

DECLARATION OF JUDGE CLEVELAND

1. As the Court's Order recalls, Article 63 of the Statute provides that a State party to a convention the construction of which is in question before the Court has a legal right to intervene. Such intervention is limited to the construction of the convention's provisions at issue at the relevant stage of the proceedings¹. This includes taking into account other rules and principles of international law, in so far as they may be relevant for the construction of those provisions².

2. In the present case, the Court acknowledges that the construction of several provisions of the Genocide Convention is in question, in particular, the interpretation of Article II, which defines the acts and the specific intent required to constitute genocide³.

3. Article II of the Convention provides a legal definition of genocide, detailing certain acts that must be committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". An essential feature of this provision is its *mens rea* requirement, which is particular to the crime of genocide: the presence of a specific intent (*dolus specialis*) to destroy the protected group, in whole or in part. The crime of genocide therefore is an aggravated crime that requires proof, not only of the intent to commit the underlying act, but also of the specific intent to destroy the protected group, in whole or in part.

4. In previous cases involving allegations of genocide, parties have disagreed as to what constitutes sufficient evidence of this *dolus specialis*, including with respect to the applicable standard of proof⁴. Indeed, in the past, international courts and tribunals have applied somewhat different standards of proof to assess whether the specific intent required in cases involving allegations of genocide is present⁵.

¹ Order, paras. 23-24 and 58; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Admissibility of the Declarations of Intervention, Order of 3 July 2024, I.C.J. Reports 2024 (II)*, p. 734, paras. 20-21 (hereinafter "*Gambia v. Myanmar, Order of 3 July 2024*"); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023, I.C.J. Reports 2023 (II)*, p. 362, para. 27 (hereinafter "*Ukraine v. Russian Federation, Order of 5 June 2023*").

² Order, para. 60; *Gambia v. Myanmar, Order of 3 July 2024*, p. 740, para. 45; *Ukraine v. Russian Federation, Order of 5 June 2023*, p. 374, para. 84.

³ *Gambia v. Myanmar, Order of 3 July 2024*, p. 740, para. 44; Order, para. 59.

⁴ *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. 65-67, paras. 143-148 (hereinafter "*Croatia v. Serbia, 2015 Judgment*").

⁵ Thus, in applying the Article II specific intent requirement in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, this Court concluded 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" (*Judgment, I.C.J. Reports 2007 (I)*, pp. 196-197, para. 373 (hereinafter "*Bosnia Genocide 2007*").

See also *Croatia v. Serbia, 2015 Judgment*, p. 128, para. 440:

"Thus, in the opinion of the Court, Croatia has not established that the only reasonable inference that can be drawn from the pattern of conduct it relied upon was the intent to destroy, in whole or in part, the Croat group. The acts constituting the *actus reus* of genocide within the meaning of Article II (a) and (b) of the Convention were not committed with the specific intent required for them to be characterized as acts of genocide."

5. As the Court has previously observed, “the standard of proof may vary from case to case and may depend on the gravity of the acts alleged”⁶. The gravity of an alleged act cannot be determined in the abstract, but only in light of the specific rules that prohibit it. Gravity is thus inseparable from the nature and content of the underlying rights and obligations in question. Accordingly, to say that the standard of proof “may depend on the gravity of the acts alleged” necessarily requires the standard of proof to be determined in relation to the nature and content of those particular rights and obligations.

6. The standard of proof for the genocidal intent required under Article II thus “concern[s] the construction of the provisions of the Genocide Convention” for the purposes of Article 63 of the Court’s Statute and Article 82 of the Rules⁷. It is not a standard determined and applied in isolation, but is inherently determined by reference to the nature of the crime and the rights and obligations established by the Convention. Although standards of proof may depend, in some circumstances, on the context in which the substantive law is applied⁸, with respect to the particular standard of proof for the *dolus specialis* under Article II of the Convention, it is the Genocide Convention of 1948 itself, particularly Article II, that defines the nature and elements of the crime and thus establishes its gravity. Accordingly, the standard of proof for the *dolus specialis* is part and parcel of the construction of the provisions of the Genocide Convention, in particular those defining the crime and the rights and obligations of States parties.

(Signed) Sarah H. CLEVELAND.

Compare International Criminal Tribunal for the former Yugoslavia, case No. IT-05-88/2-T, *Prosecutor v. Tolimir, Trial Chamber, Judgment of 12 December 2012*, para. 745: “Indications of such intent are rarely overt . . . and thus it is permissible to infer the existence of genocidal intent based on ‘all of the evidence, taken together’, as long as this inference is ‘the only reasonable [one] available on the evidence’.”

⁶ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, p. 55, para. 120, citing *Bosnia Genocide 2007*, p. 130, para. 210. This link between the standard of proof and the underlying obligation has also been recognized in other jurisdictions. See European Court of Human Rights, App. 53600/20, *Verein KlimaSeniorinnen Schweiz and others v. Switzerland, Grand Chamber, Judgment of 9 April 2024*, para. 427 (the application of the standard of proof must “tak[e] into consideration the nature of the substantive right at stake”); see also European Court of Human Rights, App. 29750/09, *Hassan v. The United Kingdom, Grand Chamber, Judgment of 16 September 2014*, para. 48.

⁷ Order, para. 61; see also para. 26.

⁸ In determining individual criminal liability, for example, international courts may apply a “beyond a reasonable doubt” standard to determination of the crime as a matter of statute, see Rome Statute of the International Criminal Court, 17 July 1998, United Nations, *Treaty Series*, Vol. 2187 p. 128, Art. 66 (3); Rules of procedure and evidence of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991, IT/32/Rev.50, 8 July 2015, Rule 87 (A).