

**Before the
International Court of Justice**

Written Observations

**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**

**Filed in the Registry of the Court
in the case of**

***Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The
Gambia v. Myanmar)***

WRITTEN OBSERVATIONS

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

INTRODUCTION

1. These Written Observations are submitted to the Court in accordance with its Order of July 3, 2024 (the “Order”) in relation to the joint intervention of Canada, the Kingdom of Denmark (“Denmark”), the French Republic (“France”), the Federal Republic of Germany (“Germany”), the Kingdom of the Netherlands (“the Netherlands”), and the United Kingdom of Great Britain and Northern Ireland (“the United Kingdom”) (together “the Joint Interveners”) pursuant to Article 63 of the Statute of the Court (the “Statute”) in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*.¹ In that Order, the Court decided that the Joint Declaration of Intervention filed by the Joint Interveners pursuant to Article 63(2) of the Statute was admissible in so far as it concerns the construction of the provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide*² (the “Genocide Convention”). The Court fixed March 3, 2025, as the time-limit for the filing of these Written Observations, as provided for in Article 86(1) of the Rules of the Court.

2. The Joint Interveners are intervening in their capacity as Contracting Parties to the Genocide Convention. These Written Observations present to the Court the views of the Joint Interveners on certain issues of interpretation under the Genocide Convention. In accordance with the Order, the Written Observations are confined to observations on the construction of the provisions of the Genocide Convention.

3. As indicated in their Joint Declaration of Intervention, the Joint Interveners consider that the proper construction of Articles I, II, IV, V and VI of the Genocide Convention is in question in the case.³ An outline of the interpretation of the Genocide Convention was provided in the Joint

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of July 3, 2024 (the “Order”).

² *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, United Nations, *Treaty Series*, Vol. 78, p. 277.

³ *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, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, November 18, 2023, (“Joint Declaration of Intervention”), paras. 17 and 20.

Declaration of Intervention of the Joint Interveners.⁴ These Written Observations restate those submissions, providing some further elaborations on the reasoning and authority for this interpretation.

4. First, **Section I** of these Written Observations provides a summary of the principles that guide the interpretation of the Genocide Convention.

5. **Section II** focusses on the definition of genocide, as enshrined in Article II of the Genocide Convention. In relation to underlying acts of genocide, Subsection II.A establishes that (a) genocide is not limited to killings; (b) underlying acts of genocide may take the form of sexual and gender-based violence; (c) the underlying acts of genocide need to be assessed differently when the acts are committed against children; and (d) forced displacement can, depending on the facts, lead to an underlying act of genocide.

6. In relation to the specific intent to destroy, in whole or in part, a group, as such, subsection II.B presents (a) a framework for assessing this specific intent, and establishes that (b) the number of victims is not determinative of a State's specific intent; (c) sexual and gender-based violence can play an important role in determining specific intent; (d) acts committed against children can play an important role in determining specific intent; and (e) forced displacement can play an important role in determining specific intent.

7. **Section III** focusses on the interpretation of Articles IV to VI of the Genocide Convention. Specifically, it establishes that the duty to punish provided for in Article I must be construed in light of Articles IV to VI of the Genocide Convention, and thus interpreted as an obligation to investigate and prosecute persons accused of genocide, and to punish persons found to be guilty of genocide.

SECTION I: PRINCIPLES OF INTERPRETATION

8. Pursuant to customary international law, as reflected in the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT")⁵, when interpreting the Genocide Convention, the ordinary meaning of its terms must be considered in their context and in light of its object and purpose. In addition to the practice of the Contracting Parties under the Genocide

⁴ *Ibid.*, paras. 23-80.

⁵ *Vienna Convention on the Law of Treaties*, Vienna, 23 May 1969, United Nations Treaty Series Vol. 1155, p. 331.

Convention, resolutions adopted by the United Nations General Assembly and the United Nations Security Council should also be taken into account as evidence of subsequent practice (Article 31(3)(b)). Such resolutions may therefore confirm the interpretation that flows from the ordinary meaning of the terms of the Genocide Convention read in their context.

9. As recognized by this Court in its Advisory Opinion on *Reservations to the Genocide Convention*, the object of the Genocide Convention is to “safeguard the very existence of certain human groups” and “confirm and endorse the most elementary principles of morality.”⁶ The Genocide Convention was “manifestly adopted for a purely humanitarian and civilizing purpose”⁷ and those “high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”⁸ This Court further noted that:

it was the intention of the United Nations to condemn and punish genocide as ‘a crime under international law’ involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.⁹

10. Furthermore, the Joint Interveners acknowledge that the Genocide Convention, on the one hand, and the constituent instruments of the International Criminal Tribunal for the former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”), on the other hand, are different legal regimes and pursue different aims. Nevertheless, in 2007 and 2015, the Court recognized the potential relevance of both tribunals’ case-law, notably in the interpretation of the constituent elements of the crime of genocide. In this case, the Joint Interveners will follow the Court’s approach stated in 2015:

[i]t is for the Court, in applying the [Genocide] Convention, to decide whether acts of genocide have been committed, but it is not for the Court to determine the individual criminal responsibility for such acts. That is a task for the criminal courts or tribunals empowered to do so, in accordance with appropriate procedures. The Court will nonetheless take account, where appropriate, of the decisions of international criminal courts or tribunals, in particular those of the ICTY, as it did in 2007, in examining the constituent elements of genocide in the present case.¹⁰

SECTION II: CONSTRUCTION OF ARTICLE II OF THE GENOCIDE CONVENTION

⁶ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15, at p. 23.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 129 (“*Croatia v. Serbia*”).

11. Article II of the Genocide Convention sets out the definition of genocide as follows:
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.
12. As described in the *chapeau* of Article II, genocide contains “two constituent elements,”¹¹ namely underlying acts of genocide as set out in paragraphs (a)-(e) of Article II, and the specific intent, which must be the intent to destroy a protected group in whole or in part, as such.

A. UNDERLYING ACTS OF GENOCIDE

(a) Genocide is not limited to killings

13. Properly construed, Article II of the Genocide Convention is clear that genocide may be committed by means other than killings.
14. Article II(a) of the Genocide Convention stipulates that one of the underlying acts of genocide is “[k]illing members of the group.” The other underlying acts of genocide in Article II(b)-(e) refer to egregious acts other than killing. The fact that “killing” is identified in Article II(a) as one of several types of acts by which genocide may be perpetrated makes it clear that killing is not a requirement for genocide, which may also be committed by acts falling within one of the other subparagraphs of Article II. The Genocide Convention thus extends to acts other than killings, such as acts of sexual and gender-based violence, as well as other acts causing serious bodily or mental harm, including torture and forced displacement, provided that the other elements of the crime of genocide are satisfied. Such acts may thus be part of a genocidal campaign.
15. There is no hierarchy amongst the underlying acts of genocide and the legal relevance of all acts targeting a protected group must be emphasized. An excessively narrow construction of underlying acts of genocide would obscure how killings and other underlying acts can be waged

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 130.*

together in a coordinated strategy aimed at destroying a protected group. In this regard, the ICTR held, in *Prosecutor v. Akayesu* (“*Akayesu*”), that “contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once *any one* of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy ‘in whole or in part’ a national, ethnical, racial or religious group.”¹²

(b) Underlying acts of genocide may take the form of sexual and gender-based violence

16. It is well established by this Court that sexual and gender-based violence may fall within the underlying acts of genocide.¹³ Likewise, the ICTR stressed in *Akayesu* that rape and sexual violence are capable of constituting underlying acts of genocide “in the same way as any other act” falling within the sub-paragraphs of Article II, provided that they are perpetrated with the specific intent to destroy, in whole or in part, a particular group targeted as such.¹⁴

17. Clearly, where sexual and gender-based violence results in death, it will be capable of falling within Article II(a) of the Genocide Convention provided it is accompanied by, or evidences, the requisite specific intent. Because of its devastating effects on women, families, and communities, the submissions below focus on sexual and gender-based violence as a form of the underlying acts of genocide referred to in Article II(b)-(d).

Causing serious bodily or mental harm (Article II(b) of the Genocide Convention)

18. Article II(b) of the Genocide Convention identifies acts “[c]ausing serious bodily or mental harm to members of the group” as one category of underlying acts of genocide. The Joint Intervenors submit that, as a matter of construction, sexual and gender-based violence is capable of falling within this provision, including because: (a) sexual and gender-based violence unquestionably causes “harm”; (b) such harm may be “bodily” and/or “mental”; and (c) such harm is almost universally “serious” by its nature.

¹² *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 497 [emphasis added].

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, paras. 158 and 166; *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, p. 43, paras. 300-302 (“*Bosnia v. Serbia*”).

¹⁴ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 731.

19. The Court has confirmed that “rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II(b) of the Convention.”¹⁵ In *Bosnia v. Serbia*, the Court referred, in support of this proposition, to the following passage from *Akayesu*, in which the ICTR specifically recognized that rape and sexual violence may give rise to “bodily” and/or “mental” harm that is “serious” within the meaning of Article II(b):

Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.¹⁶

20. In *Akayesu*, the ICTR further stated that “rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person,”¹⁷ highlighting the “serious [...] mental harm” that such acts inflict. The UN Security Council has noted that rape and other forms of sexual and gender-based violence “can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide”, and has noted that women and girls are “particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group.”¹⁸

Conditions of life calculated to bring about physical destruction of the group in whole or in part (Article II(c) of the Genocide Convention)

21. Article II(c) identifies “[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part” as a category of underlying acts of genocide. The Joint Intervenors contend that the perpetration of sexual and gender-based violence is capable of falling within this description, as recognized by the Court.¹⁹

22. Given their ordinary meaning, the words “physical destruction” in Article II(c) are not limited to cases where members of the group immediately die as a result of the “conditions of life” inflicted

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 158. See also *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*, p. 43, paras. 300-302.

¹⁶ *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*, p. 43, para. 300.

¹⁷ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 597.

¹⁸ United Nations Security Council Resolution 1820 (2008) on Women, Peace and Security, 19 June 2008, OP4 and PP6.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 166.

on the group. Indeed, in *Kayishema*, the ICTR found that even though rape may not “immediately lead to the death of members of the group,” it could nevertheless be a method of inflicting conditions of life calculated to bring about the destruction of the group in whole or in part under Article II(c).²⁰

Measures intended to prevent births within the group (Article II(d) of the Genocide Convention)

23. Article II(d) characterizes “measures intended to prevent births within the group” as an underlying act of genocide. The Court has specifically recognized that rape and sexual violence can be a measure intended to prevent births within the meaning of Article II(d) of the Genocide Convention.²¹

24. Clearly, measures will “prevent births” within the group if they create physical barriers to reproduction. International criminal tribunals have found that Article II(d) encompasses measures calculated to bring about the failure of a group to “reproduce normally,”²² which must capture measures that undermine physical reproductive capacity. This Court has found that measures, such as rape or other acts of sexual violence, which affect the capacity of members of a group to procreate, are capable of falling within Article II(d).²³

25. International criminal tribunals have also held that the “measures” referred to in Article II(d) “may be physical, but can also be mental.”²⁴ That is why, in *Akayesu*, the ICTR listed the measures intended to prevent births within the group as including not just measures directed towards a physical ability to procreate, but also those directed at a mental willingness to do so, consisting of rape; sexual mutilation; the practice of sterilization; forced birth control; separation of the sexes; prohibition of marriages; and impregnation of a woman to deprive group identity (forced impregnation).²⁵ Furthermore, the ICTR noted that “rape can be a measure intended to prevent

²⁰ *Prosecutor v. Kayishema and Ruzindana*, (Case No. ICTR-95-1-T), 21 May 1999, para. 116.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 166.

²² *Prosecutor v. Popović*, (Case IT-05-88-T), 10 June 2010, para. 855.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 166.

²⁴ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 508. See also *Prosecutor v. Rutaganda*, (Case No. ICTR-96-3-T), 6 December 1999, para. 53.

²⁵ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, paras. 507-508.

births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate.”²⁶

26. The Joint Interveners further submit that, when assessing the role of rape and sexual violence as a measure intended to prevent births, consideration must be given to the cultural and social environment in which it occurs. The cultural and social context can be relevant to the determination of the impact of rape and sexual violence on the victims and its role in preventing births.²⁷ In this regard, in the *Akayesu* case, the ICTR stressed the social and cultural impact of rape in Rwanda, noting that:

in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group.²⁸

(c) The underlying acts of genocide need to be assessed differently when the acts are committed against children

27. In assessing whether a specific act constitutes an underlying act of genocide, if the act is committed against children, its particular impact on children must be taken into account. As outlined below, the Joint Interveners make submissions as to the construction that ought to be given to Article II in relation to acts committed against children.

Children and “causing serious bodily or mental harm” (Article II(b) of the Genocide Convention)

28. The Joint Interveners submit that, when applied to children, the term “serious bodily or mental harm” ought to be interpreted in light of the distinctive needs and vulnerabilities of children. The Court has held that for harm to be “serious” it “must be such as to contribute to the physical or biological destruction of the group, in whole or in part.”²⁹ The ICTY adopted a similar approach in *Prosecutor v. Tolimir*.³⁰ The Joint Interveners contend that, when considering whether an act contributes to the physical or biological destruction of a group, it is necessary to take into account not only the nature of the act but also the specific situation or position of the victims, particularly

²⁶ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 508.

²⁷ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 507.

²⁸ *Ibid.*

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment*, I.C.J. Reports 2015, p. 3, para. 157.

³⁰ *Prosecutor v. Tolimir*, (Case No. IT-05-88/2-A), Appeals Chamber, 8 April 2015, paras. 201–202; and (Case No. IT-05-88/2-T), Trial Chamber, 12 December 2012, para. 738.

where they are children, as children have a higher susceptibility to harm. This susceptibility is acknowledged in, for example, the preamble to the United Nations Convention on the Rights of the Child, which states: “Bearing in mind that, as indicated in the Declaration of the Rights of the Child, ‘the child, by reason of his physical and mental immaturity, needs special safeguards and care’.”

29. In particular, the Joint Interveners submit that, when the victim is a child, whether or not the threshold to determine if an act amounts to “serious bodily or mental harm” has been met needs to be assessed differently. Certain acts which may not meet the threshold of “seriousness,” or which may not be regarded as contributing to the physical or biological destruction of the group when done to adults, might be regarded as meeting those thresholds when done to children. It is important to adopt a construction which recognizes that what it means for a child to suffer “serious bodily or mental harm” or “grave and long-term disadvantage to [their] ability to lead a normal and constructive life”³¹ may be different than for an adult, including in the context of conflict-related and other sexual violence.

Children and the deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part (Article II(c) of the Genocide Convention)

30. The Court has already recognized that “Article II(c) of the Convention, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group.”³² Examples of such conduct recognized by this Court include “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion.”³³

31. The Joint Interveners submit that, as with Article II(b) of the Genocide Convention, the conditions of life that will bring about the physical destruction of members of a group will depend on the characteristics of members of the group. When considering the deprivation of food or the imposition of a subsistence diet, it would be relevant to consider that the amount of food that would ultimately lead to the death of an adult is different than that which would lead to the death of a child. Similarly, the medical needs of children are different than those of adults.

³¹ *Prosecutor v. Krajišnik*, (Case No. IT-00-39-T), 27 September 2006, para. 862.

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 161.

³³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 161. See also *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 506.

32. Turning to systematic expulsion from homes and forced displacement, while they do not in and of themselves amount to underlying acts of genocide (see paragraphs 34-38 below), the Court has recognized the need to ascertain whether such displacements “took place in such circumstances that they were calculated to bring about the physical destruction of the group.”³⁴ It stated that “[t]he circumstances in which the forced displacements were carried out are critical in this regard.”³⁵ The circumstances of forced displacement could be such that it becomes evident that it will, and is calculated, to bring about the death and physical destruction of members of the group, even if such displacement did not bring about the death of adults. A situation in which children are unable to survive might additionally lead to the inability of the group as a whole to regenerate itself, thus falling within the scope of Article II(c).

33. Thus, the special needs of children should be taken into account when considering whether the subjection to a subsistence diet, the deprivation of food, the absence of particular medical services, the systematic expulsion from homes or forced displacements amount to the imposition of conditions of life that would bring about the destruction of specific members of the group.

(d) Forced displacement can lead to an underlying act of genocide

34. Forced displacement includes both the physical displacement or deportation of members of the group carried out by the perpetrator, and the displacement of members of the group caused by other acts of the perpetrator. Acts by the perpetrator such as mistreatment, persecution or forms of violence, including sexual or gender-based violence, causing members of the group to flee a place can constitute forced displacement. In this regard, the International Residual Mechanism for Criminal Tribunals stated that:

The requirement that the displacement be forced is not limited to physical force but can be met through the threat of force or coercion, such as that cause by fear of violence, duress, detention, psychological oppression or abuse of power, or taking advantage of a coercive environment. It is the absence of genuine choice that makes the displacement unlawful.³⁶

35. Although forced displacement of persons does not in and of itself amount to an enumerated underlying act of genocide, the Joint Interveners submit that, on a proper construction of the

³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 161.*

³⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 163.*

³⁶ *Prosecutor v. Mladić, (Case No. MICT-13-56-A), 8 June 2021, para. 356.*

Genocide Convention, forced displacement may, depending on the facts, lead to the underlying acts of genocide set out in Article II(b) and Article II(c) of the Genocide Convention.

36. In relation to Article II(b), the ICTY noted that:

forced displacement may – depending on the circumstances of the case – inflict serious mental harm, by causing grave and long-term disadvantage to a person’s ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof.³⁷

37. In relation to Article II(c), the Court has held that deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group, such as via the “systematic expulsion from [their] homes.”³⁸ The Court stated:

In order to determine whether the forced displacements alleged by the Parties constitute genocide in the sense of Article II of the Convention (subparagraph (c), in particular), it will seek to ascertain whether, in the present case, those forced displacements took place in such circumstances that they were calculated to bring about the physical destruction of the group. The circumstances in which the forced displacements were carried out are critical in this regard.³⁹

38. Importantly, the opportunity to destroy a protected group is not based solely on the immediate effects of a perpetrator’s acts. A perpetrator may allow some group members to flee, but if those members are subsequently subjected to conditions of life calculated to bring about their physical destruction, these acts may fall within the scope of Article II(c) of the Genocide Convention.

B. SPECIFIC INTENT TO DESTROY, IN WHOLE OR IN PART, A GROUP, AS SUCH

(a) The framework for assessing specific intent

³⁷ *Prosecutor v. Tolimir*, (Case No. IT-05-88/2-A), 8 April 2015, para. 209. Similarly, in *Prosecutor v. Karadžić*, (Case No. IT-95-5/18-T), 24 March 2016, the Trial Chamber held that “while forcible transfer does not of itself constitute an act of genocide, depending on the circumstances of a given case, it may cause such serious bodily or mental harm as to constitute an act of genocide under Article 4(2)(b)” (para. 545).

³⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, *I.C.J. Reports 2015*, p. 3, para. 161. See also *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 506.

³⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, *I.C.J. Reports 2015*, p. 3, para. 163.

39. A distinguishing feature of genocide is the requirement that a perpetrator must intend, when committing one or more underlying acts of genocide, to destroy a protected group in whole or in part, as such. As the Court has noted, specific intent is the “essential characteristic of genocide, which distinguishes it from other serious crimes.”⁴⁰ The Joint Intervenors submit that three aspects, outlined below, are of particular relevance for the interpretation of this “essential characteristic.”

40. First, as the Court has agreed in its decisions, the Joint Intervenors submit that specific intent can be established on the basis of circumstantial evidence. In this regard, in *Croatia v. Serbia*, the Court noted that the parties “agreed that while the *dolus specialis* is to be sought, first, in the State’s policy”, it may, “alternatively, [...] be established by indirect evidence, i.e. deduced or inferred from certain types of conduct.”⁴¹ Both in that case and in *Bosnia v. Serbia*, the Court went to significant lengths to assess whether such specific intent could be inferred. The Court’s approach in these two cases reflects a general feature of jurisprudence concerning genocide: while “general plans” or official governmental policies can yield direct evidence, genocidal intent is rarely formulated expressly. In *Croatia v. Serbia*, the parties agreed “that such [genocidal] intent will seldom be expressly stated.”⁴² In the same vein, Trial and Appeals Chambers of the ICTY have noted, respectively, that “[i]ndications of [...] [genocidal] intent are rarely overt,”⁴³ and that, “by its nature, genocidal intent is not usually susceptible to direct proof.”⁴⁴

41. The Joint Intervenors agree with these observations, which rightly emphasize that circumstantial evidence will typically be significant in drawing inferences of specific intent. This must be borne in mind by international courts and tribunals when assessing allegations of genocide and should inform their approach to the standards governing the assessment of evidence. In this regard, the Court has identified aspects of the standard to infer specific intent, stressing 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.”⁴⁵ The Joint

⁴⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 132.

⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 143.

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 143. See also Judge Bennouna’s Declaration appended to the judgment in the *Bosnia v. Serbia* case, *I.C.J. Reports 2007*, p. 362: it is “[i]ndeed [...] rare for a State bluntly to proclaim its intent to destroy, in whole or in part, an ethnical, cultural or religious group or to disclose knowledge that such a crime was going to occur or to admit to having committed it.”

⁴³ *Prosecutor v. Tolimir*, (Case No. IT-05-88/2-T), 12 December 2012, para. 745.

⁴⁴ *Prosecutor v. Karadžić* (Case No. IT-95-5/18-T), Rule 98 bis Appeals Judgement, 11 July 2013, para. 80.

⁴⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, p. 3, at para. 148.

Interveners submit that this standard applies to the assessment of circumstantial evidence in cases of genocide, when drawing an inference of specific intent from a pattern of conduct.⁴⁶

42. Second, the Joint Interveners note that the Court's approach has prompted mixed reactions, including the view that the standard of "the only inference that could reasonably be drawn"⁴⁷ sets the bar unduly high.⁴⁸ The Joint Interveners submit that, precisely because direct evidence of genocidal intent will often be rare, it is crucial for the Court to adopt a balanced approach that recognizes the exceptional 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 Joint Interveners believe that the standard adopted by the Court in *Croatia v. Serbia* can, read properly, form the basis of such a balanced approach. It makes clear that the inference of intent must be the only reasonable one, not the only inference. If the other inferences available on the evidence are not reasonable inferences, they could not displace a reasonable inference of intent for genocide.

43. In this regard, the Joint Interveners note that the Court's express reference to a "reasonableness criterion" is key to a balanced approach. The Court highlights the central importance of reasonableness by observing that "[t]he notion of 'reasonableness' must necessarily be regarded as implicit in the reasoning of the Court,"⁴⁹ not least to avoid an approach that would make it "impossible to reach conclusions by way of inference."⁵⁰ Thus, when determining whether or not specific intent can be inferred from conduct, a court or tribunal must weigh the evidence before it, and filter out inferences that are not reasonable. Put differently, the "only reasonable inference"

⁴⁶ *Corfu Channel Case, Judgment of April 9th, 1949: I.C.J. Reports 1949, p. 4, pp. 16-17; 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, p. 43, para. 209: "The Court has long recognized that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive (cf Corfu Channel)", and para. 373; Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 148 confirms that the notion of "reasonableness" is implicit in this standard, that is, "the only inference that could be reasonably drawn" [emphasis added].*

⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, at para. 148.*

⁴⁸ See Judge Cançado Trindade *Dissenting Opinion* in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 202, para. 467: "the International Court of Justice seems to have imposed too high a threshold for the determination of mens rea of genocide."*

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 148.*

⁵⁰ *Ibid.*

test applies only between alternative explanations that have been found to be reasonably supported by the evidence.

44. Furthermore, it is worth observing that the Court used the “only reasonable inference” test with respect to drawing an inference of specific intent from a “pattern” of conduct only. This cannot be the threshold of the test when other methods of inference are also present, such as when examining the *scope* and *severity* of a perpetrator’s conduct to evidence specific intent. Indeed, the Court has 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.⁵¹

45. Third, when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically. The jurisprudence of the ICTY demonstrates that this approach is not only desirable, but an important element of the sound evaluation of evidence. In this respect, the Joint Interveners agree with the approach of the ICTY Appeals Chamber in the *Stakić* case, which required trial chambers to assess “whether all of the evidence, taken together, demonstrated a genocidal mental state,” while noting that, in that case, “the Trial Chamber’s compartmentalised mode of analysis [would] obscur[e] the proper inquiry.”⁵² In determining whether genocidal intent may be inferred from “relevant facts and circumstances,” regard must be had to “the totality of the evidence.”⁵³ In other words, “all of the evidence, taken together,” must be considered.⁵⁴

46. In addition to the three general considerations just indicated, the Court’s jurisprudence has clarified the relevance of a number of factors that can assist in determining whether specific intent exists based on “the totality of the evidence.”⁵⁵ The Joint Interveners submit that the factors detailed below should guide the Court in the interpretation of the specific intent requirement outlined in Article II of the Genocide Convention.

⁵¹ *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, p. 43, para. 373.

⁵² *Prosecutor v. Stakić*, (Case No. IT-97-24-A), 22 March 2006, para. 55.

⁵³ *Prosecutor v. Muvunyi* (Case No. ICTR-00-55A-T), 11 February 2010, para. 29.

⁵⁴ *Prosecutor v. Tolimir* (Case No. IT-05-88/2-T), 12 December 2012, para. 745, citing *Prosecutor v. Stakić* (Case No. IT-97-24-A), 22 March 2006, para. 55.

⁵⁵ *Prosecutor v. Muvunyi* (Case No. ICTR-00-55A-T), 11 February 2010, para. 29.

(b) The number of victims killed is not determinative of a State's specific intent

47. Often, large-scale killing of group members will be the most obvious and immediate manifestation of an intention to destroy a group in whole or in part. Nonetheless, the Joint Interveners submit that other acts such as injuring, sterilizing, or impregnating members of the targeted group may also strongly evidence an intent to destroy the group to which they belong. Beyond killing, evidence of other acts committed against a targeted group can be equally relevant to the determination of specific intent. Moreover, the presence of several underlying acts of genocide can also be indicative of genocidal intent. Accordingly, the Joint Interveners submit that the specific intent requirement in Article II should be construed in such a way that the overall factual picture is taken into account, rather than each individual incident or alleged underlying act of genocide being considered in isolation.⁵⁶

48. The Joint Interveners also submit that contextual factors such as the scale and nature of the atrocities constitute indicators of specific intent. As noted above, specific intent is rarely proven through direct evidence, but may be inferred from all the facts and circumstances.⁵⁷ In this regard, the ICTY found that “absent direct evidence, the intent to destroy may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts.”⁵⁸

49. The Court has also found that, in the absence of direct proof of intent, “there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part.”⁵⁹ In assessing the scale and nature of relevant acts, international criminal tribunals have taken into

⁵⁶ In *Prosecutor v. Stakić*, (Case No. IT-97-24-A), 22 March 2006, the ICTY Appeals Chamber held: “Rather than considering separately whether the Appellant intended to destroy the group through each of the genocidal acts specified by Article 4(1)(a), (b), and (c), the Trial Chamber should expressly have considered whether all of the evidence, taken together, demonstrated a genocidal mental state.” (para. 55). See also *Prosecutor v. Karadžić*, (Case No. IT-95-5/18-T), 24 March 2016, para. 550.

⁵⁷ *Prosecutor v. Karadžić*, (Case No. IT-95-5/18-T), 24 March 2016, paras. 550 and 5825. See also *Prosecutor v. Jelisić* (Case No. IT-95-10-A), 5 July 2001, para. 47; *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 523.

⁵⁸ *Prosecutor v. Popović*, (Case IT-05-88-T), 10 June 2010, para. 823. Also see *Prosecutor v. Popović*, (Case IT-05-88-A), 30 January 2015, para. 503.

⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment*, I.C.J. Reports 2015, p. 3, para. 139.

consideration a number of factors in addition to the number of individuals seriously injured or dead,⁶⁰ including the number of assailants involved,⁶¹ the number of prohibited and other culpable acts “in close geographical and temporal proximity,”⁶² and the intensity of the attack as well as the systemic and discriminatory nature of the prohibited acts.⁶³

50. Therefore, the Joint Interveners submit that the question of scale – as a basis on which to infer intent – does not relate solely to killings. The number of victims killed is merely a starting point in considering the scale and nature of the atrocities.⁶⁴ In fact, in undertaking a quantitative assessment of the other relevant factors, the victimized population should be taken to include all victims targeted by the various underlying acts of genocide and not be limited to those victims who were killed.

51. The Genocide Convention does not require that in the determination of the specific intent to destroy, there should be a focus on the numbers of victims killed, nor has this factor been determinative in international criminal tribunals. Indeed, circumstances may be such that the perpetrator cannot, or decides not to, avail itself of the fastest or most direct means to accomplish the physical or biological destruction of the protected group. In *Krstić*, the ICTY Appeals Chamber found that:

the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected did not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent.⁶⁵

52. As such, the determination of a State’s intention to destroy a group is not contingent upon the number of people killed.

53. Finally, another reason not to focus on numbers of victims killed to determine specific intent is that the figures may be deceptive as they most likely would not take into account the long-term deaths that may result in the destruction of a group, nor would they necessarily account for the biological destruction of the group. It is noteworthy that the scope of the Genocide Convention

⁶⁰ *Prosecutor v. Muhimana* (Case No. ICTR-95-1B-T), 28 April 2005, para. 516.

⁶¹ *Prosecutor v. Muhimana* (Case No. ICTR-95-1B-T), 28 April 2005, para. 516.

⁶² *Prosecutor v. Mladic* (Case No. IT-09-92-T), 22 November 2017, para. 3515.

⁶³ *Prosecutor v. Mladic* (Case No. IT-09-92-T), 22 November 2017, para. 3515.

⁶⁴ *Prosecutor v. Krstić*, (Case No. IT-98-33-A), 19 April 2004, para. 12. See also *Prosecutor v. Mladic*, (Case No. MICT-13-56-A), 8 June 2021, para. 576.

⁶⁵ *Prosecutor v. Krstić*, (Case No. IT-98-33-A), 19 April 2004, para. 32.

covers not only physical but also biological destruction of a targeted group,⁶⁶ as further elaborated upon below.

(c) Sexual and gender-based violence can play an important role in determining specific intent

54. In the context of Article II, the word “destroy” encompasses both the physical and the biological destruction of the targeted group.⁶⁷ Whereas physical destruction focuses on the annihilation of the existing group, biological destruction is aimed at the regenerative power of the group. The Court has confirmed that an intent to destroy the group, in whole or in part, can manifest itself in measures that “have consequences for the group’s capacity to renew itself, and hence to ensure its long-term survival.”⁶⁸ Other courts have also inferred specific intent from the long-term implications of underlying acts of genocide on a targeted group, including its regenerative power and capacity to ensure its long-term survival.⁶⁹ The Joint Intervenors submit that sexual and gender-based violence can affect a group’s ability to regenerate itself. As noted above (section II.A.(b)), it can directly affect the physical ability to procreate and can create other barriers to procreation, including through the impacts of social stigma.

55. The Joint Intervenors also contend that the fact that sexual and gender-based violence is not capable of advancing any military objective means that it can provide compelling evidence of specific intent to destroy a protected group. Furthermore, sexual and gender-based violence may reveal an intent to physically and/or biologically destroy a protected group given its impact not only on individuals but also on the group itself. Sexual violence, when employed as a genocidal strategy, aims to destroy the victim as an incremental step to annihilating the group, as confirmed in *Akayesu*.⁷⁰ It is simultaneously an assault on the victim and on the existence of the group and can therefore be used as a strategy of genocide.

56. As recognized by the United Nations Security Council in resolution 1820 (2008), sexual and gender-based violence can be used to humiliate, subordinate, and destroy entire communities.⁷¹ It

⁶⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 136.*

⁶⁷ *Ibid.*

⁶⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para. 136.*

⁶⁹ *Prosecutor v. Karadžić*, (Case No. IT-95-5/18-T), 24 March 2016, para. 5671.

⁷⁰ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, paras. 731-732.

⁷¹ United Nations Security Council Resolution 1820 (2008) on Women, Peace and Security, 19 June 2008, PP6.

causes chaos and terror, makes people flee, projects the dominance of the perpetrator group, and ostracizes survivors from their community. As a result, sexual and gender-based violence can lead to the destruction of a protected group, can evince a specific intent, and can, depending on the overall circumstances of the situation, thus amount to genocide.

57. In this regard, in *Akayesu*, the ICTR held that “sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.”⁷² The ICTR added that “sexual violence was a step in the process of the destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself.”⁷³ The Joint Intervenors submit that this finding should be reflected in the construction of Article II of the Genocide Convention in circumstances where sexual and gender-based violence has been documented on a significant scale. The continuum of a planned system of widespread sexual violence – from the fear it generates, to the physical and psychological scars it causes, and from the pregnancies it may induce, to the stigma it generates amongst victims – can serve to demonstrate the perpetrators’ intent to both physically and biologically destroy a protected group.

(d) Acts committed against children can play an important role in determining specific intent

58. The Joint Intervenors submit that, in construing the specific intent requirements in Article II, there are at least three ways in which the Court should take account of the targeting of children as such, including by killing.

59. First, proof of the targeting of children may assist in demonstrating that the members of the group were targeted *because of* their membership of the protected group. Evidence that children have been targeted on a significant scale could, depending on the circumstances, preclude a defense that the members of a protected group were targeted solely for certain other reasons, such as that they posed a security threat.

60. Secondly, 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

⁷² *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 731.

⁷³ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 732.

specific part of the “group is emblematic of the overall group, or is essential to its survival.”⁷⁴ The Joint Interveners submit that children form a substantial part of the groups protected by the Genocide Convention, and that the targeting of children could, depending on the circumstances, provide 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.

61. Thirdly, where children are the target of underlying acts of genocide, this may assist in demonstrating the existence of the requisite intent. Given the significance of children to the survival of all groups, evidence of the targeting of children may, in light of “the totality of the evidence”⁷⁵ and “all of the evidence, taken together”,⁷⁶ contribute to an inference that the perpetrators intended to destroy a substantial part of the protected group. In *Akayesu*, for example, the ICTR emphasized that evidence demonstrating that “even newborn babies were not spared” demonstrated the perpetrators’ “intention to wipe out the Tutsi group in its entirety.”⁷⁷

62. Thus, the Joint Interveners submit that the targeting of children is relevant to the determination of specific intent.

(e) Forced displacement can play an important role in determining specific intent

63. The Joint Interveners submit that, in addition to leading to the underlying acts of genocide, as outlined in section II(d) of these Written Observations, forced displacement may also constitute evidence of specific intent and this may be so even in cases where affected members of the group are not transferred to a place where they are subjected to conditions leading to their death or destruction.⁷⁸

⁷⁴ See *Prosecutor v. Krstić*, Judgment, (Case No. IT-98-33-A), 19 April 2004, para. 12.

⁷⁵ *Prosecutor v. Muvunyi* (Case No. ICTR-00-55A-T), 11 February 2010, para. 29.

⁷⁶ *Prosecutor v. Tolimir* (Case No. IT-05-88/2-T), 12 December 2012, para. 745, citing *Prosecutor v. Stakić* (Case No. IT-97-24-A), 22 March 2006, para. 55.

⁷⁷ *Prosecutor v. Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 121. See also *Prosecutor v. Kayishema and Ruzindana*, (Case No. ICTR-95-1), 21 May 1999, paras. 532–533.

⁷⁸ *Prosecutor v. Tolimir*, (Case No. IT-05-88/2-A), 8 April 2015, para. 254. 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, p. 3, para. 434, where the Court stated: “that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part”. Even though the Court found that Croatia had not demonstrated that such forced displacement constituted the *actus reus* of genocide within the meaning of Article II(c) of the Convention, it nonetheless considered that “the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be “indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts.”

64. In *Bosnia v. Serbia*, the Court affirmed that “deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of the group, nor is such destruction an automatic consequence of the displacement,” but nevertheless recognized 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.”⁷⁹

65. The Declarants further submit that a violent military operation triggering the forced displacement of members of a targeted group may similarly contribute to evidence of a specific intent to destroy the protected group, regardless of whether the acts triggering the forced displacement fall within one of the five categories of underlying acts of genocide.

C. CONCLUSION OF SECTION II

66. As outlined above, the Joint Interveners submit that genocide, as defined in Article II of the Genocide Convention, is not limited to killings and that the number of victims killed is not determinative of a State’s specific intent. Underlying acts of genocide may take the form of sexual and gender-based violence. Forced displacement can, depending on the overall circumstances, also lead to an underlying act of genocide. Furthermore, the underlying acts of genocide need to be assessed differently when acts are committed against children, bearing in mind the particular impact of such acts on children. Finally, when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically. In this regard, sexual and gender-based violence, acts committed against children, and forced displacement can play an important role in determining the specific intent required under Article II.

SECTION III: CONSTRUCTION OF ARTICLES IV TO VI OF THE GENOCIDE CONVENTION

67. Under Article I of the Genocide Convention, States Parties have confirmed that genocide is a crime under international law “which they undertake to prevent and to punish.” The Joint Interveners contend that the duty to punish provided for in Article I must be construed in light of Articles IV to VI of the Genocide Convention, and thus interpreted as an obligation to investigate and

⁷⁹ *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, p. 43, para. 190; 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, p. 3, para 434.

prosecute persons accused of genocide, and to punish persons found to be guilty of genocide. In the view of the Joint Interveners, pursuant to these provisions, a State Party discharges its obligation to punish genocide by prosecuting persons subject to criminal jurisdiction within its own criminal courts; by cooperating with competent international tribunals when it has accepted their jurisdiction; and by considering the extradition of persons accused of genocide for trial in other States, as relevant.

68. Article VI requires trial by a “competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction” of anyone charged with genocide or other acts punishable under the Genocide Convention. The Joint Interveners submit that this provision presupposes an obligation on the part of the State concerned to conduct an investigation prior to the commencement of a prosecution.

69. Although the Genocide Convention does not specify how a prosecution and trial must be conducted in order to fulfill the obligation of investigation, prosecution, and trial by a “competent tribunal”, the Joint Interveners submit that the relevant provision must be interpreted as encompassing guarantees of fair trial, including that such a tribunal be independent and impartial. These are fundamental requirements recognized under international human rights law⁸⁰ and international humanitarian law.⁸¹ As mentioned in paragraph 8 above, the obligations under the Genocide Convention must, under Article 31(3)(c) of the VCLT, be interpreted taking into account other relevant and applicable rules of international law. Furthermore, the Joint Interveners submit that failure to respect the judicial standards which guarantee a fair trial would frustrate the object and purpose of the Genocide Convention given that in those circumstances, the trial would remain an empty promise, unable to attain the aim of combating impunity. A judicial system which in effect maintains impunity, or which conducts sham trials meant only to shield the accused from justice,

⁸⁰ International Covenant on Civil and Political Rights, art. 14(1); African Charter on Human and Peoples’ Rights, art. 7(1)(d); American Convention on Human Rights, art. 8(1); European Convention on Human Rights, art. 6(1); Universal Declaration of Human Rights, art. 10; Association of Southeast Asian Nations Human Rights Declaration, art. 20(1).

⁸¹ See for example common Article 3(1)(d) to the 1949 Geneva Conventions, prohibiting “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” This provision reflects “elementary considerations of humanity” which are applicable irrespective of reservations to the Geneva Conventions, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 14, para. 218.

does not meet the Genocide Convention’s purpose of “liberat[ing] mankind” from the “odious scourge” of genocide.⁸²

70. Another standard of relevance relates to sufficient transparency in the prosecution and trial. International human rights treaty bodies and decisions of regional human rights courts have determined that duties to investigate, prosecute, and punish within their respective treaties include a duty to do so transparently, while guaranteeing the protection of witnesses and victims, to ensure that society is duly and appropriately informed to be able to assess the integrity of the process, and to safeguard public confidence in the judicial process.⁸³

SECTION IV: CONCLUSION

71. As recognized by this Court in its Advisory Opinion on *Reservations to the Genocide Convention*, the Genocide Convention was adopted to “condemn and punish genocide as a crime under international law involving the denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations.”⁸⁴ Its provisions have been and must continue to be interpreted in accordance with its “humanitarian and civilizing purpose.”⁸⁵

72. As outlined in these Written Observations, underlying acts of genocide are not limited to killings and may take the form of sexual and gender-based violence and other acts. Furthermore, the underlying acts of genocide need to be assessed differently when acts are committed against children, bearing in mind the particular impact of such acts on children. Forced displacement can also lead to an underlying act of genocide. Finally, the number of victims killed is not determinative of a State’s specific intent to commit genocide. Rather, when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically. In this regard, the Joint Interveners contend that sexual and gender-based violence, acts

⁸² Genocide Convention, Preambular paragraph 3.

⁸³ See for example *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the right to life*, HRC 30 October 2018, CCPR/C/GC/36, para. 28; *Mapiripán Massacre v. Colombia* (Merits, Reparations, and Costs) Inter-American Court of Human Rights Series C No 134 (15 September 2005), para. 219; *El-Masri v. the Former Yugoslav Republic of Macedonia (FYROM)*, ECtHR 13 December 2012, Appl. No 39630/09, paras. 191-193.

⁸⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 15, at p. 23.

⁸⁵ *Ibid.*

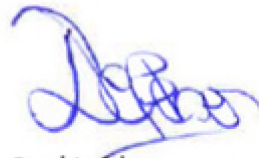
committed against children, and forced displacement play an important role in determining the specific intent required under Article II.

73. With respect to the duty to punish genocide, as provided for in Articles I and IV to VI of the Genocide Convention, the Joint Interveners submit that the obligation to investigate and prosecute perpetrators of genocide must be interpreted as including a duty to do so transparently and as encompassing guarantees of fair trial. Failure to respect the judicial standards which guarantee a fair trial would frustrate the object and purpose of the Genocide Convention of “liberat[ing] mankind” from the “odious scourge” of genocide given that in those circumstances, the trial would remain an empty promise, unable to attain the aim of combating impunity.

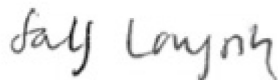
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