POSITION PAPER

PRESERVING THE LEGAL STANDARD OF GENOCIDAL INTENT

13 November 2026

The International Court of Justice (ICJ) will deliver its final, unappealable judgment in *The Gambia v. Myanmar* on 19 November 2026. Six States (Canada, Denmark, France, Germany, the Netherlands and the United Kingdom) have filed a Joint Declaration of Intervention urging the Court to adopt a legally unfounded "holistic" approach to genocidal intent under the 1948 Genocide Convention.

Intent, not outcome. The "holistic" approach is fundamentally flawed and dangerous in practice. Casualties, destruction and displacement are physical outcomes produced by many actors and causes in an armed conflict. The "holistic" approach aggregates these outcomes across an entire conflict and treats the cumulative picture as proof of genocidal intent: in effect, it presumes genocide from the destructive consequences of war. Genocidal intent (*dolus specialis*) is a state of mind of identifiable persons, to be proved under the Court's established case law. The "holistic" approach departs fundamentally from the text of the Genocide Convention, from treaty law and from the Court's own case law, and **thinc.** urges sovereign States to oppose it.

thinc. takes no position on the facts of the case: our concern is to protect the integrity of legal standards.

OUR POSITION RESTS ON FOUR PRINCIPLES

1. **One test, not two.** Where genocidal intent is inferred from conduct or a pattern of conduct, it must be the only reasonable inference, supported by fully conclusive evidence (*Bosnia v. Serbia*, 2007; *Croatia v. Serbia*, 2015). In *Croatia* the Court rejected a request to relax the test for genocidal intent, holding that "reasonableness" is implicit in the existing test and that the ICTY's formulation is "in substance identical" (paras. 146–148). Nor did the ICTY relax the test in *Tolimir*. Yet the Joint Declaration of Intervention (paras. 52–53) invokes *Croatia v. Serbia*, in convoluted language, as if it had created a separate "reasonableness" criterion. It did not.
2. **IHL assessment comes first.** Conduct in an active theatre of hostilities must be assessed first under international humanitarian law (IHL), the specialised law of armed conflict, which must be taken into account in interpreting the Genocide Convention (Vienna Convention, Art. 31(3)(c)). IHL judges the legality of each attack individually, on the information available to the commander at the time (Additional Protocol I, Arts. 51(5)(b) and 57), not on the aggregate impact of a war. An act or measure intended to comply with IHL, however tragic its civilian consequences, provides a credible alternative inference, which negates genocidal intent as the "only reasonable inference."
3. **No reversal of the burden of proof.** The burden of proving genocide rests on the accuser, who must provide "fully conclusive" evidence of intent (*Bosnia v. Serbia*, 2007). An aggregate toll of casualties and destruction cannot discharge that burden: instead, the accuser must positively prove an intent to destroy the protected group. A non-State armed group that fights from among civilians, using them as shields, itself contributes to the toll of casualties and destruction. It would be perverse to infer one party's genocidal intent from destruction to which its adversary contributed through its own violations of IHL.
4. **Due process and equality of arms in court.** UN and NGO reports cannot serve as proof of their assertions. They must be tested in court and weighed against the operational records of armed forces, including After-Action Reviews (AARs). Acceptance of unexamined and untested reports as proof constitutes a breach of due process.

WHY IT MATTERS

Genocide must not be a false label for the tragedy of urban warfare. A "holistic" standard of proof would amount to a covert extension of the Court's compulsory jurisdiction to armed conflict. Combined with provisional measures, which the Court orders during conflict on the mere plausibility of the rights claimed, it would allow the Court to micromanage armed conflicts. This would expose the legitimate operations of NATO and Western allies against terrorists and other non-State armed groups in urban settings to specious genocide litigation and to military risk, and would discourage States from contributing forces to multinational operations.

OUR CALL

- **To the intervening States:** Canada, Denmark, France, Germany, the Netherlands and the United Kingdom should withdraw their Joint Declaration of Intervention before the judgment, together or individually, as should Belgium, Ireland and Slovenia their declarations. Colombia set the precedent when it withdrew its intervention in another genocide case on 18 September 2026.
- **To other States:** Through immediate public statements and diplomatic channels, oppose the repurposing of the Genocide Convention into a tool for judicial intervention in armed conflict. In future genocide cases, which are now proliferating, intervene under Article 63 of the ICJ Statute to defend the established standard.