to argue that intent may be inferred from a pattern of conduct, the intervening States use this mechanism to replace proof of a genocidal plan with loose contextual assumptions.
 - **Diluting the "only reasonable inference" standard.** The intervening States seek to reduce the standard to a flexible test of general reasonableness. A legitimate military aim, such as defeating an armed group, rescuing hostages or protecting one's forces, does not by itself exclude genocidal intent. But where it provides a reasonable explanation for the conduct, genocidal intent is not the only reasonable inference, and the inference fails. The "holistic" approach is designed to avoid that result.
 - **Substituting cumulative assumptions for act-specific proof.** Citing ICTY case law (e.g., *Stakić*), they argue against assessing specific operational incidents on their merits, and in favour of an aggregation of casualties to infer a genocidal state of mind.
14. Building on this framework, the intervening States list several factors that would operate as evidentiary shortcuts to genocidal intent:
- **Broadening the meaning of harm.** They invoke the ICTY precedent in *Krstić* to argue that a high death toll is not necessarily required, extending the evidentiary significance of harm to severe injuries and psychological trauma. *Krstić* does not support them. The genocide found there rested on the execution of some 7,000 to 8,000 captured men and boys, and the intent to destroy was inferred from those killings, with no military explanation, not from the harm suffered by survivors. The gravity of harm suffered by civilians cannot substitute for proof of the specific intent required by the Convention.
 - **Child casualties.** They argue that child casualties carry heightened probative weight, disregarding how armed groups systematically exploit civilians and children as human shields.
 - **Displacement.** Citing *Bosnia v. Serbia*, they treat wartime evacuations and displacement as evidence of *dolus specialis*, regardless of whether the purpose was to clear combat zones or to protect civilians, and even where the acts causing displacement are not themselves acts of genocide.

These shortcuts face an insurmountable obstacle: when an act or measure is lawful under IHL, however tragic the civilian casualties and destruction it causes, it cannot be taken as an indication of genocidal intent. Under IHL, acts and measures of war are judged on an incident-by-incident basis, on the information available at the time, not on the aggregate outcome (see paras. 18–20).

15. Tied to this framework, the Joint Intervention urges the Court to give particular probative weight to UN summaries, fact-finding mission reports and NGO materials, characterising them as evidence from "disinterested witnesses", while discounting primary military reporting.
16. The intervening States give no consideration to the procedural safeguards needed to test such evidence: cross-examination of witnesses and experts, questioning of report authors, and rebuttal expert evidence. This is not a minor procedural concern. Where reports support an inference of genocidal intent, the absence of any means of testing them raises serious due-process concerns.
17. Taken together, the Joint Intervention would replace rigorous judicial fact-finding with a cumulative inference of intent. It penalises States facing hybrid warfare by treating the tragic consequences of urban combat as proof of genocide, and it exposes the lawful exercise of self-defence and Western military operations to strategic lawfare.

THE LAWS OF WAR AND THE GENOCIDE CONVENTION

18. **The core answer to the "holistic" approach is a simple rule:** in armed conflict, genocidal intent can only be inferred from conduct whose character has first been established under the rule of international humanitarian law that governs it: attacks under the rules on targeting, proportionality and precautions; sieges and restrictions on aid under the rules on starvation and humanitarian relief; and displacement under the rules on evacuation. A pattern of conduct can only be built from measures assessed in this way.
19. **This is how the Court itself proceeded.** In *Croatia v. Serbia* (2015), the Court first assessed the specific acts, then the pattern. When Serbia alleged genocide through the shelling of Krajina towns in 1995, the Court first asked whether the shelling had been indiscriminate, relying on the ICTY's assessment in *Gotovina*, and, unable to find that it was, held that those deaths could not count as acts of genocide.

20. **It is also how the laws of war judge commanders:** on the information available to them at the time, not on the aggregate outcome. Military action against combatants and military objectives, including dual-use objects, that complies with the laws of war provides an alternative, non-genocidal explanation. Genocidal intent therefore cannot be the only reasonable inference from it. The burden stays on the applicant, and direct evidence, such as official statements, is still assessed on its own terms.
21. **The lesson of *Gotovina*.** In 2011, the ICTY Trial Chamber convicted General Ante Gotovina using a "200-metre standard": artillery impacts more than 200 metres from a military target were treated as evidence of indiscriminate shelling. The standard appeared nowhere in the evidence, the pleadings or the law of armed conflict. In 2012, the Appeals Chamber found it without foundation and acquitted him. Where the facts of urban warfare are complex and the standard of proof demanding, a tribunal may be tempted to adjust the standard rather than confront what the evidence will carry. The ICJ, however, has no appeals chamber to correct it.
22. **The two bodies of law fit together.** International humanitarian law is the specialised body of rules governing the conduct of hostilities. It accepts that lawful operations may foreseeably cause civilian death and destruction, provided incidental harm is not excessive in relation to the concrete and direct military advantage anticipated. The Genocide Convention, by contrast, is an intent-based instrument that was not designed to regulate targeting. In its *Nuclear Weapons Advisory Opinion* (1996), the Court held that whether a deprivation of life is "arbitrary" is determined by "the applicable *lex specialis*, namely, the law applicable in armed conflict". Article 31(3)(c) of the Vienna Convention on the Law of Treaties requires a treaty to be interpreted taking into account "any relevant rules of international law applicable in the relations between the parties". The Convention must therefore be read together with IHL, not as a parallel standard that judges targeting decisions on its own terms.
23. **Myanmar's facts differ in kind, not only in degree.** *The Gambia v. Myanmar* concerns clearance operations against a denationalised, unarmed minority. There was no organised armed adversary embedded within the Rohingya population, no dual-use objects in contention, no combatants operating from civilian infrastructure. Whatever the Court holds on those facts cannot be transposed, without more, to urban warfare against an armed group operating from within the civilian population. There, alternative explanations for civilian death exist by construction. That is not a loophole: it is the "only reasonable inference" test operating as designed.

24. **Article II(c) is where an expansive reading would do most damage.** "Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction" is the most elastic of the enumerated acts. The words "deliberately" and "calculated" are not ornamental: they carry the specific intent into the act itself. A reading that allows tragic conditions of life to prove their own intent collapses the distinction the drafters constructed. Restrictions on aid must be assessed under the rules on starvation and humanitarian relief, with their stated reasons, before any pattern is inferred.
25. **Foreseeability is not intent.** Ireland, intervening in *South Africa v. Israel*, has invited the Court to find genocidal intent where a reasonable person would have foreseen the destruction of the group as a likely consequence of a State's conduct. That is a negligence standard. To adopt it would be to abolish *dolus specialis* while keeping the word.
26. **The "holistic" approach rewards human shields.** When armed groups fight from homes, hospitals, schools and tunnels, civilian casualties rise. An approach based on aggregate outcomes turns the enemy's unlawful tactics into evidence against the State fighting it: the more a group hides among civilians, the stronger the genocide case against its opponent.
27. **This is a question of interpretation, and States can raise it.** Because the relationship between IHL and the Genocide Convention is a question of construction of the Convention, it is exactly the kind of argument States may put to the Court by intervening under Article 63 of the ICJ Statute. The United States has already taken this position: when it ratified the Convention in 1988, it attached the understanding that acts in the course of armed conflicts committed without the specific intent required by Article II are not sufficient to constitute genocide.

MILITARY IMPLICATIONS OF THE "HOLISTIC" APPROACH

28. Combined with the ICJ's recent expansion of its practice on provisional measures, a lowered genocide threshold would create a number of strategic threats to the defence capabilities of NATO and other Western States.

Any urban campaign can be recast as genocide

29. The anti-ISIS coalition's campaigns in Mosul and Raqqa, and earlier operations in Fallujah, Afghanistan and Libya, all caused civilian casualties, destruction and displacement, in some cases on a large scale. Child casualties and mass displacement are near-universal features of urban warfare. Under a diluted standard, campaigns like these could be presented as evidence of genocidal intent and judged under the Genocide Convention rather than under IHL, the specialist body of law that governs them. The States urging the "holistic" approach are exposing their own counter-terrorism and other operations to the same reasoning.
30. As Andrés Muñoz-Mosquera, chief legal adviser to NATO's Supreme Allied Commander from 2014 to 2025, told *The Wall Street Journal*, lowering the threshold "would transform genocide from a narrowly defined legal crime into an expansive vehicle for litigating the conduct of states at war".

Incentivising human shields

31. In urban warfare against non-State actors, civilian casualties and mass displacement frequently occur where adversaries unlawfully use civilians as shields. Treating civilian suffering, such as the proportion of child deaths or the displacement of civilians, as presumptive evidence of genocidal intent incentivises armed groups to maximise such casualties in order to trigger legal proceedings against the forces fighting them.

Small States will stop contributing to peace operations

32. The risk is not confined to major powers. If a State that volunteers forces for an international operation, to disarm an armed group or to stabilise a collapsed authority, thereby exposes itself to genocide proceedings, small troop-contributing States will conclude that the risk is not worth carrying. As Fiji's Ambassador to the United Nations, Filipo Tarakinikini, whose country has contributed troops to UN operations continuously since 1978, told *The Wall Street Journal*: "If sending troops to disarm armed groups or stabilize a collapsing state carries the risk of genocide proceedings," small countries "will quietly stop volunteering." A Court that produces that result will have weakened the prevention of atrocities in the name of their punishment.

ICJ micro-management of military operations

33. Because the Genocide Convention is virtually the only treaty conferring compulsory ICJ jurisdiction over conduct in armed conflict, genocide claims become a tactical hook for litigants. The Court's recent practice of ordering binding provisional measures (notably in *South Africa v. Israel*) rests on a low threshold: the plausibility of the rights claimed, rather than a reasonable possibility of success on the merits, the test commonly applied in domestic and international litigation and arbitration (for example, Article 17A(1)(b) of the UNCITRAL Model Law on International Commercial Arbitration). Litigating States can thus secure restrictions on sovereign militaries long before any violation is proven on the merits, while non-State armed groups, which are not parties, remain unconstrained.

Exposure of commanders, officials and soldiers

34. A diluted standard would also facilitate genocide allegations in other venues: universal jurisdiction prosecutions in foreign domestic courts (more than 90 States exercise universal jurisdiction), International Criminal Court proceedings against Western commanders, and claims against States providing military assistance to allies.

LEGAL AND POLICY IMPLICATIONS OF THE "HOLISTIC" APPROACH

Departure from the established rules of treaty interpretation

35. The "holistic" approach departs from the Court's own precedents and from the customary rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. In *Bosnia v. Serbia* (2007), the Court applied those general rules to the Genocide Convention, focusing on the ordinary meaning of its terms in their context and in light of its object and purpose. There is no principled basis for a bespoke interpretive method reserved for this treaty alone. Introducing one without textual authorisation would move the Court from interpreting a treaty towards deciding *ex aequo et bono*, which Article 38(2) of the ICJ Statute permits only if the parties so agree.

Erosion of the *dolus specialis* standard

36. Genocide is distinguished from war crimes and crimes against humanity by *dolus specialis*: the specific intent to destroy a protected group, in whole or in part, as such. The Court has consistently required that, where intent is inferred from a pattern of conduct, it must be "the only reasonable inference that can be drawn". This protects lawful military action from false genocide claims. The "holistic" approach, by contrast, assesses wide contextual facts and infers intent from operational consequences, such as displacement or child casualties, that are almost inevitable in protracted urban warfare against non-State armed groups.

One allegation, one standard

37. The Convention describes genocide, in its title, its preamble and Article I, as a crime. State responsibility before the Court is not criminal liability, but the finding is still that a crime was committed, with the gravest consequences for the State, its leaders and its soldiers. For that reason, the Court has held that a charge of genocide must be proved by "fully conclusive" evidence (*Bosnia v. Serbia*, 2007; reaffirmed in *Croatia v. Serbia*, 2015). If State responsibility for genocide could be established on a materially lower standard than individual criminal responsibility, applicants would seek findings before the ICJ rather than pursue the more demanding criminal process, and those findings would then be relied on by prosecutors and courts against individual leaders. There is no rationale for applying different standards of proof to the same allegation of genocide.

The burden of proof stays with the applicant

38. A lower threshold would in practice compel respondent States to prove a negative: that their operations were not genocidal. The burden of proof never shifts. Where a State produces the operational records of its armed forces, such as targeting decisions, orders and contemporaneous assessments, including After-Action Reviews, the applicant's evidence must engage with those records and overcome them, so as to establish that genocidal intent is the only reasonable inference. These records show what commanders knew at the time, which is the standard the laws of war apply. Setting untested reports against them and letting the overall picture decide is not enough.

Evidentiary weight: UN and NGO reports and military records

39. The "holistic" framework relies heavily on UN agency summaries, Special Rapporteur statements and NGO material as evidence of "contextual facts". This is problematic:

- **UN fact-finding reports.** As scholars including Professor Bassiouni, Dr Dov Jacobs and Professor William Schabas have shown, UN fact-finding missions operate under political mandates rather than judicial standards. They often rely on secondary sources, hearsay and witness interviews that cannot be tested, and are frequently unable to verify what they report. The answer is not to exclude such material, but to weigh it individually and critically, on its methodology rather than its letterhead.
 - **NGO reports.** Their methodology, funding, mission and prior advocacy positions vary widely and are relevant to weight. Most NGOs lack access to operational military intelligence and expertise in targeting law.
 - **Military records.** After-Action Reviews are produced as a matter of standing practice in professional armed forces, for command accountability and legal compliance, not for litigation. If they are treated as inherently self-serving while UN reports are treated as presumptively reliable, the incentive to produce them honestly, or at all, degrades. This harms every professional military that takes compliance seriously, and falls hardest on those that document most carefully.
 - **Due process.** Due process means that witnesses can be cross-examined, expert reports contradicted, and UN and NGO reports closely scrutinised before they are relied on. Admitting untested material without these safeguards breaches the principle of equality of arms.
40. Two questions from the Bench at the January 2026 hearings show the Court is alive to these issues: Judge Cleveland asked what weight should attach to NGO reports, and Judge Gómez Robledo asked whether adverse inferences may be drawn from a respondent's refusal to admit international investigative bodies. A State may decline access for reasons that have nothing to do with consciousness of guilt, such as concern about a politicised mandate or predetermined conclusions. Where the finding must rest on genocidal intent as the only reasonable inference, an adverse inference of this kind cannot bear that weight.
41. For commanders in high-intensity urban warfare, the result is an asymmetric vulnerability. If tribunals accept untested NGO or UN narratives over primary military records, armed groups are incentivised to engineer civilian casualties to generate legal claims, and field commanders are exposed to litigation for combat actions that comply fully with IHL.

The conduct of hostilities belongs to IHL

42. The Genocide Convention applies in peacetime and wartime, but the Court's jurisdiction under it is limited to genocide, not to alleged violations of IHL generally. IHL governs targeting, proportionality and precautions. Accumulated violations may constitute war crimes, but they do not thereby constitute genocide. Heavy civilian losses in war do not equal genocide, even less so in protracted urban warfare with non-state armed groups and terrorists.
43. 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." He recalled the commentary on the 1947 Draft Convention:

"[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."

MATERIALISATION OF RISK: EXPANDING STATE EXPOSURE THROUGH COMPLICITY CLAIMS

44. The litigation risks of an expanded genocide standard are no longer theoretical. They have already materialised against one of the intervening States. Germany joined the Joint Intervention on 15 November 2023. Less than four months later, on 1 March 2024, Nicaragua instituted proceedings against Germany, alleging that its military and other assistance to Israel breached the Genocide Convention. Germany's preliminary objections were heard on 7–10 September 2026, and the Court's decision is pending.
45. As an intervening State, Germany will in principle be bound by the construction of the Convention that the Court adopts in the Myanmar judgment (Article 63(2) of the ICJ Statute). If the Court endorses the standard Germany advocated, that standard will shape how Israel's conduct is assessed in *South Africa v. Israel* and, through it, how Germany's own responsibility is assessed in *Nicaragua v. Germany*. Germany could face a finding of complicity in genocide under an interpretation it helped to advance.

46. A lower threshold for intent also widens the duty to prevent and the reach of complicity. In *Bosnia v. Serbia* (2007), the Court held that a State must act once it knows, or should normally have known, of a serious risk that genocide will be committed. The lower the bar for intent, the more armed conflicts present a "serious risk", and the more exposed are States that supply weapons, equipment and sustenance to the parties. Joint operations, arms transfers and intelligence sharing all become litigable.
47. The exposure is uneven. The United States, through its reservation to Article IX of the Convention, cannot be brought before the ICJ in a genocide case without its consent. Most of its allies have no such reservation, and any State party can sue them, even one that has suffered no injury, as the Court confirmed in the ICJ *Myanmar* case. By exploiting a lowered intent threshold, activist States can bring Western democracies before the Court whenever they provide security assistance to allies, turning the Court into an instrument of geopolitical lawfare.

INTERVENING STATES SHOULD WITHDRAW

48. The procedural window to amend the Joint Intervention has closed: the participating States cannot alter the contents of the existing filing. Each of them (Canada, Denmark, France, Germany, the Netherlands and the United Kingdom) can, however, withdraw its declaration of intervention before the judgment.
49. **The route is no longer untested.** On 18 September 2026, Colombia notified the Court that it was withdrawing its declaration of intervention in *South Africa v. Israel* (ICJ press release of 22 September 2026). This confirms that a State can step back from an Article 63 intervention unilaterally during the proceedings.
50. **The doctrinal basis.** The withdrawal also rests on the principle of State freedom of action laid down by the Permanent Court of International Justice in the *Lotus* case (*France v. Turkey*, 1927): restrictions on the independence of States cannot be presumed. Neither the ICJ Statute nor the Rules of Court prohibit the withdrawal of an Article 63 declaration.
51. **A dual-track approach.** An intervening State should lodge a short, unreasoned notification of withdrawal with the Registry, referring to the Colombia precedent. At the same time, it should issue a public statement setting out its legal and security reasons. As a matter of diplomatic practice, confidential consultations with the other intervening States should precede the filing; if coordination is not possible in time, a State should withdraw alone.

52. **Judicial diplomacy.** Even if the Court does not issue a formal order recognising the withdrawal, communications to the Registry are circulated to all Members of the Court. A withdrawal signals to the bench that a primary intervener no longer supports the diluted standard, and may encourage judges to safeguard the traditional *dolus specialis* requirement in the judgment and in their individual opinions.
53. **Public debate.** Prominent citizens and civil society leaders in the intervening States, Germany above all, can issue public statements questioning their country's participation in the Myanmar proceedings and warning of its consequences. Such statements may come to the attention of the judges while they finalise their judgment, declarations and opinions.