Note: This translation has been prepared by the Registry for internal purposes
and has no official character

INTERNATIONAL COURT OF JUSTICE

CASE CONCERNING
APPLICATION OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(THE GAMBIA *v.* MYANMAR)

DECLARATION OF INTERVENTION OF THE DEMOCRATIC REPUBLIC OF THE CONGO UNDER ARTICLE 63 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

10 December 2024

[Translation by the Registry]

To the Registrar of the International Court of Justice, the undersigned, being duly authorized by the Government of the Democratic Republic of the Congo, states as follows:

1. On behalf of the Government of the Democratic Republic of the Congo (DRC), I have the honour to submit to the Court a Declaration of intervention under Article 63 of the Court's Statute in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*.

2. According to Article 82, paragraph 2, of the Rules of Court, a State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute must file a declaration which

"specif[ies] the case and the convention to which it relates and [which] contain[s]

(a) particulars of the basis on which the declarant State considers itself a party to the convention;

(b) identification of the particular provisions of the convention the construction of which it considers to be in question;

(c) a statement of the construction of those provisions for which it contends;

(d) a list of the documents in support, which documents shall be attached".

3. The above will be set out in this Declaration, following some preliminary observations.

PRELIMINARY OBSERVATIONS

4. On 11 November 2019, the Republic of The Gambia (The Gambia) instituted proceedings against the Republic of the Union of Myanmar (Myanmar) based on the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention, the 1948 Convention or the Convention)[1]. In its Application, The Gambia requests the Court to adjudge and declare that in view of the acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya, an ethnic, racial and religious group, Myanmar has breached and continues to breach its obligations under the Convention.

5. By a Judgment of 22 July 2022, the Court rejected all the preliminary objections raised by Myanmar against the Application filed by The Gambia and found that it had jurisdiction to entertain the Application[2].

6. The Court having then authorized the submission of further written proceedings under Article 45, paragraph 2, of its Rules, the present Declaration was filed at the earliest opportunity, and

[1] Convention on the Prevention and Punishment of Genocide, adopted 9 December 1948, entered into force 12 January 1951, United Nations Treaty Series, Vol. 78, p. 277.

[2] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 477.

no later than "the date fixed for the filing of the last written pleading", namely 30 December 2024[3], in accordance with the provisions of Article 82, paragraph 2, of the Rules of Court.

7. In its 1951 Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court explained that "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention"[4]. As the Court has since stated, the common interest of the States parties to the Convention to ensure the prevention, suppression and punishment of genocide "implies that the obligations in question are owed by any State party to all the other States parties . . . [They are] 'obligations *erga omnes partes*' in the sense that each State party has an interest in compliance with them in any given case"[5]. Since each State party has an interest such obligations *erga omnes partes* being met, they also undoubtedly have an interest in the provisions of the Convention setting out those obligations being interpreted in such a way as to ensure that the Convention fully achieves its object and purpose. It is for these reasons, and with a view to helping achieve this result, that the DRC submits this Declaration of intervention.

BASIS ON WHICH THE DRC CONSIDERS ITSELF A PARTY TO THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

8. The DRC became a party to the Convention on the Prevention and Punishment of Genocide pursuant to a notification of succession issued on 31 May 1962[6].

PROVISIONS OF THE GENOCIDE CONVENTION THE CONSTRUCTION OF WHICH THE DRC CONSIDERS TO BE IN QUESTION

9. For the purposes of this Declaration of intervention, the DRC considers that the provisions of the Genocide Convention the construction of which is in question are Articles I, II and III, provisions for which it proposes to offer a construction that preserves the full meaning of the obligation for all States parties to comply fully with their "obligation . . . not to commit genocide" as interpreted by the Court[7]. It will not address the obligation to punish the crime of genocide under Article I of the Convention, or the associated obligations arising from Articles IV, V and VI of the Convention mentioned in the Application instituting proceedings.

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Order of 21 November 2024*.

[4] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, *Advisory Opinion, I.C.J. Reports 1951*, p. 23.

[5] *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 449, para. 68.

[6] See status of ratification of the Convention at https//treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-1&chapter=4&clang=_en (last consulted on 27 Nov. 2024).

[7] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 113, para. 166 (*Bosnia and Herzegovina* v. *Serbia and Montenegro*).

THE DRC'S INTERPRETATION OF ARTICLES I, II AND III OF THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

10. The DRC will set out in detail below what it considers to be the proper interpretation of the following provisions of the Genocide Convention, whose application is in question in this case. It will address the following points in particular:

— the interpretation of the concept of genocidal intent and, in this connection, the question of proof of genocidal intent in the context of Article II;

— the interpretation of the concept of protected group in the context of Article II;

— the interpretation of the obligation to prevent and punish the crime of genocide and acts relating to the crime of genocide in the context of Articles I and III.

In the following passages of this Declaration, the DRC will refer first to the Court's jurisprudence in respect of these provisions. It will also consider that of the international criminal courts and tribunals on the concept of genocide within the meaning of Article 6 of the Rome Statute of the International Criminal Court (ICC), Article 2 of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) and Article 4 of the Statute of the International Criminal Tribunal for Rwanda (ICTR). These provisions are closely related to the 1948 Convention and, as is clear from the Court's jurisprudence, it is therefore pertinent to take account of that jurisprudence in interpreting the Convention.

ARTICLE II: INTERPRETATION OF THE CONCEPT OF GENOCIDAL INTENT

11. According to Article II of the Convention:

> "In the present Convention, genocide means any of the following acts *committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such*:
>
> *(a)* Killing members of the group;
>
> *(b)* Causing serious bodily or mental harm to members of the group;
>
> *(c)* Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
>
> *(d)* Imposing measures intended to prevent births within the group;
>
> *(e)* Forcibly transferring children of the group to another group"[8].

This definition establishes two essential elements of the crime of genocide, namely the *actus reus*, which refers to the acts committed, and the *mens rea*, which refers to the intent. In ascertaining whether genocide has actually been committed, over and above the existence of contestable facts, it

[8] Emphasis added.

is the criterion of genocidal intent that is most often at the heart of discussions in legal writings[9] and jurisprudence[10].

12. Such is the situation in this case, where the two Parties contend for different interpretations. The Gambia, as the applicant State, considers that intent can be established[11], which Myanmar, as the respondent State, contests[12]. Beyond disagreements over the factual aspects of the case — disagreements that the DRC will not enter into — it was already apparent at the provisional measures stage that the Parties have opposing views on the interpretation of Article II of the Convention. Thus, for example, counsel for The Gambia observed that "[a]s this Court made clear in its *Bosnia* v. *Serbia* Judgment, 'it is clear that acts of "ethnic cleansing" may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts'. In 2015, the Court reaffirmed in its *Croatia* v. *Serbia* Judgment that '[a]cts of "ethnic cleansing" can indeed be elements in the implementation of a genocidal plan'"[13]. Myanmar interpreted the Court's jurisprudence on intent quite differently, contending that the Court had "clearly distinguished between 'the necessary specific intent (*dolus specialis*), that is to say with a view to the destruction of the group, as distinct from its removal from the region'"[14].

13. As a party to the Convention, the DRC, for its part, favours a reasonable interpretation that can reconcile two seemingly conflicting requirements: on the one hand, to maintain the uniqueness of genocide as a particularly grave crime, and requiring proof of specific intent to that end; and, on the other, to ensure that too high a standard of proof does not result in making any practical application of the Genocide Convention impossible.

14. The DRC would thus stress three elements that must be taken into account for any interpretation of the Convention, elements that will be set out in detail below: first, the existence of genocide is by no means ruled out by the fact that the physical acts falling within the scope of Article II of the Convention were committed in the context of armed conflict (A); second, genocide may be committed while, in parallel, its perpetrator is pursuing objectives other than the destruction of a protected group within the meaning of the Convention (B); lastly, one of the consequences of this fact is that an act may be characterized as genocide even when it would otherwise be a war crime or a crime against humanity (C).

15. *A contrario*, and this is the key takeaway from the interpretation the DRC would like to put forward, Article II of the Convention on the Prevention and Punishment of Genocide does not require genocidal intent to be established as the *exclusive* intent of the perpetrator of the crime.

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[9] See, for example, Alexander Greenawalt, "Rethinking Genocidal Intent: The Case for a Knowledge-Based Interpretation", *Columbia Law Review*, 1999, pp. 2259-2294; William A. Schabas, *Genocide in International Law*, 2nd ed., Cambridge, C.U.P., 2009, pp. 241-306; Kai Ambos, "What does 'intent to destroy' in genocide mean?", *International Review of the Red Cross*, 2010, pp. 833-858; Guénaël Mettraux, *International Crimes: Law and Practice*, Vol. I: Genocide, Oxford, O.U.P., 2019, pp. 161-222.

[10] See the summary of case law produced by the IRMCT: https://cld.irmct.org/notions/show/384/genocidal.

[11] For The Gambia: CR 2019/20, 12 Dec. 2019, pp. 12-22 (Reichler).

[12] For Myanmar: CR 2019/19, 11 Dec. 2019, pp. 12-20 (Aung San Suu Kyi).

[13] CR 2019/20, 12 Dec. 2019, p. 35, para. 13 (Sands) (references omitted).

[14] CR 2019/19, 11 Dec. 2019, p. 30, para. 29 (Schabas) (references omitted).

A. A situation of armed conflict does not preclude establishing the crime of genocide

16. It often happens that a State accused of committing or of failing to prevent or punish genocide relies on the existence of a situation of armed conflict, which, in its view, explains or even justifies the acts in question. The respondent State has done so in these proceedings, by claiming that the acts it is accused of are essentially a consequence of the military operations conducted by its armed forces against insurgent movements[15]. These military operations are then presented as being directed against "insurgents or terrorists"[16], thus proving the absence of genocidal intent.

17. It goes without saying that such a stance completely defeats the very object of the Convention, which is to punish genocide, whether committed in time of war or in time of peace. The text of Article I of the Convention leaves no doubt in this respect: "The Contracting Parties confirm that genocide, *whether committed in time of peace or in time of war*, is a crime under international law which they undertake to prevent and to punish"[17]. As with crimes against humanity, the crime of genocide must be prevented or punished, irrespective of the circumstances. The fact that the situation in question is characterized as one of armed conflict — be it international or not — therefore has no bearing on the establishment of such a crime.

18. This is very clear from the Convention's *travaux préparatoires*. The United Nations Secretariat (tasked with preparing the draft text that was to serve as a basis for the negotiations) had initially observed that in general, in a situation of war, the objective of each protagonist is to impose its will on the other party rather than destroy a racial, ethnical, national or religious group as such. But it then added:

> "War may, however, be accompanied by the crime of genocide. This happens when one of the belligerents aims at exterminating the population of enemy territory and systematically destroys what are not genuine military objectives. Examples of this are the execution of prisoners of war, the massacre of the population of occupied territory and their gradual extermination. These are clearly cases of genocide."[18]

This view does not appear ever to have been challenged during the discussions surrounding the adoption of the Convention.

19. The jurisprudence very clearly confirms this approach. It was established that genocide had occurred in Rwanda irrespective of the situation of armed conflict prevailing in the country at the time[19]. Similarly, the fact that the Srebrenica massacre took place in the context of the war that was then tearing Bosnia and Herzegovina apart did not prevent it from being recognized as genocide[20]. In the case between Croatia and Serbia, the Court made the general observation that

> "the Convention and international humanitarian law are two distinct bodies of rules, pursuing different aims. The Convention seeks to prevent and punish genocide as a crime under international law (Preamble), 'whether committed in time of peace or in time of war' (Art. I), whereas international humanitarian law governs the conduct of

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[15] CR 2019/19, 11 Dec. 2019, p. 13, paras. 5 *et seq*. (Aung San Suu Kyi).

[16] *Ibid.*, para. 12.

[17] Emphasis added.

[18] Doc. E/477, 26 June 1947, p. 23.

[19] See in particular the *Akayesu* case, described below (para. 37).

[20] See in particular the *Krstić* case, described below (para. 30).

> hostilities in an armed conflict and pursues the aim of protecting diverse categories of persons and objects."[21]

Thus, the Convention must be applied independently of the legal régime governing armed conflict.

20. This interpretation seems to be very widely (if not unanimously) shared by other States parties to the Convention. In another case where the application of the Convention is at issue, Mexico noted that

> "it is important to examine that the fact that genocidal acts are committed in times of war does not affect the characterization of the crime of genocide. The attack on a civilian population of a particular protected group cannot be attempted to be justified under international law if the intent is to destroy in whole or in part a protected group."[22]

Similarly, Türkiye observed that:

> "By confirming that genocide is a crime that can be committed 'in time of peace or in time of war', Article I clarifies that a nexus with war or armed conflict is not required for the crime of genocide to occur. Furthermore, it also establishes that the existence of war or armed conflict does not justify the commission of genocide or constitute a legitimate defence."[23]

21. It may seem to go without saying that these two legal régimes apply independently of each other, and it is to be noted that this is not explicitly contested by the States parties to the present dispute, or by the States parties that have intervened in these proceedings. However, it is worth underlining all the consequences thereof. Allowing that a situation of war does not preclude genocide being established is to recognize that the existence of a war aim (i.e. to defeat or fight the enemy, or, more fundamentally, to impose one's will on the enemy) can by no means rule out genocidal intent. Such intent can therefore be established even though, by definition, the perpetrator of a crime is at the same time pursuing objectives associated with military operations. The DRC would like to place particular emphasis on this specific point.

B. The Convention does not require genocidal intent to be the sole or even the primary intent

22. In the present case, as in many other cases involving accusations of genocide, the State accused of committing genocide (or failing to prevent or punish it) essentially hides behind the following argument: since the acts complained of can be explained by other objectives (such as military victory, security, the fight against terrorism or the conquest of territory), they cannot be characterized as genocide. As we have seen, this was the defence used before the Court by Myanmar during the oral arguments preceding the adoption of provisional measures[24].

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[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment, I.C.J. Reports 2015 (I)*, p. 68, para. 153 (*Croatia* v. *Serbia*).

[22] Declaration of intervention filed by Mexico on 24 May 2024 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, para. 24.

[23] Declaration of intervention filed by Türkiye on 7 Aug. 2024 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, para. 40.

[24] See the references above, in particular CR 2019/19, 11 Dec. 2019 (Aung San Suu Kyi).

23. According to this line of reasoning, the existence of objectives other than the destruction of a group "as such" precludes the establishment of genocide. At the very least, genocide cannot be established if the primary objective did not consist in the destruction, in whole or in part, of a group protected by the Convention.

24. Yet the Convention does not require genocidal intent to be the *sole* or even the *primary* intent. This conclusion is very clear from the text of the Convention (1) and existing jurisprudence (2).

1. There is no requirement in the text of the Convention for genocidal intent to be the sole or primary intent

25. Article II of the Genocide Convention requires that the act be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". But there is absolutely no requirement that such intent be exclusive of other objectives or motives that would explain the conduct in question, or even that genocidal intent take precedence over these other objectives, with all the evidentiary difficulties that would involve.

26. Legal scholars generally take this view. William Schabas, commenting on Article II of the Convention, thus makes a distinction between establishing genocidal intent — the only requirement under the text — and the existence of individual motives or grounds underlying the acts, which may involve a wide variety of factors[25]. After an in-depth analysis of the Convention's *travaux préparatoires* and the lengthy debates on the phrase "as such" in Article II, the author concludes: "Individual offenders should not be entitled to raise personal motives as a defence to genocide, arguing for instance that they participated in an act of collective hatred but were driven by other factors"[26]. Another commentator on the Convention also observes that

> "no *monocausal* psychological relationship is required, but rather that the victims' group affiliation may be one reason to act within a 'bundle of motives'. This amplifying clause is essential for maintaining the Convention's protective function since the motive criterion would otherwise never be fulfilled with the addition of even minor supplementary motives (such as pecuniary gain, increasing favour with a superior, or relishing feelings of power). Furthermore, there is a need to prevent evidentiary difficulties since the prosecuted offender should easily be able to make irrefutable claims that his acts were at least motivated by reasons other than the victim's group membership"[27].

There can therefore be a wide range of motives and, the author immediately adds, there is no requirement to prove that genocidal intent was not only the sole but also the primary intent:

> "This raises the subsequent question of whether the motive to target victims based on their group membership must hold particular weight within the assortment of motives (whether it be an 'essential', 'dominant' or 'driving' motive), or if such weighting is inconsequential. Once again, in order to address substantial evidentiary challenges, the latter option clearly emerges as more favourable. Within the complex realm of human decision-making, even the perpetrators themselves will often be incapable to discern the extent to which their actions relied on one motive versus another within a multitude of

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[25] William Schabas, *Genocide in International Law*, 2nd ed., *op. cit.*, p. 294.

[26] *Ibid.*, p. 306.

[27] Christian J. Tams, Lars Berster and Björn Schiffbauer, *The Genocide Convention. Article-by-Article Commentary*, München, C.H. Beck, 2nd ed., 2024, pp. 168-169 (Lars Berster). Emphasis in the original.

> motives. All the more, a court would have tremendous difficulty in attaining adequate clarity regarding the significance and hierarchical structure of the motives at play. Imposing stringent criteria on the weight of the genocidal motive within a collection of motives would thus regularly result in an inability to establish guilt, rendering the crime of genocide toothless within the framework of international law"[28].

27. A similar point of view was expressed by certain States parties to the Convention in another case where the application of the Convention is in question. As Chile stated,

> "it is essential to note that the Genocide Convention does not require that the intent to destroy a group (in whole or in part) be the sole or primary purpose of the perpetrator. Genocide's special intent must be distinguished from the reasons or motivations which may have caused the accused to act. Indeed, members of a protected group could be targeted for their nationality, ethnicity, race, and/or religion, in addition to other reasons. Therefore, evidence of further motives — personal, political, or linked to military advantage — will not preclude a finding of genocide if such special intent is otherwise established"[29].

28. The DRC is fully convinced by the assessment of these authors and intervening States, and by their supporting arguments. The crime of genocide is a collective endeavour, of which individual acts form a part, irrespective of the protagonists' personal motivations. What is essential therefore is to determine genocidal intent on the basis of this collective act, which can itself be based on a wide range of objectives. This is how international courts have proceeded when called upon to interpret the Convention.

2. There is no requirement in the jurisprudence for genocidal intent to be the sole or primary intent

29. To date, international jurisprudence has found that genocide had occurred in three particular instances: the Srebrenica massacre *(a)*, Rwanda *(b)* and certain actions of the Khmer Rouge régime in Cambodia *(c)*. In each of these precedents, the international courts clearly rejected any requirement for a sole or primary genocidal intent that could be supplanted or set aside by other objectives or motives.

(a) *Srebrenica*

30. The *Krstić* case was first heard by the ICTY, which convicted the accused of genocide for his participation in the Srebrenica massacre in July 1995[30]. As the Tribunal explicitly stated in another case concerning the same event, "[t]he victims of the crime must be targeted because of their membership in the protected group, *although not necessarily solely because of such membership*"[31].

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[28] *Ibid.*, p. 169; see also p. 171.

[29] Declaration of intervention filed by Chile on 12 September 2024 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, para. 33 (references omitted).

[30] *Radislav Krstić*, IT-98-33, judgments of 2 Aug. 2001 (Trial Chamber) and 19 April 2004 (Appeals Chamber): https://www.icty.org/en/case/krstic.

[31] ICTY, *Vidoje Blagojevic and Dragan Jokij*, IT-02-60-T, 17 Jan. 2005, p. 252, para. 669 (emphasis added).

31. The characterization of genocide was then at the centre of the Judgment rendered by the Court on 26 February 2007 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* between Bosnia and Herzegovina and Serbia and Montenegro. This Judgment confirms the interpretation resulting from a plain reading of Article II of the Convention, such that genocidal intent does not have to be either the sole or even the primary intent. This confirmation results from general statements and statements of principle, as well as from the manner in which such statements were applied in the particular case of Srebrenica.

32. Generally, first of all, the Court has stated that

> "[n]either the intent, as a matter of policy, to render an area 'ethnically homogeneous', nor the operations that may be carried out to implement such policy, can *as such* be designated as genocide: the intent that characterizes genocide is 'to destroy, in whole or in part' a particular group, and deportation or displacement of the members of a group, even if effected by force, is not *necessarily* equivalent to destruction of that group, nor is such destruction an *automatic* consequence of the displacement"[32].

The Court's position is nuanced: *as a matter of principle*, it refuses to equate ethnic cleansing with an act of genocide. The objective of rendering an area "ethnically homogeneous" may, indeed, not be accompanied by genocidal intent. As the words emphasized in the extract above indicate, ethnic cleansing, *as such*, does not therefore *necessarily* or *automatically* constitute genocide. *A contrario*, and quite logically, the Court does not conclude that what otherwise constitutes ethnic cleansing cannot, at the same time, be characterized as an act of genocide. Genocidal intent may well, indeed, be established in the context of an ethnic cleansing operation. Everything therefore depends on the circumstances of the case.

33. In principle, the lesson to be drawn is simple. Genocidal intent cannot be inferred or ruled out based on the fact that the perpetrators of the acts in question were pursuing other objectives, such as a policy of ethnic cleansing. Genocidal intent has to be established, and it is sufficient for it to be established, *irrespective* of the existence of other aims. As the Court makes clear, "[t]he specific intent is . . . to be distinguished from other reasons or motives the perpetrator may have"[33].

34. This was the approach taken by the Court in finding that genocide had occurred in Srebrenica. That genocide did indeed take place in a context of war and ethnic cleansing perpetrated by Serbian forces in Bosnia and Herzegovina. In that context, it is hard to deny that the initial objective of the forces led by General Mladić was to conquer the Srebrenica enclave. But, as the Court observed, at a particular point in time, that objective was coupled with genocidal intent[34]. By singling out men and children allegedly of military age, General Mladić was also clearly pursuing a "military objective" (the phrase is used several times in the Judgment[35]) with a view to weakening the other side's forces. The fact that there was more than one objective did not, however, prevent the Court from making a finding of genocidal intent in the specific circumstances of the case.

35. Like the ICTY, whose decisions are cited throughout the 2007 Judgment, the Court nevertheless does not claim to establish a hierarchy among the different objectives pursued by the

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[32] *I.C.J. Reports 2007 (I)*, p. 123, para. 190 (emphasis added); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, *Judgment*, *I.C.J. Reports 2015 (I)*, pp. 126-127, para. 435.

[33] *I.C.J. Reports 2007 (I)*, p. 122, para. 189.

[34] *Ibid.*, pp. 165-166, para. 295.

[35] *Ibid.*, p. 165, paras. 294 and 295.

perpetrators. In particular, it does not seek to demonstrate that genocidal intent outweighed or prevailed over other objectives or motives. What is essential is to determine whether genocidal intent can be established; that requirement is necessary and sufficient under Article II of the Convention.

36. In this regard, the Srebrenica precedent is far from isolated, as can be seen from the Rwanda and Cambodia cases, namely the two other precedents in which international courts found that genocide had occurred.

(b) *Rwanda*

37. In the *Akayesu* case, the first in which an international court handed down a conviction for genocide, the ICTR based its finding on the following assessment: "Clearly therefore, the massacres which occurred in Rwanda in 1994 had a specific objective, namely the extermination of the Tutsi, who were targeted especially because of their Tutsi origin *and not because they were RPF fighters*"[36]. As the words emphasized suggest, genocidal intent co-existed with the pursuit of other objectives, in that instance the fight against the Rwandan Patriotic Front (RPF), which was attempting an armed overthrow of the ruling régime. However, once the existence of genocidal intent was demonstrated, it could be established that genocide had occurred, notwithstanding the fact that the Rwandan Government was pursuing other objectives.

38. The existence of multiple objectives is apparent in another passage of the judgment:

> "Finally, in response to the question . . . whether the tragic events that took place in Rwanda in 1994 occurred solely within the context of the conflict between the RAF [Rwandan Armed Forces] and RPF, the Chamber replies in the negative, *since it holds that the genocide did indeed take place against the Tutsi group, alongside the conflict*"[37].

The Chamber's reasoning is clear: the existence of a situation of armed conflict implies, by definition, that the parties are pursuing military objectives. But if, "alongside the conflict", an act of genocide is committed, it can by no means be excused or justified by the existence of that conflict.

39. Similarly, confirming the above reading of Article II of the Convention, the ICTR rejected the arguments of the accused, who claimed that they had taken part in the massacres for reasons other than that of exterminating the Tutsis. One of them, for example, claimed to have sought to eliminate economic competitors, for revenge or financial gain, which was considered irrelevant:

> "The Appeals Chamber notes that criminal intent (*mens rea*) must not be confused with motive and that, in respect of genocide, personal motive does not exclude criminal responsibility providing that the acts proscribed in Article 2 (2) *(a)* through to *(e)* [*sic*] were committed 'with intent to destroy, in whole or in part, a national, ethnical, racial or religious group'"[38].

40. Whether on a collective level (with regard to the many political objectives of the Rwandan régime of the time, including victory in the conflict with the RPF rebels) or individual level (with a

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[36] ICTR, *Akayesu* case, Judgement of 2 Sept. 1998, para. 125 (emphasis added).

[37] *Ibid.*, para. 127 (emphasis added).

[38] ICTR-95-1-A, *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, [1 June] 2001, para. 161: MSC16634R0000621564.PDF.

wide variety of motives depending on the character of the accused), the conclusion is the same: if the physical acts set out in Article II of the Convention have been perpetrated, proof of genocidal intent is a necessary and *sufficient* requirement to establish the crime. Whether the perpetrators had other motives is irrelevant.

41. In this respect, the Tribunal endorses the reasoning of the Commission of Experts tasked by the Security Council to give an opinion on the situation in Rwanda[39]. In its report, the Commission notes that the intent to destroy a political group is not included in Article II of the Convention and observes:

> "This may appear to leave the door slightly open for perpetrators to argue that the killings that they ordered or carried out were directed against political groups and not any of the groups listed in article II. Alternatively, it may be argued that the killings were politically motivated and not with the intent to destroy a national, ethnic, racial or religious group, as such. However, *this attempt at a defence is bound to fail, as it should, because the presence of political motive does not negate the intent to commit genocide if such intent is established in the first instance*"[40].

This conclusion, drawn on the basis of the Rwandan precedent, is general in scope and could very well be applied to the Cambodia case.

(c) *Cambodia*

42. Mention can also be made in this regard of the decision handed down on 23 December 2022 by the Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia, convicting Khieu Samphân of genocide against both the Vietnamese and the Cham minority.

43. In respect of the former, the accused claimed that genocidal intent was not established given that there was an armed conflict between Cambodia and Viet Nam[41]. He argued that certain speeches given by the Cambodian authorities referring to the Vietnamese "enemy" had to be understood in the context of armed conflict and that the speeches were intended "to galvanise [Democratic Kampuchea] troops facing vastly superior enemy numbers"[42]. In other words, the acts targeting the Vietnamese were motivated by a military objective, and Khieu Samphân criticized the Trial Chamber "for failing to explain why it interpreted the term 'enemy' . . . to mean more than a military target"[43].

44. The Supreme Court Chamber rejected this argument. It found that the terms used by the senior leaders of the Khmer Rouge régime were employed "'to refer to Vietnam or Vietnamese in general terms' and not exclusively to combatants"[44]. The Vietnamese were, moreover, regarded as

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[39] Resolution 935 (1994), 1 July 1994, para. 1.

[40] Final Report of the Commission of Experts established pursuant to Security Council resolution 935 (1994), S/1994/1405, 9 Dec. 1994, paras. 158-159, reference omitted (emphasis added).

[41] Extraordinary Chambers in the Courts of Cambodia, Case No. 002/19-09-2007-ECCC/SC, Doc No. F76, 23 Dec. 2022, para. 1611.

[42] *Ibid.*, para. 1612.

[43] *Ibid.*

[44] *Ibid.*, para. 1847.

the "hereditary enemy"[45], a phrase that clearly points to the existence of an intent beyond that of simple victory in a specific armed conflict.

45. At the same time, the Supreme Court Chamber upheld the Trial Chamber's characterization of genocide for acts targeting the Cham, a religious minority living in Cambodia. Khieu Samphân expressed the view that "the purpose of the Khmer Rouge was to create a secular society where religion took second place in relation to the revolutionary goal of rebuilding the country and that the identity of Cham as members of a group was not a problem"[46]. The Extraordinary Chambers of Cambodia did not agree. That there were political motives linked to such a purpose could not rule out the existence of a specific intent targeting the Cham as a group. More generally, the fact that the latter may have been targeted as opponents to the régime did not preclude them from also being targeted as members of a religious group. Once again, there is no requirement for such specific intent to be the sole or even the primary intent. It simply has to be established.

46. More generally, Khieu Samphân's conviction for genocide was upheld while the Khmer Rouge régime was pursuing a so-called "Pol Potist" policy or one linked to fundamentalist Maoism[47]. That ideology had multiple objectives: to create a new secular, anti-capitalist and anti-imperialist "communist, classless society", a project said to justify the fierce repression of all opposition. Genocide against the Vietnamese and the Cham minority occurred in the context of this broader political project. Once again, it is of no consequence that there were multiple objectives that could be ranked in any particular order: genocidal intent alone has to be demonstrated. As this example also suggests, allowing that there were multiple objectives can lead to a parallel characterization of the crime of genocide, crimes against humanity and war crimes for the same set of facts.

C. An act constituting a crime against humanity or a war crime may also be characterized as genocide

47. In Myanmar's oral statements before the Court, it conceded that certain aspects of the actions undertaken in the context of the armed conflict between its troops and the "Arakan Rohingya Salvation Army" could give rise to investigations by its judicial system. Such investigations and any subsequent prosecutions would, however, concern war crimes, or even crimes against humanity, but not genocide. According to the Agent of the respondent State, "such conduct, if proven, could be relevant under international humanitarian law or human rights conventions, but not under the 1948 Genocide Convention"[48].

48. According to established jurisprudence, it is nevertheless entirely possible for a genocide conviction and a conviction for crimes against humanity and war crimes to be cumulative. The possibility for offences to be cumulative follows in particular from the *Popovic* case, where the ICTY observed that:

> "[a] conviction for genocide under Article 4 (3) *(a)* of the Statute (Count 1) is not impermissibly cumulative with a conviction for a crime against humanity under

[45] *Ibid.*

[46] *Ibid.*, para. 1856.

[47] Henri Locard, *Le « Petit livre rouge » de Pol Pot ou Les paroles de l'Angkar*, Paris, L'Harmattan, 2000.

[48] CR 2019/19, 11 Dec. 2019, para. 28 (Aung San Suu Kyi).

> Article 5 of the Statute (Counts 3 [extermination], 4 [murder], 6 [persecution], and 7 [inhumane acts (forcible transfer)])
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> . . . . . .
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> The Trial Chamber finds that . . . a conviction for genocide under Article 4 (3) *(a)* (Count 1) is not impermissibly cumulative with a conviction for murder as a violation of the laws or customs of war punishable under Article 3 (Count 5). While a conviction for genocide requires proof of the special intent noted above, this is not required for a conviction under Article 3. Article 3 requires proof of a close link between the acts of the accused and the armed conflict, which is not a requirement under Article 4.6"[49].

This principle has been applied in a number of cases relating to the Srebrenica genocide[50], as well as that of Rwanda[51] and Cambodia[52].

49. In the same vein, the Court has held that "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that *this is the only inference that could reasonably be drawn* from the acts in question"[53]. Irrespective of the question of proof — which will be addressed in the following pages — the DRC notes the Court's observation that this approach is "in substance identical" to that of the ICTY[54]. Given the latter's settled jurisprudence (and that of international criminal tribunals more generally) on cumulative convictions, this criterion can by no means be interpreted as precluding the possibility of genocide being committed because the acts in question also constitute war crimes or crimes against humanity. The relevant criterion is thus the standard of proof required to demonstrate genocidal intent rather than the exclusivity of that intent.

50. In short, whether the question is considered in connection with a context of war and the existence of multiple objectives or motives, or in the context of offences committed simultaneously with other crimes, the conclusion is the same: genocidal intent can be established autonomously, and cannot be excluded on the basis of other factors or circumstances.

ARTICLE II: PROOF OF GENOCIDAL INTENT

51. The question of proof of genocide is one of the most difficult issues, in particular as regards the manner in which the necessary specific intent (*dolus specialis*) must be demonstrated for genocide to be able to be considered to have been committed. In the present case, the Parties — at the provisional measures stage — and the intervening States have expressed their position on the manner in which genocidal intent should be demonstrated.

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[49] ICTY, *Popovic* et al., IT-05-88, Trial Chamber judgement, 10 June 2010, paras. 2115-2116.

[50] ICTY, *Tolimir* case, IT-05-88/2, Trial Chamber judgement, 12 Dec. 2012, para. 1205: "It is permissible to enter simultaneous convictions for genocide under Article 4 (3) *(a)* as well as a conviction for any crime under Article 5 [i.e. crimes against humanity], or a conviction for murder under Article 3 [i.e. war crimes]".

[51] ICTR, *Musema* case, ICTR 96-13, Appeals judgement, 16 Nov. 2001, paras. 364-367: cumulative conviction for genocide and extermination for the same facts; ICTR, *Nahimana* et al., ICTR-99-52, Appeals judgement, 28 Nov. 2007, paras.1028-1036: cumulative convictions for genocide and extermination as a crime against humanity, genocide and persecution as a crime against humanity, incitement to commit genocide and persecution as a crime against humanity.

[52] *Khieu Samphân* case, cited above; conviction for persecution as a crime against humanity for political motives against the Cham on the basis of participation in a joint criminal enterprise (para. 610).

[53] *Croatia* v. *Serbia*, p. 67, para. 148 (emphasis added); *Bosnia and Herzegovina* v. *Serbia and Montenegro*, pp. 196-197, para. 373.

[54] *Croatia* v. *Serbia*, p. 67, para.148.

52. Counsel for Myanmar stated that "where proof of genocidal intent depends upon inferences drawn from a pattern of conduct, other explanations for the mental element of the crime must be excluded"[55]. Rejecting the analysis in the Fact-Finding Mission's report on the genocidal intent of the Myanmar authorities, counsel for Myanmar explained that "the validity of the opinion of the Fact-Finding Mission about genocidal intent is undermined by its failure to consider, in any substantive manner, the issue of alternative explanations"[56]. Referring to the camps for displaced persons set up by the Myanmar authorities, counsel for Myanmar contended that "[t]he Mission never attempts to explain why there appears to be no evidence of systematic physical destruction in the displacement camps, perhaps because this might provide a *reasonable* explanation that runs counter to the genocidal intent hypothesis"[57]. Thus, Myanmar does not dispute that genocidal intent can be inferred from a pattern of conduct but, in that case, other explanations for the conduct concerned must be excluded. Even though it is difficult to form a definitive view of Myanmar's stance based solely on the positions taken by its counsel during the hearings on provisional measures, it appears to be that, for genocidal intent to be excluded, the other potential explanation must be "reasonable". The Gambia, for its part, recalled the following passage from the *Croatia* v. *Serbia* Judgment: "for a pattern of conduct . . . to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that it can only reasonably be understood as reflecting that intent", and stated that "The Gambia's Application is based squarely on that standard"[58].

53. In their joint Declaration of intervention in the present proceedings, Canada, Denmark, France, Germany, the Netherlands and the United Kingdom emphasized the Court's finding in the *Croatia* v. *Serbia* case that "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question"[59]. According to those States,

> "it is crucial for the Court to adopt a balanced approach that recognizes the special gravity of the crime of genocide, without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide near-impossible. The Declarants believe that the standard adopted by the Court in *Croatia* v. *Serbia* can, read properly, form the basis of such a balanced approach.
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> . . . . . .
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> In this regard, the Declarants note that the Court's express reference to a 'reasonableness criterion' is key to a balanced approach"[60].

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[55] CR 2019/19, p. 40, para. 52 (Schabas).

[56] For Myanmar: CR 2019/19, p. 36, para. 45 (Schabas).

[57] For Myanmar: CR 2019/19, p. 39, para. 50 (Schabas) (emphasis added). See also, *ibid*., p. 27, para. 19: "In the context of a provisional measures application . . ., the test must be whether it is plausible that genocidal intent is the only inference that can be drawn. In other words, unless it is plausible that another *reasonable* explanation of the intent for the acts can be excluded, the application must fail" (emphasis added).

[58] For The Gambia: CR 2019/20, p. 31, para. 6 (Sands).

[59] Joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, pursuant to Article 63 of the Statute of the International Court of Justice in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, 15 Nov. 2023, p. 13, para. 50.

[60] *Ibid*., p. 14, paras. 51-52. See, in the same vein, the Declaration of intervention of Spain in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, 28 June 2024, p. 6, paras. 23-25.

The intervening States invited the Court to examine all the evidence taken as a whole[61]. They stressed that the number of victims killed is not decisive in determining genocidal intent and emphasized other factors relevant to determining such intent, namely sexual or sexist violence, acts targeting children and forced displacement[62].

54. The DRC strongly agrees with the position set out above. In particular, it notes that an express manifestation of specific intent is not required (A), since genocidal intent can be deduced or inferred from certain types of conduct or from a pattern of conduct (B), in so far as the conduct or pattern of conduct in question reasonably permits such an inference (C).

A. Express manifestation of genocidal intent is not required

55. According to the interpretation of the Court, which is accepted by all the States that have opined on this point in the present proceedings, an express manifestation of genocidal intent is not required[63].

56. Similarly, the ICTY and the ICTR have observed on several occasions that "[i]ndications of such intent are rarely overt"[64]. Their settled jurisprudence admits the possibility of inferring genocidal intent from indirect evidence[65]. This approach has been taken by the ICJ itself in its jurisprudence on the application of the 1948 Convention in disputes between Bosnia and Herzegovina and Serbia and Montenegro, and Croatia and Serbia. Thus, in its 2015 Judgment in the *Croatia* v. *Serbia* case, the Court found that

> "[t]he Parties agree that the *dolus specialis* is to be sought, first, in the State's policy, while at the same time accepting that such intent will seldom be expressly stated. They

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[61] *Ibid*., pp. 14, paras. 54-55. See also the Declaration of intervention of Chile in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, 12 Sept. 2024, p. 9, para. 32, and, in the same case, the Declarations of intervention of Türkiye, 7 Aug. 2024, p. 36, paras. 99-101, and Spain, 28 June 2024, p. 7, para. 26.

[62] *Ibid.*, pp. 14-20, paras. 56-76. For a reference to relevant criteria to infer genocidal intention, see also the Declaration of intervention of Colombia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, 24 April 2024, pp. 38-39, paras. 120-123.

[63] In the first interpretative declarations transmitted at the ratification of the 1948 Convention, the United States stated that "the term 'intent to destroy, in whole or in part, a national, ethnical, racial, or religious group as such' appearing in Article II means the *specific* intent to destroy, in whole or in substantial part, a national ethnical, racial or religious group as such by the facts specified in Article II"; United Nations Treaty Collection, Chapter IV, Human Rights, 1. Convention on the Prevention and Punishment of the Crime of Genocide, Declarations and Reservations, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4&clang=_en#EndDec (emphasis added). In so far as this declaration may be interpreted as requiring proof of an express manifestation of the intent to destroy one of the groups protected by the 1948 Convention as such, the DRC notes that such an interpretation is too stringent in relation to the standards of proof required to demonstrate genocidal intent and that it is by no means confirmed by the jurisprudence.

[64] See, for example, ICTY, *The Prosecutor* v. *Zdravko Tolimir*, Judgement, Trial Chamber II, 12 Dec. 2012, IT-05-88/2-T, p. 401, para. 745; ICTR, *Sylvestre Gacumbitsi* v. *The Prosecutor*, Appeals Judgement, 7 July 2006, ICTR-2001-64-A, pp. 19-20, para. 40.

[65] See, for example, ICTY, *Tolimir*, *op. cit.*, p. 401, para. 745; ICTY, *The Prosecutor* v. *Milomir Stakić*, Judgement, Appeals Chamber, 22 March 2006, IT-97-24-A, pp. 25-26, paras. 55-56; ICTR, *Iledephonse Hategekimana* v. *The Prosecutor*, Judgement, Appeals Chamber, 13 Sept. 2013, ICTR-00-55B-A, p. 48, para. 133; ICTR, *The Prosecutor* v. *Yussuf Munyakazi*, Judgement, Appeals Chamber, 28 Sept. 2011, p. 54, para. 142; ICTR, *Gacumbitsi*, *op. cit.*, pp. 19-20, paras. 40-41.

agree that, alternatively, the *dolus specialis* may be established by indirect evidence, i.e., deduced or inferred from certain types of conduct"[66].

Both in this Judgment and the 2007 Judgment in the case between Bosnia and Herzegovina and Serbia and Montenegro, the Court allowed that genocide could be established even "[i]n the absence of a State plan expressing the intent to commit genocide"[67]. In each case, the question to be asked is rather whether genocidal intent can be inferred from various sources of evidence, by analysing the acts in question in order to determine whether such an inference can reasonably be made[68].

B. Genocidal intent may be deduced or inferred from certain types of conduct or from a pattern of conduct

57. Since genocidal intent may be deduced or inferred from various sources of evidence, it is worthwhile taking a closer look at the evidence that can be taken into account in this regard.

58. In its jurisprudence cited above, the Court referred to the possibility of deducing or inferring genocidal intent from "particular circumstances" or from a "pattern of conduct"[69]. The Court defined a pattern of conduct as "a consistent series of acts carried out over a specific period of time"[70]. As a commentator on the 1948 Convention noted, genocidal intent "must be inferred from facts which, in their entirety, constitute the manifestation of such intent beyond reasonable doubt"[71]. Thus, it is not a question of examining separately the incidents reported as being acts of genocide but of examining the factual context as a whole in order to determine whether "there is persuasive and consistent evidence for a pattern of atrocities" and whether that factual context constituted "a pattern of acts . . . such as to lead to an inference from such pattern of the existence of a specific intent (*dolus specialis*)"[72]. The existence of a "pattern" or a "pattern of conduct" may therefore lead to the conclusion that an actual genocidal plan or policy crystallized.

59. That said, it is not legally necessary to prove the existence of such a plan or policy in order to demonstrate genocidal intent[73]. This fact is particularly important since it is accepted that "[t]he acts of genocide need not be premeditated and the intent may become the goal later in an operation"[74]. As stated above, that is what happened in Srebrenica in July 1995[75].

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[66] *Croatia* v. *Serbia*, p. 65, para. 143.

[67] *Croatia* v. *Serbia*, p. 66, para. 145.

[68] *Croatia* v. *Serbia*, p. 67, para. 148; *Bosnia and Herzegovina* v. *Serbia and Montenegro,* pp. 196-197, para. 373.

[69] *Ibid.*

[70] *Croatia* v. *Serbia*, p. 151, para. 510.

[71] Christian J. Tams, Lars Berster and Björn Schiffbauer, *The Genocide Convention. Article-by-Article Commentary*, *op. cit.*, p. 150-151 (Lars Berster).

[72] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 143, para. 242. See also, ICTY, *Tolimir*, *op. cit.*, p. 414, para. 772 ("rather than considering separately whether there was an intent to destroy the group through each of the enumerated acts in Article 4 of the Statute, consideration should be given to all of the evidence, taken together".); ICTY, *The Prosecutor* v. *Vujadin Popović*, Judgement, Trial Chamber II, 10 June 2010, IT-05-88-T, pp. 414-415, paras. 820-823; ICTY, *The Prosecutor* v. *Milomir Stakić*, Judgement, Appeals Chamber, 22 March 2006, IT-97-24-A, pp. 25-26, paras. 55-56.

[73] ICTY, *The Prosecutor* v. *Goran Jelisić*, Judgement, Appeals Chamber, 5 July 2001, IT-95-10-A, p. 20, para. 48.

[74] *Bosnia and Herzegovina* v. *Serbia and Montenegro,* p. 163, para. 292 (quoting the 2001 judgement of the ICTY Trial Chamber in the *Krstić* case, para. 572). See also, ICTR, *Munyakazi*, *op. cit.*, p. 54, para. 142.

[75] See above, paras. 30 *et seq*.

60. The Court stated that the physical element (*actus reus*) and the mental element (*mens rea*) of the crime of genocide "are linked" and that "the characterization of the acts [i.e. the *actus reus* of genocide] and their mutual relationship can contribute to an inference of intent"[76]. Thus, for example, acts of murder, rape and sexual violence or depriving members of a group of their means of subsistence, taken individually, are relevant not only in the analysis of the physical element (*actus reus*) of the crime of genocide, as conduct corresponding to subparagraphs *(a)* (murder), *(b)* (rape and sexual violence) and *(c)* (depriving members of a group of their means of subsistence); they are equally relevant in demonstrating the specific *mens rea* of the crime of genocide, in particular as regards their mutual relationship.

61. Similarly, acts that in principle do not themselves fall within the scope of Article II of the Convention can be taken into account to establish genocidal intent. Acts of "ethnic cleansing" — that is, the policy of making an area ethnically homogeneous and the operations implementing such a policy, through, among other things, the deportation or displacement of members of a group — provide a clear example in this regard. The Court considered that such acts could constitute the crime of genocide if the "forced displacements took place *in such circumstances that they were calculated to bring about the physical destruction of the group*"[77]. There is therefore nothing to prevent these acts being taken into account to prove genocidal intent: "it is clear that acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts"[78].

62. The Court considered that the same was true of forcing individuals to wear insignia of their ethnicity: "forcing individuals to wear insignia of their ethnicity does not in itself fall within the scope of Article II *(c)* of the Convention, but it might be taken into account for the purpose of establishing whether or not there existed an intent to destroy the protected group, in whole or in part"[79]. It came to the same conclusion with regard to attacks on cultural and religious property and symbols: "The Court recalls . . . that it may take account of attacks on cultural and religious property in order to establish an intent to destroy the group physically"[80]. Thus, to return to the examples mentioned above, acts of murder, rape and sexual violence or depriving members of a group of their means of subsistence are relevant in proving a genocidal pattern of conduct, even though, taken individually, they do not constitute — or do not all constitute — acts of genocide as enumerated in Article II.

63. It is clear from the foregoing that there is a broad conception of the acts that must be taken into account in identifying a pattern of conduct establishing genocidal intent. According to the jurisprudence of the ICTY and the ICTR, in analysing evidence in order to infer genocidal intent,

> "[f]actors . . . may include the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts. The existence of a plan or policy, a

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[76] *Croatia* v. *Serbia*, p. 62, para. 130.

[77] *Croatia* v. *Serbia*, p. 72, para. 163 (emphasis added).

[78] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 123, para. 190; *Croatia* v. *Serbia*, p. 71, para. 162.

[79] *Croatia* v. *Serbia*, p. 115, para. 382.

[80] *Croatia* v. *Serbia*, p. 116, para. 390; See also *Bosnia and Herzegovina* v. *Serbia and Montenegro*, pp. 185-186, para. 344.

> perpetrator's display of his intent through public speeches or meetings with others may also support an inference that the perpetrator had formed the requisite specific intent"[81].

As the ICTY observes, the specific intent to commit the crime of genocide does not have to be expressly stated and "may clearly be inferred from the gravity of the 'ethnic cleansing' practiced"[82]. Such intent

> "may be inferred from a certain number of facts such as the general political doctrine which gave rise to the acts possibly covered by the definition in Article 4, or the repetition of destructive and discriminatory acts. The intent may also be inferred from the perpetration of acts which violate, or which the perpetrators themselves consider to violate, the very foundation of the group — acts which are not in themselves covered by the list in Article 4 (2) but which are committed as part of the same pattern of conduct"[83].

This "intent derives from the combined effect of speeches or projects laying the groundwork for and justifying the acts, from the massive scale of their destructive effect and from their specific nature, which aims at undermining what is considered to be the foundation of the group"[84].

64. The variety of factors that may be taken into account to establish the existence of a pattern of conduct is confirmed in the jurisprudence of the Court. In the case between Croatia and Serbia, Croatia had suggested a list of 17 useful factors to establish the existence of such a pattern of conduct[85]. In its 2015 Judgment, while not questioning the 17 factors suggested by Croatia or excluding any as irrelevant, the Court took the view that

> "the most important [were] those that concern 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 Croats and the nature, extent and degree of the injuries caused to the Croat population"[86].

65. In this regard, the DRC would place particular emphasis on the criterion relating to "the fact that those attacks are said to have caused casualties and damage far in excess of what was justified by military necessity", which the Court identified as being among "the most important" in proving the existence of a genocidal pattern of conduct. As the Court itself states, "the rules of international humanitarian law might be relevant in order to decide whether the acts alleged by the Parties constitute genocide within the meaning of Article II of the Convention"[87]. Thus, compliance with the rules of international humanitarian law is a relevant factor in identifying genocidal intent and acts that are contrary to the rules concerned acquire significant weight in the factual context indicating the existence of a genocidal pattern of conduct.

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[81] ICTY, *Tolimir*, *op. cit.*, p. 401, para. 745 (references omitted).

[82] ICTY, *The Prosecutor* v. *Radovan Karadžić and Ratko Mladić*, Review of the Indictment, Trial Chamber I, 16 Nov. 1995, Case No. IT-95-18-I, pp. 5-6.

[83] ICTY, *The Prosecutor* v. *Radovan Karadžić and Ratko Mladić,* Review of the Indictment, Trial Chamber I, 11 July 1996, Case Nos. IT-95-5-R61 and IT-95-18-R61, para. 94.

[84] *Ibid*., para. 95.

[85] *Croatia* v. *Serbia*, pp. 119-120, para. 408.

[86] *Croatia* v. *Serbia*, p. 121, para. 413.

[87] *Croatia* v. *Serbia*, p. 68, para. 153.

66. For similar reasons, the same considerations must be applied to the rules on the protection of human rights, given their continued application in times of armed conflict, an application confirmed by the Court on several occasions[88]: acts that are in violation of these rules must be attributed significant weight in assessing the existence of a genocidal pattern of conduct.

67. It is clear from the foregoing that genocidal intent may be deduced or inferred from various sources of evidence, namely an analysis of the particular circumstances or the pattern of conduct in which the acts corresponding to the *actus reus* of the crime of genocide took place, and that the acts that must be taken into account as part of that context from which genocidal intent may be inferred are many and various.

C. Genocidal intent must be reasonably established

68. The DRC notes that genocidal intent must be "reasonably" deduced or inferred from particular circumstances or a pattern of conduct.

69. This approach is in keeping with that taken by the Court in its constant jurisprudence. In its 2007 Judgment, the Court stated that

> "[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, *it would have to be such that it could only point to the existence of such intent*"[89].

In its 2015 Judgment, the Court explained that "[t]he notion of 'reasonableness' must necessarily be regarded as implicit in the reasoning of the Court"[90], adding that the passage from its 2007 Judgment quoted above "amounts to saying that, in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question"[91]. These passages confirm that this criterion applies when the intent is inferred from particular circumstances or a pattern of conduct and does not concern cases where express statements provide evidence of genocidal intent.

70. As noted above, the criterion established by the Court must be interpreted in such a way as to achieve a balance between the particular gravity of the crime of genocide and the need to avoid making it impossible to apply the 1948 Convention in practice[92]. In the same vein, the six States intervening jointly in the present case cautioned against too restrictive an interpretation of the criterion established by the Court, calling for a "balanced approach" in applying it and noting that

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[88] *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 240, para. 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004 (I)*, pp. 177-178, paras. 105-106; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, pp. 242-243, para. 216; *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion of 19 July 2024*, para. 99.

[89] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, pp. 196-197, para. 373 (emphasis added).

[90] *Croatia* v. *Serbia*, p. 67, para. 148.

[91] *Ibid.* (emphasis added).

[92] See above, para. 13.

"the Court's express reference to a 'reasonableness criterion' is key to a balanced approach"[93]. Indeed, the "reasonable" nature of the inference is the key factor in the interpretation of the threshold applied by the Court in assessing the particular circumstances or a pattern of conduct. This word is indicative of the flexibility that is required when faced with the delicate task of proving a State's genocidal intent.

71. As stated in the introduction to this part of the Declaration, during the hearings on provisional measures, Myanmar referred to "alternative explanations" to contest the fact that its authorities were motivated by genocidal intent[94]. This argument raises the question whether and to what extent the existence of other explanations can negate any possibility of inferring the existence of genocidal intent. In the view of the DRC, this is clearly not the case.

72. First, Myanmar itself does not seem to have claimed that the mere possibility of there being explanations other than genocidal intent is sufficient to rule out such intent being reasonably inferred from a pattern of conduct. On the contrary, the passages quoted above show that, in referring to the existence of other *reasonable* explanations, Myanmar considered that the existence of genocidal intent on the part of the authorities was not demonstrated[95]. Thus, Myanmar admitted that for genocidal intent to be ruled out, it is not sufficient for another explanation simply to be possible; such an explanation must be able to be *reasonably* inferred from the relevant facts so that the existence of genocidal intent may be challenged.

73. Second, this is the approach of the international criminal tribunals, as illustrated by the 2019 appeals judgement of the International Residual Mechanism for Criminal Tribunals (IRMCT) in the *Karadžić* case. The Trial Chamber in those proceedings "based its finding regarding Karadžić's intent on its conclusion that the only reasonable inference available on the evidence was that Karadžić shared with Mladić, Beara, and Popović the intent that every able-bodied Bosnian Muslim male from Srebrenica be killed"[96]. Radovan Karadžić appealed against his first-instance conviction for genocide, alleging that the Trial Chamber had erred in its assessment of the evidence relied on to infer his genocidal intent and that the inference of genocidal intent was not the only reasonable inference: "Karadžić submit[ted] that the Trial Chamber [had] erred in inferring his genocidal intent due to its 'mistaken' evaluation of the evidence and erroneous inferences that were not the only reasonable conclusions based on the evidence"[97]. The Appeals Chamber systematically rejected the defence's arguments, taking the view that "Karadžić fail[ed] to show that the Trial Chamber [had] erred in its assessment of the evidence *or dr[awn] unreasonable inferences* warranting appellate intervention"[98]. For example, Karadžić claimed that "the Trial Chamber [had] erred in relying on his comments at the Bosnian Serb Assembly session on 6 August 1995 as he was referring to VRS military tactics and not the killing of civilians, which [was] evident from reading his remarks in full"[99]. Thus, in contesting any genocidal intent on the part of Karadžić, his defence team argued that the comments taken into account by the Trial Chamber among the evidence enabling genocidal intent to be inferred were made in reference to the military objectives of the campaign conducted by Serb

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[93] Joint Declaration of intervention in *The Gambia* v. *Myanmar* case, *op. cit*., p. 14, paras. 51-52. See also the Declaration of intervention of Spain in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, 28 June 2024, p. 6, paras. 23-25.

[94] See above, para. 52.

[95] See above, fn. 56 and associated text.

[96] IRMCT, *The Prosecutor* v. *Radovan Karadžić*, Judgement, Appeals Chamber, 20 March 2019, MICT-13-55-A, p. 254, para. 624.

[97] *Ibid.*, p. 255, para. 626.

[98] *Ibid.*, p. 258, para. 630 (emphasis added).

[99] *Ibid.*, p. 256, para. 628.

forces in Bosnia and Herzegovina. The Appeals Chamber rejected this argument, asserting that "Karadžić merely provide[d] an alternative interpretation of the evidence but *fail[ed] to demonstrate that the Trial Chamber's interpretation of his statement or its reliance on it in establishing his intent was unreasonable*"[100]. The Appeals Chamber's conclusion clearly states that the decisive factor in the assessment of the factual evidence is the *reasonable* nature of the inference and that the simple fact that another interpretation might exist does not automatically make the inference of genocidal intent unreasonable.

74. In the same vein, in the judgement handed down on 23 December 2022, in response to the argument of Khieu Samphân's defence that the Trial Chamber had erred in relying on the testimony of one witness because it was open to various interpretations, the Supreme Court Chamber of the Extraordinary Chambers of Cambodia stated that "claiming that EK Hen's testimony could be interpreted in a variety of ways does not suffice to demonstrate that the Trial Chamber's interpretation was unreasonable"[101].

75. Third, such an approach is perfectly logical and consistent with the fact that, as noted above, the perpetrators of genocide may pursue multiple objectives, and that genocidal intent does not have to be either the sole or the primary intent[102]. In short, there can always be more than one possible interpretation of a set of facts. However, if a court is convinced by the available evidence that there is genocidal intent, that conclusion must be considered as "the only inference that could reasonably be drawn from the acts in question"[103].

76. In light of the foregoing, genocidal intent must be considered to be established when it can be reasonably deduced or inferred from all the relevant facts.

ARTICLE II: INTERPRETATION OF THE CONCEPT OF PROTECTED GROUP AND THE CONCEPT OF "PART" OF THE PROTECTED GROUP

77. As the DRC has already noted with regard to genocidal intent under Article II of the Genocide Convention, genocide "means any of the following acts committed with intent to destroy, *in whole or in part, a national, ethnical, racial or religious group*, as such"[104].

78. In its Application instituting proceedings, The Gambia claims *inter alia* that "[t]he genocidal acts committed during these [clearance] operations were intended to destroy the Rohingya as a group, in whole or in part"[105]. At the current stage of the proceedings, the Parties have not contested whether the Rohingya constitute a protected group as such under the 1948 Convention. Yet The Gambia and Myanmar clearly hold opposing views on the assessment of the concept of "part" of the protected group, as we shall see below. In this context, in the view of the DRC, it is important

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[100] *Ibid.*, p. 258, para. 631.

[101] Supreme Court Chamber of the Extraordinary Chambers in the Courts of Cambodia, Case File No. 002/19-09-2007-ECCC/SC, doc. No. F76, 23 Dec. 2022, pp. 751-752, para. 1620.

[102] See above, paras. 22 *et seq*.

[103] *Croatia* v. *Serbia*, p. 67, para. 148.

[104] Emphasis added.

[105] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, Application instituting proceedings and request for the indication of provisional measures, p. 7, para. 6.

to elaborate on the concept of protected group (A) before clarifying the concept of "part" of such a group (B).

A. The concept of protected group

79. The crime of genocide is distinguished from most other international crimes by the fact that it protects specifically identified groups. It is not the fact that the victim is an individual but rather that he or she is a member of a certain group which determines the crime of genocide. For the perpetrator of the crime, the individual victim is "an incremental step in the overall objective of destroying the group"[106]. This comes across clearly in the judgement handed down by the Trial Chamber of the ICTR in the *Prosecutor* v. *Alfred Musema* case:

> "For any of the acts charged to constitute genocide, the said acts must have been committed against one or more persons because such person or persons were members of a specific group, and specifically, because of their membership in this group. Thus, the victim is singled out not by reason of his individual identity, but rather on account of his being a member of a national, ethnical, racial or religious group. The victim of the act is, therefore, a member of a given group selected as such, which, ultimately, means the victim of the crime of genocide is the group itself and not the individual alone. The perpetration of the act charged, therefore, extends beyond its actual commission — for example, the murder of a particular person — to encompass the realization of the ulterior purpose to destroy the group in whole or in part"[107].

The ICTY explained the importance of the identity of the group in these terms:

> "Article 4 of the Tribunal's Statute defines genocide as one of several acts 'committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group, *as such*'. The term 'as such' has great significance, for it shows that the offence requires intent to destroy a collection of people who have a particular group identity"[108].

In its 1996 Draft Code of Crimes against the Peace and Security of Mankind, the International Law Commission (ILC) rightly notes that

> "[i]t is the membership of the individual in a particular group rather than the identity of the individual that is the decisive criterion in determining the immediate victims of the crime of genocide. The group itself is the ultimate target or intended victim of this type of massive criminal conduct. The action taken against the individual members of the group is the means used to achieve the ultimate criminal objective with respect to the group"[109].

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[106] International Law Commission (ILC), Draft Code of Crimes against the Peace and Security of Mankind, 1996, doc. A/51/10, para. 6 of the commentary on Article 17.

[107] ICTR, Trial Chamber, *The Prosecutor* v. *Alfred Musema*, Case No. ICTR- 96-13-A, Judgment and Sentence, 27 Jan. 2000, para. 165.

[108] ICTY, Appeals Chamber, *The Prosecutor* v. *Stakić*, Case No. IT-97-24-A, Judgement, 22 March 2006, para. 20.

[109] ILC, Draft Code of Crimes against the Peace and Security of Mankind (1996), doc. A/51/10, para. 6 of the commentary on Article 17, p. 45.

80. While the crime of genocide is thus characterized by the intention to destroy a group, the question of membership of the protected group is particularly complex[110]. Whereas international criminal courts and tribunals at first defined groups objectively, they increasingly determine membership of a group subjectively, relying on the perception of the group's otherness.

81. To that end, to identify members of the group, the DRC considers it necessary to adopt a subjective approach notably consisting of referring to how both the perpetrators of the crime of genocide and the targeted groups perceive their distinct identity[111]. The Court took this approach in the present case when it stated the following in its Order indicating provisional measures: "The Court's references in this Order to the 'Rohingya' should be understood as references to the group that self-identifies as the Rohingya group and that claims a longstanding connection to Rakhine State, which forms part of the Union of Myanmar"[112]. It took the same approach in its Judgment on the preliminary objections[113].

82. This subjective representation of the concept of a group was also emphasized by the ICTR in the *Rutaganda* case, when Trial Chamber I stated that

> "for the purposes of applying the Genocide Convention, membership of a group is, in essence, a subjective rather than an objective concept. The victim is perceived by the perpetrator of genocide as belonging to a group slated for destruction. In some instances, the victim may perceive himself/herself as belonging to the said group"[114].

The ICTY took this approach in the *Jelisić* case:

> "The Trial Chamber consequently elects to evaluate membership in a national, ethnical or racial group using a subjective criterion. It is the stigmatisation of a group as a distinct national, ethnical or racial unit by the community which allows it to be determined whether a targeted population constitutes a national, ethnical or racial group in the eyes of the alleged perpetrators"[115].

This position has remained constant and has been reaffirmed by the ICTY in several cases, as illustrated by the following example: "a national, ethnical, racial or religious group is identified 'by using as a criterion the stigmatisation of the group, notably by the perpetrators of the crime, on the basis of its perceived national, ethnical, racial or religious characteristics'"[116].

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[110] See Scott Straus, "Contested Meanings and Conflicting Imperatives: A Conceptual Analysis of Genocide", *Journal of Genocide Research*, 2001, p. 365.

[111] See also in this respect the declaration of Judge Salam, appended to the Advisory Opinion on *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem*, 19 July 2024, para. 21.

[112] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, *Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, paras. 14-15.

[113] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 477, para. 29.

[114] ICTR, *The Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda*, Case No. ICTR-96-3-T, 6 Dec. 1999, para. 56.

[115] ICTY, Trial Chamber I, *The Prosecutor* v. *Goran Jelisić*, Case No. IT-95-10-A, Judgement of 14 Dec. 1999, para. 70.

[116] ICTY, Trial Chamber I, *The Prosecutor* v. *Vidoje Blagojević and Dragan Jokić*, Case No. IT-02-60-T, 17 Jan. 2005, para. 667.

83. Thus, the perception of the group, by itself and by the perpetrator of genocide, is considered to be the decisive factor. It is by relying on the stigmatization of the targeted group by the perpetrator of the act based on perceived national, ethnical, racial or religious characteristics that its members who are exposed to discriminatory acts become identifiable.

B. The concept of "part" of the protected group

84. In their oral arguments during the provisional measures phase, the Parties to the present case differed on the question of the relevance of recourse to a quantitative criterion to determine "part" of the protected group. In particular, counsel for Myanmar stated in this respect that

> "[i]f this case ever goes to the merits, Myanmar will produce evidence challenging the figure of 10,000 as an exaggeration . . . But 10,000 deaths out of a population of well over one million might suggest something other than an intent to physically destroy the group . . . I can already hear the objections from counsel for the Applicant, who will claim that genocide is not just about the numbers . . . Numbers are important in other respects"[117].

In response to this statement, The Gambia asserted that

> "[g]enocide is not just a numbers game . . . and the Convention makes clear that the intention to destroy a group 'in part' is sufficient. You have evidence before you that entire Rohingya villages have been destroyed, and most, if not all, of the inhabitants have been killed. There is ample authority in the jurisprudence on genocide to support the view that such destruction of an entire community, in a limited geographic area, on grounds of ethnicity or religion or race, and even where it is not the whole protected group, can properly be characterized as an act of genocide"[118].

85. The DRC stresses at the outset that the quantitative criterion is certainly not the only one to come into play in determining what constitutes "part" of the protected group within the meaning of the Genocide Convention. This is far from the first time, moreover, that the question of the criteria used to that end has arisen before the Court. In the case between Bosnia and Herzegovina and Serbia and Montenegro, the Court noted three criteria it deemed "relevant" in determining the circumstances in which an attack on "part" of a protected "group" could be characterized as genocide within the meaning of Article II[119]. It subsequently reaffirmed these three criteria, qualifying them as "critical" in the *Croatia* v. *Serbia* case[120].

86. The three criteria applied by the Court can be presented as follows. In the first place, "the intent must be to destroy at least a *substantial part* of the particular group"[121]. Second, the Court observed "that it is widely accepted that genocide may be found to have been committed where the intent is to destroy the group *within a geographically limited area*"[122], it not being "necessary to intend to achieve the complete annihilation of a group from every corner of the globe"[123]. In this

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[117] See CR 2019/19, pp. 37-38, para. 48 (Schabas).

[118] CR 2019/20, pp. 36-37, para. 17 (Sands) (references omitted).

[119] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 126, para. 198.

[120] *Croatia* v. *Serbia*, p. 65, para. 142.

[121] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 126, para. 198 (emphasis added).

[122] *Ibid.*

[123] *Yearbook of the ILC*, 1996, Vol. II, Part Two, p. 45, para. 8 of the commentary to Article 17.

regard, "[t]he area of the perpetrator's activity and control are to be considered"[124]. The Court thus noted that "[a]ccount must also be taken of the prominence of the allegedly targeted part within the group as a whole"[125]. Third, the Court used a qualitative rather than a quantitative criterion. Quoting the ICTY Appeals Chamber in the *Krstić* case[126], it thus noted that the number of individuals targeted should be evaluated not only in absolute terms, but also "in relation to the overall size of the entire group"[127]. According to the Court, if the targeted part of the group is emblematic of the overall group, or is essential to its survival, it may be considered as "substantial" within the meaning of Article II of the Convention[128].

87. While the Cour stated that the first criterion, namely "the substantiality criterion[,] is critical" [129] and takes "priority", it also stated that this "list of criteria is not exhaustive"[130] and that it is for the Court to assess "those [criteria] and all other relevant factors in any particular case"[131]. The DRC suggests that, in order to determine the scope of the phrase "substantial part" of the group targeted by genocidal intent, a reasonable interpretation of these words is necessary, in light of both international jurisprudence and the positions expressed by the other intervening States. Such a reasonable interpretation is the one favoured by the Court when it states that "in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, [it] will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group"[132].

88. The ICTY also interpreted the phrase "in whole or in part" in this way in establishing that genocide had been committed in Srebrenica. According to the Appeals Chamber of the ICTY, the perpetrator of genocide must have intended to destroy a substantial part of the group. The Chamber noted that for the purposes of making such a determination, or, rather, in order to ascertain whether the targeted part of the group is substantial enough to meet that requirement, a certain number of factors could be taken into consideration:

> "The number of individuals targeted should be evaluated not only in absolute terms, but also in relation to the overall size of the entire group. In addition to the numeric size of the targeted portion, its prominence within the group can be a useful consideration. If a specific part of the group is emblematic of the overall group, or is essential to its survival, that may support a finding that the part qualifies as substantial within the meaning of Article 4 [of the Statute] [which is modelled on Article II of the Convention]".[133]

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[124] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 126, para. 198.

[125] *Croatia* v. *Serbia*, p. 65, para. 142.

[126] ICTY, Appeals Chamber, *Prosecutor* v. *Radislav Krstić*, IT-98-33-A, judgement of 19 April 2004, para. 12.

[127] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 127, para. 200.

[128] *Ibid*.

[129] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 127, para. 201; *Croatia* v. *Serbia*, p. 65, para. 142.

[130] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 127, para. 201.

[131] *Ibid*.

[132] *Ibid*.

[133] ICTY, Appeals Chamber, *Prosecutor* v. *Radislav Krstić*, IT-98-33-A, judgement of 19 April 2004, para. 12.

89. In the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, the Court considered that the Appeals Chamber of the ICTY had put the matter in "carefully measured" terms[134]. The qualitative rather than just the quantitative approach of the Appeals Chamber is indeed necessary for the purpose of assessing what is a "substantial part" of the protected group. Taking this approach, the Appeals Chamber considered that the Bosnian Muslim population of Srebrenica, or the Muslims of Eastern Bosnia, a group of an estimated 40,000 individuals, met the criterion of "substantial part". Although small in relation to the overall Bosnian Muslim population (which can be estimated at several hundred thousand or more individuals), the Appeals Chamber considered that it was located in a strategic position and was therefore essential to the survival of the Bosnian Muslim nation as a whole[135].

90. The DRC is, moreover, not the only State intervening in this case to have suggested a reasonable interpretation of the concept of "substantial part" of the protected group based on a combined reading of several approaches. This is indeed clear in the joint Declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom[136], which states that

> "the Court has determined that a finding of genocide requires that the intent was to destroy 'at least a substantial part of the particular group.' As noted above, what counts as a 'substantial part of the particular group' will depend on all the circumstances, including whether a specific part of the 'group is emblematic of the overall group, or is essential to its survival.' The Declarants submit that children form a substantial part of the groups protected by the Genocide Convention, and that the targeting of children provides an indication of the intention to destroy a group as such, at least in part. Children are essential to the survival of any group as such, since the physical destruction of the group is assured where it is unable to regenerate itself"[137].

91. Other States have made similar statements in other proceedings concerning the Genocide Convention. Colombia, in particular, asserts the following in its Declaration of intervention in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*:

> "It follows that, in evaluating whether the allegedly targeted part of a protected group is substantial in relation to the overall group, the Court will take into account the quantitative element as well as evidence regarding the geographic location and prominence of the allegedly targeted part of the group.
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> Colombia fully agrees with the interpretations made by the Court in the Bosnia and Croatia judgments. Indeed, in the correct construction of Article II of the Convention, the genocidal intent shall be evidenced by acts on a significant scale; the intent must be to destroy at least a substantial part of the particular group; genocide may be found to have been committed where the intent is to destroy the group within a geographically limited area; the area of the perpetrator's activity and control are to be

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[134] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 127, para. 200.

[135] ICTY, Appeals Chamber, *Prosecutor* v. *Radislav Krstić*, IT-98-33-A, judgement of 19 April, paras.15-17.

[136] See the joint Declaration of intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, paras. 69-70.

[137] *Ibid*., para. 69 (references omitted).

> considered; and account must also be taken of the prominence of the allegedly targeted part within the group as a whole"[138].

This interpretation is also advanced by Spain in its Declaration in the same case:

> "'[t]he Palestinians in Gaza' are unquestionably 'a part' of the group of 'the Palestinians', as they also meet all of the requirements established in jurisprudence: they constitute a substantial part of a particular group, they are located in a geographically limited area, they are in an area controlled by the alleged perpetrator of the crime and they may be distinguished from the rest of the group, which is to say that the perpetrators can identify them as a separate entity to be destroyed as such'[139].

The interpretation of the concept of "substantial part" of the protected group put forward by Chile in its Declaration of intervention in the same case is along the same lines:

> "In addition, the Genocide Convention also provides protection for parts of a group. However, when assessing a genocidal intent directed towards a part of a group, that part must be *substantial*. This does not require a specific numeric threshold to be reached; it is enough to consider the potential effect of the intended destruction of that section on the group as a whole. In this sense, the prominence of the allegedly targeted part within the group as a whole is relevant, considering its importance to the broader community. Similarly, an intent to destroy a part of a group within a geographically limited region is generally sufficient, and it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe"[140].

92. Thus, the DRC considers that the perception that the group has of itself and that the perpetrator of the acts has of the group is the decisive factor. By relying on the stigmatization of the targeted group by the perpetrator of the act based on perceived national, ethnical, racial or religious characteristics, its members who are exposed to discriminatory acts become identifiable. Moreover, a "substantial part" of the protected group requires a reasonable interpretation combining several approaches based in particular on quantitative, qualitative and geographic factors.

ARTICLES I AND III: THE SCOPE OF THE OBLIGATIONS TO PREVENT AND PUNISH THE CRIME OF GENOCIDE

93. In this final part of its Declaration, the DRC will address the scope of the obligations of States parties to the 1948 Convention under Articles I and III thereof.

94. These two provisions read as follows:

> "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish" (Article I).

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[138] Declaration of intervention of Colombia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, paras.116-117 (references omitted).

[139] Declaration of intervention of Spain in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, para. 21.

[140] Declaration of intervention of Chile in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, para. 27 (references omitted).

"The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity in genocide" (Article III).

95. As the Court confirmed in its 2007 Judgment, despite the fact that Article I "does not *expressis verbis* require States to refrain from themselves committing genocide[,] . . . taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide"[141]. Following the same logic of transposing to States a prohibition initially conceived to apply to individuals, the Court added that the States parties to the Convention are bound not only "not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them", but also not to commit *any of the acts listed in Article II of the Convention*[142]. Even though the acts set out in paragraphs *(b)* to *(e)* refer to categories of criminal law, it would "not be in keeping with the object and purpose of the Convention to deny that the international responsibility of a State — even though quite different in nature from criminal responsibility — can be engaged through one of the acts, other than genocide itself, enumerated in Article III"[143].

96. Furthermore, Article I of the Convention imposes on States parties a distinct obligation to prevent genocide, as is clear from the use of the term "undertake"[144].

97. These points were not contested at the provisional measures stage[145]. The parts of the case-file relating to the present case that are publicly available do not, however, give a clear overview of the arguments of The Gambia and Myanmar on two points which, in the view of the DRC, warrant some clarification, since they are closely linked to the very object and purpose of the Convention. They are, first, the responsibility of a State for conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide or complicity in genocide (A), and, second, the scope of a State's responsibility for breaching its obligation to prevent genocide (B).

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[141] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 113, para. 166.

[142] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 114, para. 167.

[143] *Ibid.*

[144] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 111, para. 162.

[145] UNGA, resolution 56/83, Responsibility of States for internationally wrongful acts, UN doc. A/RES/56/83, Annex, Articles 4 to 11.

A. A State's own responsibility may be engaged for conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide or complicity in genocide

98. The obligation for a State not to participate in or contribute to committing genocide through conspiracy, incitement or an attempt to do so is based on Article I read in conjunction with Article III, paragraphs *(b)* to *(e)*, quoted above.

99. The Court has clearly stated that the fact that a State is not responsible for committing genocide does not mean that it cannot be held responsible for one of the acts listed in Article III *(b)* to *(e)* of the Convention:

> "there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph *(a)*, of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent's responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs *(b)* to *(e)*. In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility"[146].

100. Thus, a State may be held internationally responsible for each of the acts referred to in Article III, paragraphs *(b)* to *(e)*, if the conduct in question is attributable to it under a customary rule of attribution set out in Articles 4 to 11 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts[147].

B. Scope of the obligation of prevention

101. The obligation of all States parties to the Convention to prevent genocide is set out in Article I. As the Maldives states, quoting the Court's jurisprudence, in its Declaration of intervention, "[t]he obligations to prevent genocide and to punish genocide are 'two distinct yet connected obligations.' They are central to the Convention, are owed *erga omnes partes*, and also form part of customary international law"[148].

102. In its 2007 Judgment, the Court stated that the obligation of prevention is an obligation of conduct or due diligence that is triggered the instant a State "learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed"[149]. It requires States parties to take all measures at their disposal to try to prevent one of the acts listed in Article III from occurring[150]. Thus, the obligation of prevention not only concerns the commission of the crime of genocide but also all the acts mentioned in Article III of the Convention (1). Furthermore, although the commission of one of the acts concerned will often be a manifestation of the fact that a State has violated its obligation of prevention, the distinct and autonomous nature of this obligation means that

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[146] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 200, para. 381.

[147] UNGA, resolution 56/83, Responsibility of States for internationally wrongful acts, UN doc. A/RES/56/83, Annex, Articles 4 to 11.

[148] Declaration of intervention filed by the Republic of the Maldives in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*, p. 6, para. 28 (references omitted; emphasis in the original).

[149] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 222, para. 431.

[150] *Ibid.*

it may be violated without the realization of one of the acts in Article III being a *conditio sine qua non* for the violation (2).

1. The obligation of prevention concerns all the acts listed in Article III of the Convention

103. In its Judgment in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* case, the Court found that

> "[i]f a State is held responsible for an act of genocide (because it was committed by a person or organ whose conduct is attributable to the State), *or for one of the other acts referred to in Article III of the Convention* (for the same reason), then there is no point in asking whether it complied with its obligation of prevention in respect of the same acts, because logic dictates that a State cannot have satisfied an obligation to prevent genocide in which it actively participated. On the other hand, it is self-evident . . . that if a State is not responsible for *any of the acts referred to in Article III, paragraphs (a) to (e), of the Convention*, this does not mean that its responsibility cannot be sought for a violation of the obligation to prevent genocide and the other acts referred to in Article III"[151].

104. This reasoning highlights the following points with regard to the interpretation of the obligation of prevention set out in the Article I of the Convention:

(i) the obligation of prevention is not limited to the commission of genocide but also concerns the acts listed in Article III of the Convention; the provisional measures ordered by the Court in two of the cases relating to the interpretation of the Genocide Convention that are currently pending[152] and the interventions of various States confirm this interpretation[153];

(ii) the violation by a State of its obligation not to commit any of the acts mentioned in Article III means that it will also have breached the obligation of prevention set out in Article I of the Convention;

(iii) a State may be held responsible for breaching its obligation of prevention notwithstanding the fact that it has not been held responsible for committing any of the acts referred to in Article III, paragraphs *(a)* to *(e)*; this is due to the nature of the obligation of prevention which is distinct and autonomous from the other obligations set out in the Convention.

105. Thus, a State may be held responsible not only for failing to prevent the commission of the crime of genocide but also for failing to take all measures at its disposal to try to prevent:

— conspiracy to commit genocide (Article III, paragraph *(b)*);

— direct and public incitement to commit genocide (Article III, paragraph *(c)*);

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[151] *Ibid.*, p. 201, para. 382 (emphasis added).

[152] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 30, para. 86 (2); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel), Provisional Measures, Order of 26 January 2024*, p. 25, para. 86 (3).

[153] See the Declaration of intervention of Spain filed on 28 June 2024 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*, p. 12, para. 40, and the Declaration of intervention of Chile filed on 12 Sept. 2024 in the same case, pp. 9-10, para. 35.

— an attempt to commit genocide (Article III, paragraph *(d)*);

— complicity in genocide (Article III, paragraph *(e)*).

Even when genocide did not ultimately occur, direct and public incitement by a State to commit genocide, or conspiracy to commit genocide, imply the violation by that State of both the prohibition to perpetrate those acts and its obligation to prevent them. Furthermore, a State may be held responsible for breaching its obligation to prevent one of the acts referred to in Article III of the Convention, notwithstanding the fact that it was not considered responsible for committing such acts.

2. Violation of the obligation of prevention may be established irrespective of whether one or more acts referred to in Article III of the Convention have been committed

106. In its 2007 Judgment, the Court stated that "a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed"[154]. It also recalled the rule set out in Article 14, paragraph 3, of the ILC's Articles on State Responsibility: "The breach of an international obligation requiring a State to prevent a given event occurs when the event occurs and extends over the entire period during which the event continues and remains not in conformity with that obligation"[155].

Applying this rule, the Court stated that

> "[i]t is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs . . . [I]f neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out [in above-mentioned Article 14, paragraph 3,] must occur for there to be a violation of the obligation to prevent."[156]

107. In its Judgment, the Court examined whether Serbia had failed to comply with its obligation of prevention solely in connection with the Srebrenica massacre, which it had earlier characterized as genocide[157]. Similarly, in its 2015 Judgment, having concluded that Croatia had not shown that genocide had been committed, the Court stated that, accordingly, there could not be "any question of responsibility for a failure to prevent genocide, a failure to punish genocide, or complicity in genocide"[158].

108. However, while, in most situations, a State's responsibility for failing to comply with its obligation of prevention will be engaged in connection with the commission of one of the acts referred to in Article III of the Convention, the DRC is of the view that this will not necessarily always be the case. Thus, the possibility of engaging the responsibility of a State for violating its obligation of prevention notwithstanding the fact that genocide (or any other act referred to in Article III of the Convention) was not committed should not, in principle, be ruled out.

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[154] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 221, para. 431.

[155] Responsibility of the State for Internationally Wrongful Acts, *op. cit.*, Article 14, para. 3.

[156] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 222, para. 431.

[157] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 222, para. 431.

[158] *Croatia* v. *Serbia*, p. 128, para. 441.

109. In its 2007 Judgment, the Court recognizes that the obligation of prevention arises before one of the acts referred to in Article III is committed:

> "This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of these means as the circumstances permit."[159]

The obligation of prevention thus arises the instant a State learns of, or should have learned of, the existence of a serious risk of one of the acts referred to Article III of the Convention being committed. For this obligation to be able to have full legal effect in serving the object and purpose of the Convention, it should be possible to conclude that it has been violated by a State *irrespective* of whether one of the acts referred to in Article III was committed. Three arguments can be advanced in support of this.

110. First, such an interpretation is in line with the approach that is already applied to *incitement* to commit genocide. As a general rule, incitement to commit a crime engages the responsibility of the inciter only in so far as the crime is actually committed. However, genocide is an exception in this regard, since direct and public incitement to commit genocide is punishable *even when genocide has not been committed or attempted*, as Article III, paragraph *(b)*, clearly indicates and Article 25, paragraph 3, subparagraph *(e)*, of the Statute of the ICC confirms[160]. This is particular to the crime of genocide as opposed to the other international crimes referred to in the Rome Statute, and testifies to the specific nature of genocide. In this respect, there is nothing exceptional about dissociating the obligation to prevent genocide from the commission of the genocide in question. After all, it is merely a question of following the same logic as that adopted for incitement to commit genocide.

111. Second, rejection of any relationship of subordination between the violation of the obligation of prevention and the commission of genocide results from the nature of the obligation to prevent the acts referred to in Article III as an obligation of conduct or due diligence rather than of result. The Court followed this reasoning when it refused to accept that a State that has failed to comply with its obligation of prevention can evade responsibility by claiming, or even by proving, that genocide would have been committed even if it had acted in conformity with the obligation set out in Article I:

> "it is irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide. As well as being generally difficult to prove, this is irrelevant to the breach of the obligation of conduct in question, the more so since the possibility remains that the combined efforts of several States, each complying with its obligation to prevent, might have achieved the result — averting the

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[159] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 222, para. 431.

[160] Rome Statute of the ICC, adopted on 17 July 1998, entered into force on 1 July 2002, *UNTS*, Vol. 2187, p. 175.

> commission of genocide — which the efforts of only one State were insufficient to produce"[161].

Thus, the breached obligation's nature as an obligation of conduct requires the obligation of prevention to be dissociated from the commission of the acts prohibited under the Convention. Whether the obligation of prevention has been violated is analysed *irrespective* of whether the acts referred to in Article III could have been averted if the necessary measures had been taken. Applying the same logic, it must also be possible to analyse the obligation of prevention *irrespective* of whether the acts referred to in Article III materialized or not.

112. Third, as the Court itself notes in the passage quoted above, it is possible that "the combined efforts of several States, each complying with its obligation to prevent,"[162] may be necessary for the expected result of the obligation of prevention — namely, to prevent the commission of genocide or another of the acts cited under Article III — to be achieved. This scenario echoes the preamble to the Convention, which stresses that "in order to liberate mankind from such an odious scourge, international co-operation is required". In this context of "combined efforts" of several States, the obligation of prevention is incumbent on each of them independently and must be able to be assessed with regard to each of them equally independently. Thus, if one of those States remains completely passive in the face of the serious risk of genocide being committed, while the others take the necessary measures and succeed in ensuring that genocide does not occur, that State will have breached its obligation of prevention. It would be contrary to the object and purpose of the Convention not to punish that State's inaction and to allow it to get away with the violation of the obligation of prevention by hiding behind the States that complied with their obligation to prevent genocide.

113. In light of all the foregoing, requiring one of the acts mentioned in Article III to have been committed as a *conditio sine qua non* to be able to find a breach of the obligation of prevention is likely to lead to results that are manifestly absurd and unreasonable, contrary to the object and purpose of the Convention as a whole, which, as the Court has recalled, is "to prevent the intentional destruction of groups"[163]. Since the obligation of prevention is the first and primary manifestation of this objective of the Convention, it is vital to reinforce its autonomous and distinct character from the other obligations under the Convention and not to limit its scope unduly by subordinating it to the commission of one of the acts referred to in Article III.

CONCLUSION

114. Based on the foregoing, the DRC avails itself of the right conferred upon it by Article 63, paragraph 2, of the Statute of the Court to intervene as a non-party in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 7 States intervening)*.

115. For the reasons set out in this Declaration of intervention, the DRC's interpretation of the provisions of the Convention on the Prevention and Punishment of the Crime of Genocide, whose application is in dispute in the present case, is as follows:

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[161] *Bosnia and Herzegovina* v. *Serbia and Montenegro*, p. 221, para. 430.

[162] *Ibid.*

[163] *Ibid.*, p. 126, para. 198.

Article II: the concept of genocidal intent

— The Genocide Convention can be applied in parallel with another legal régime, in particular that of the law of armed conflict; in this context, the existence of a war aim can by no means rule out the existence of genocidal intent. Genocidal intent may therefore be established even though the perpetrator of the crime is at the same time pursuing objectives associated with military operations.

— Establishing genocidal intent is a necessary and sufficient condition to establish the *mens rea* set out in Article II; this provision does not require genocidal intent to be the sole or even the primary intent among other intentions, grounds or motives that the perpetrators of genocide might have.

— More generally, genocidal intent may be established autonomously, and cannot be ruled out in the light of other factors or circumstances.

Article II: proof of genocidal intent

— The demonstration of genocidal intent is not contingent on express manifestations of such intent. Genocidal intent may be deduced or inferred from various sources of evidence, based on an analysis of the specific circumstances or a pattern of conduct in which the acts corresponding to the *actus rea* of the crime of genocide occur. The acts that must be taken into account as part of the context from which genocidal intent may be inferred are many and varied.

— Genocidal intent is considered to be established when it may be reasonably deduced or inferred from a set of relevant facts. When that is the case, genocidal intent will be the sole intent that may be reasonably inferred from the acts in question.

Article II: the concepts of protected group and part of the protected group

— How the group perceives itself and how the perpetrator of genocide perceives it is a decisive factor in identifying the protected group within the meaning of the Convention. It is by relying on the stigmatization by the perpetrator of the act on the basis of the perceived national, ethnical, racial or religious characteristics of the targeted group that its members become identifiable.

— The "part" of the protected group referred to in Article II means a substantial part of that group. Determining a "substantial part" of the protected group for the purpose of applying this provision requires a reasonable interpretation combining several approaches based in particular on quantitative, qualitative and geographic factors.

Article I and III: the scope of the obligations to prevent and punish the crime of genocide

— A State may be held internationally responsible for each of the acts referred to in Article III, paragraphs *(b)* to *(e)*, if the conduct in question is attributable to it under one of the customary rules of attribution set out in Articles 4 to 11 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts[164].

— Even when genocide did not ultimately materialize, direct and public incitement by a State to commit genocide, or conspiracy to commit genocide, imply the violation by that State of both the prohibition to perpetrate the acts in question and its obligation to prevent them. Furthermore,

[164] UNGA, resolution 56/83, Responsibility of States for internationally wrongful acts, UN doc. A/RES/56/83, Annex, Arts. 4 to 11.

a State may be held responsible for breaching its obligation to prevent one of the acts referred to in Article III of the Convention, despite not being considered responsible for committing such acts.

— If a State manifestly fails to comply with its obligation of prevention in the face of a serious risk of genocide, it must be possible on an exceptional basis to engage the responsibility of that State even when genocide did not materialize.

116. The Government of the DRC has appointed the undersigned as Agent for the purposes of this Declaration.

117. It is requested that all correspondence in this case be sent to the following address:

Embassy of the Democratic Republic of the Congo to the Kingdom of Belgium, the Kingdom of the Netherlands and the Grand Duchy of Luxembourg, Rue Marie de Bourgogne 30, 1000 Brussels, Belgium

With the following addresses in copy:

— info@ambardc.be

— eureka.lfirm@gmail.com

— mingashang@yahoo.fr

Respectfully,

(Signed) Ivon MINGASHANG,

Agent of the Democratic Republic of the Congo.

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