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INTERNATIONAL COURT OF JUSTICE

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

(THE GAMBIA *v.* MYANMAR: 11 STATES INTERVENING)

WRITTEN OBSERVATIONS OF THE DEMOCRATIC REPUBLIC OF THE CONGO UNDER ARTICLE 86 OF THE RULES OF THE INTERNATIONAL COURT OF JUSTICE

22 September 2025

[Translation by the Registry]

1. On 10 December 2024, the Democratic Republic of the Congo (hereinafter the "DRC") filed a Declaration of intervention under Article 63 of the Statute of the Court in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*. By an Order of 25 July 2025, the Court found that Declaration to be admissible, together with those of three other States, and fixed 25 September 2025 as the time-limit within which those States could file written observations under Article 86, paragraph 1, of the Rules of Court. The present written observations are filed pursuant to that Order.

2. In its Declaration of intervention, the DRC set out what it considered to be the proper interpretation of Articles I, II and III of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention", the "1948 Convention" or the "Convention")[1]. It thus discussed its interpretation of the concept of genocidal intent in the context of Article II of the Convention[2], its interpretation of the concepts of protected group and part of the protected group in the context of Article II[3], and its interpretation of the obligation to prevent the crime of genocide and acts relating to the crime of genocide in the context of Articles I and III[4].

3. At this stage of the proceedings, the DRC fully maintains the various elements of interpretation set out in its Declaration of intervention. It notes, however, that the Court stated in its Order of 25 July 2025 that it expected the intervening States to refrain from addressing in their written observations "matters other than the construction of provisions of the Genocide Convention, such as the evidentiary value of a certain category of documents, the facts or the application of the Convention to the facts"[5]. In keeping with that Order, the DRC will therefore confine itself in the present written observations to matters pertaining strictly to the interpretation of the 1948 Convention, and will not address any points relating to the facts of the case or the question of the probative value of certain categories of documents.

4. Before turning to the questions of interpretation that still require further discussion at this stage, the DRC notes that there is in fact consensus among the Parties to the case on a number of points made in the DRC's Declaration of intervention of 10 December 2024, including, in particular, the fact that:

— a situation of armed conflict does not preclude the establishment of the crime of genocide[6];

— the 1948 Convention does not require genocidal intent to be the sole intent[7];

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

[2] Declaration of intervention of the Democratic Republic of the Congo, 10 Dec. 2024, paras. 11-20.

[3] *Ibid.* paras. 77-92.

[4] *Ibid.* paras. 93-114.

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar: 7 States intervening), Admissibility of the Declarations of Intervention, Order of 25 July 2025*, para. 60.

[6] Memorial of The Gambia, pp. 462-463, paras. 12.107-12.109 ("genocide almost always occurs in the context of an armed conflict"); Counter-Memorial of Myanmar, p. 274, paras. 8.14-8.15 ("It is true that it is possible for genocide to be committed during the course of an armed conflict").

[7] Memorial of The Gambia, p. 74, para. 4.26 ("the inference of genocidal intent . . . may co-exist with other motivations such as, for example, personal revenge or advancement, retaliation or collective punishment"); Reply of The Gambia, pp. 34-37, paras. 3.28-3.34; Rejoinder of Myanmar, p. 95, para. 4.44 ("As a matter of law, it may well be possible for an individual or a State to act with genocidal intent (intent A), while simultaneously seeking to achieve an ulterior purpose that has nothing to do with genocide (intent or motive B)").

— an express manifestation of genocidal intent is not required; such intent may be deduced or inferred from certain types of conduct or from a pattern of conduct[8];

— the concept of "substantial part" of the protected group does not refer to a purely quantitative criterion but is to be interpreted in light of several factors, including quantitative, qualitative and geographic ones[9];

— a State's responsibility may be engaged for the acts provided for in Article III of the 1948 Convention (conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide or complicity in genocide)[10].

These points of agreement seem especially important in that they reflect a shared understanding of various essential provisions of the 1948 Convention which have sometimes been the subject of debate.

5. In addition to these points of consensus, however, a reading of the written pleadings of the Parties to the case brings to light several arguments relating to the interpretation of the 1948 Convention to which the DRC cannot subscribe. This is the case, in particular, with respect to the assertions that:

— the legal instruments relating to the crime of genocide adopted since 1948 and their application cannot provide guidance on the interpretation of the Genocide Convention (I);

— the compliance of certain elements of a genocidal act with the law of armed conflict precludes the establishment of genocide within the meaning of Article II of the Convention (II); and

— rape and other acts of sexual violence fall outside the scope of Article II of the Convention (III).

The following sections of these written observations will focus on rebutting these three arguments.

I. The legal instruments relating to the crime of genocide adopted since 1948 and their application can provide guidance on the interpretation of the Genocide Convention

6. In its Counter-Memorial, the Respondent claims that only practice relating to the interpretation of the 1948 Convention itself can be taken into account in the interpretation of that instrument and that any decisions of international criminal courts and tribunals rendered on the basis of different legal instruments should be disregarded. It argues that even if those instruments criminalize genocide, there is nothing to suggest that the meaning given to that term and the conditions for its application are the same as in the 1948 Convention. Therefore, such material does

[8] Memorial of The Gambia, p. 83, para. 4.46; Counter-Memorial of Myanmar, p. 134, para. 4.32; Reply of The Gambia, p. 37, para. 3.34; Rejoinder of Myanmar, p. 93, para. 4.35.

[9] Memorial of The Gambia, pp. 80-81, paras. 4.38-4.42; Counter-Memorial of Myanmar, pp. 133-134, paras. 4.27-4.29; Rejoinder of Myanmar, pp. 87-88, para. 4.23.

[10] Memorial of The Gambia, pp. 87 *et seq.*, paras. 4.52 *et seq.*; Counter-Memorial of Myanmar, p. 148, para. 4.80 ("Although the Convention does not expressly say so, it imposes an obligation on Contracting Parties not to commit genocide or other acts enumerated in Article III through the actions of their organs or persons whose acts are attributable to them under general principles of State responsibility.").

not constitute relevant subsequent practice that can be taken into account in the interpretation of the treaty in question[11].

7. That argument lacks any legal basis. It should first be noted in this regard that the definition of the crime of genocide in more recent instruments, such as the statutes of international criminal tribunals and the International Criminal Court, is in every respect identical to that contained in the 1948 Convention. Consequently, the interpretation of the terms of this definition resulting from the jurisprudence of these courts and tribunals is necessarily relevant for the interpretation of the 1948 Convention. Moreover, by excluding recourse both to these later instruments and to customary international law that may have developed in relation to genocide, the Respondent is disregarding one of the fundamental rules of interpretation enshrined in the 1969 Vienna Convention on the Law of Treaties. Indeed, according to Article 31, paragraph 3 *(c)*, of that instrument, for the purposes of the interpretation of a treaty, "[t]here shall be taken into account, together with the context[,] . . . any relevant rules of international law applicable in the relations between the parties". In this respect, the Respondent fails to show on what basis it should be considered that it is not bound by customary international law that may have developed in relation to genocide and for what reason recourse to other applications and interpretations of the concept of genocide in contemporary international law should be excluded from the process of interpreting the 1948 Convention.

8. It is especially telling that the Respondent itself subsequently refers, in its interpretation of the Convention, both to later legal instruments — such as the *Elements of Crimes* of the International Criminal Court[12] — and to the jurisprudence of international criminal courts and tribunals[13]. This confirms, in so far as it is necessary, the lack of any legal basis for the particularly restrictive position advocated by that State as regards the sources that may be relied upon when interpreting the 1948 Convention.

9. The fact that the jurisprudence of international criminal courts and tribunals in particular is of great relevance for the purposes of this exercise is also confirmed by the Court's own practice. Indeed, in various situations involving questions of interpretation of the 1948 Convention, the Court has consistently referred, to that end, to the jurisprudence of both the International Criminal Tribunal for Rwanda (hereinafter the "ICTR") and the International Criminal Tribunal for the former Yugoslavia (hereinafter the "ICTY")[14]. It should also be noted that the latter Tribunal, for its part, frequently drew on the 1948 Convention to interpret the definition of genocide contained in its Statute[15]. Together, these various elements demonstrate beyond any doubt the baselessness of the argument that only practice relating to the Genocide Convention itself can be taken into account in the interpretation of that instrument.

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[11] Counter-Memorial of Myanmar, pp. 126-127, paras. 4.5-4.7; Rejoinder of Myanmar, pp. 81-82, para. 4.3.

[12] See e.g. Counter-Memorial of Myanmar, p. 142, para. 4.58.

[13] See e.g. Rejoinder of Myanmar, p. 93, para. 4.37; p. 99, para. 4.54; p. 108, paras. 4.79-4.80.

[14] See e.g. *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. 167, para. 300.

[15] See e.g. ICTY, *The Prosecutor* v. *Goran Jelisić*, Judgement, Trial Chamber I, 14 Dec. 1999, IT-95-10-T, para. 61; ICTY, *The Prosecutor* v. *Radislav Krstić*, Judgement, Trial Chamber I, 2 Aug. 2001, IT-98-33-T, para. 541; ICTY, *The Prosecutor* v. *Radislav Krstić*, Judgement, Appeals Chamber, 19 Apr. 2004, IT-98-33-A, paras. 6-14 and 24-25; ICTY, *The Prosecutor* v. *Zdravko Tolimir*, Judgement, Appeals Chamber, 8 Apr. 2015, IT-05-88/2-A, paras. 202 and 226.

II. The compliance of certain elements of a genocidal act with the law of armed conflict does not preclude the establishment of genocide within the meaning of Article II of the Convention

10. In its Declaration of intervention, the DRC observed that a situation of armed conflict in no way precludes the establishment of the crime of genocide and that, in this regard, one cannot merely rely on one's right to fight an enemy to avoid an act being characterized as genocidal[16]. It follows that genocide may occur during an international or non-international armed conflict in which certain attacks are conducted against a hostile party. As noted above, the Parties to the proceedings agree on this point of principle[17].

11. In its written pleadings, the Respondent nevertheless considers that genocide cannot be established when there is "legitimate killing of insurgents or terrorists in battle in an armed conflict or in a law enforcement operation"[18]. Indeed, it argues that in such circumstances, there is no "killing" within the meaning of Article II *(a)* of the Convention, since, in accordance with the principles of international humanitarian law, the deprivation of life is not arbitrary. In the words of the Respondent:

> "Article II *(a)* of the Convention does not apply to the legitimate killing of insurgents or terrorists in battle in an armed conflict or in a law enforcement operation, and does not extend to civilian deaths caused by such operations, if they are exclusively directed at legitimate targets, and the civilian casualties are not caused deliberately"[19].

In support of this claim, it quotes the following passage from the Court's Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*: "if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II *(a)* of the Genocide Convention."[20]

12. The respondent State thus appears to preclude the establishment of genocide solely on the basis that the operation in question was purportedly conducted against a hostile party in accordance with the law of armed conflict.

13. In this respect, the DRC wishes to dispel any possible confusion that may arise from the relationship between the Convention and the law of armed conflict, which, as the Court has recalled, "are two distinct bodies of rules, which pursue different objectives"[21].

14. Turning first to the Judgment quoted above, it is important to recall the Court's reasoning in this regard. In order to pronounce on the existence of a potential genocide allegedly committed during "Operation Storm" launched by Croatian forces in Krajina, the Court identified two standards to be met in turn: first, there must be physical acts within the meaning of Article II *(a)* to *(e)* of the

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[16] Declaration of intervention of the Democratic Republic of the Congo, paras. 16-21.

[17] See above, para. 4.

[18] Counter-Memorial of Myanmar, p. 141, para. 4.53.

[19] [Rejoinder] of Myanmar, p. 103, para. 4.64.

[20] *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. 139, para. 474.

[21] *Ibid.*, p. 68, para. 153.

Convention (*actus reus*); second, assuming that such acts have been established, there must be evidence of a specific intent to destroy the targeted group as such (*dolus specialis*), which is the hallmark of the crime of genocide. It is only in the context of the first step that respect for the law of armed conflict (and, more broadly, for human rights, or even general international law) could have any weight, specifically with regard to the characterization of "killing" within the meaning of the Convention. Thus, in a situation involving *solely* acts that are justified under these bodies of rules, the "killing" characterization could, prima facie, be disputed.

15. However, of the various acts concerned, only *some* must be unjustifiable under the law of armed conflict for the *actus reus* to be immediately beyond question. For example, if a State launches a massive attack against a particular ethnic group and, in so doing, carries out attacks on both combatants (some of which are hypothetically in compliance with the *jus in bello*) and civilians (in violation of that same law), there can be no doubt that "killing" within the meaning of Article II of the Convention has been committed. In such an event — undoubtedly the most common scenario in which accusations of genocide are made — the outcome will then depend on whether the existence of genocidal *intent* can be demonstrated. If such intent is established, a finding of genocide can be made, without further consideration of the question of compliance with the *jus in bello*. In this context, demonstrating that certain elements of a military operation were consistent with the *jus in bello* is therefore not sufficient to exclude the possibility of genocide.

16. That is precisely what the Court ruled in the case between Croatia and Serbia. After examining the physical acts complained of, it distinguished between those acts which could *not* be characterized as war crimes (relying on the jurisprudence of the ICTY), and those which, on the contrary, were criminal. Hence, only some of the acts (and not all) referred to in Serbia's counter-claim fell within the scope of Article II *(a)* and *(b)* of the Genocide Convention, allowing for the conclusion that the *actus reus* was established. Having completed that first step, the Court logically turned to the question of the intent behind the operation as a whole, but found itself unable to establish it in that instance[22]. The point here, however, is that the physical component can be established even if *some of the elements* of a military operation prove consistent with the law of armed conflict. Conversely, a State cannot absolve itself of all responsibility by demonstrating that other elements of its operation did not constitute a violation of the law of armed conflict.

17. Confirmation of this methodology can be found by extending the analysis to other cases, and in particular the genocide of the Tutsis in Rwanda. Genocide could be established in that case because both physical acts, including killings, were perpetrated against the Tutsi group and a genocidal intent was identified. In light of this, the fact that military actions may have been carried out by genocidal forces against enemy forces in the context of an armed conflict was not considered relevant. The following passage from the *Akayesu* decision rendered by the ICTR is worth quoting here:

> "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."[23]

As the italicized terms suggest, the alternative is as follows: either the context is *solely* that of an armed conflict (in the sense that all physical acts are justified by the pursuit of military objectives), or the situation is one where genocidal acts are perpetrated *alongside the conflict*. It is only in the

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[22] *Ibid.*, p. 146, para. 499.

[23] ICTR, *Akayesu* case, judgement of 2 Sept. 1998, para. 127; emphasis added.

first scenario that the possibility of genocide can be ruled out. That is not the case in the second scenario, where genocide can be established if genocidal intent can be shown.

18. More generally, the argument put forward by the Respondent amounts to drawing an artificial distinction between the *actus reus* and the *mens rea* by seeking to exclude examination of the latter because of an alleged compliance with the law of armed conflict noted during the establishment of the *actus reus.* In reality, a proper interpretation of Article II of the Genocide Convention reveals that demonstrating the existence of genocidal intent, set forth in the opening words of that provision, is decisive. If intent to destroy a group protected by the Convention as such is established, and this intent is manifested through acts set out in the subparagraphs of Article II, then that provision has indeed been violated. Where that is so, the potential compliance of some of the elements of the genocidal undertaking with the law of armed conflict is irrelevant. Theoretically, even the possibility of genocide being perpetrated through acts directed exclusively at combatants, in a manner that appears to be consistent with the *jus in bello*, cannot be excluded. Indeed, one need only imagine an ethnic group composed exclusively of combatants whose destruction as an ethnic group (and not merely as an enemy force) is sought. More commonly, a genocidal actor will often seek to destroy a protected group by targeting the combatants who are part of that group and who seek to defend its existence. Here too, the fact that certain attacks may be in keeping with the law of armed conflict in no way excludes their genocidal character.

19. Lastly, in order to establish the existence of the *actus reus*, it is necessary but sufficient to show that some of the elements of the genocide fall within the scope of one of the subparagraphs of Article II. What is essential, however, is the establishment of genocidal intent (*mens rea*), whether or not some of the physical acts concerned were in compliance with the law of armed conflict.

III. Rape and other acts of sexual violence fall within the scope of Article II of the Convention

20. The DRC also considers it necessary to discuss the interpretation of the act referred to in Article II *(b)* of the Genocide Convention, namely the causing of serious bodily or mental harm to members of the protected group. The Respondent states in its Counter-Memorial that "[t]he word 'serious' . . . creates a threshold of gravity" and that "[r]ape and other acts of sexual violence . . . are capable of falling within this provision only if [the] resulting serious bodily and mental harm is such as to contribute to the physical or biological destruction of the protected group"[24]. The respondent State is seemingly of the view that there may be acts of rape and sexual violence which do not reach the threshold of gravity required to fall within the scope of Article II *(b)* of the 1948 Convention. The DRC considers that rape and other acts of sexual violence are, by definition, acts causing serious bodily or mental harm to victims and thus undeniably form part of the *actus reus* of the crime of genocide.

21. The 1948 Convention does not define what is to be understood by "serious bodily or mental harm". Nevertheless, consistent jurisprudence of the ICTY and ICTR has established that:

> "[t]he determination of the seriousness of the bodily or mental harm inflicted on members of a group must be made on a case-by-case basis, with appropriate consideration given to the particular circumstances of each case. The harm must be of such a serious nature as to contribute or tend to contribute to the destruction of all or part of the group; although it need not be permanent or irreversible, it must go 'beyond

[24] Counter-Memorial of Myanmar, p. 143, paras. 4.65 and 4.66.

temporary unhappiness, embarrassment or humiliation' and inflict 'grave and long-term disadvantage to a person's ability to lead a normal and constructive life'."[25]

22. Focusing more specifically on the concept of serious mental harm in the judgement rendered on 8 April 2015 in the *Tolimir* case, the Appeals Chamber of the ICTY rejected the restrictive interpretation set out in the instrument of [accession] of the United States to the 1948 Convention:

> "The Appeals Chamber is also not persuaded that the United States of America's 'understanding' of serious mental harm as 'the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques', expressed in its instrument of accession to the Genocide Convention is correct under customary international law, as Tolimir argues. Tolimir does not point to any other State party to the Genocide Convention subscribing to such a restrictive reading of serious mental harm as an act of genocide, nor does he explain why the Appeals Chamber should not be guided by the case law of the ICTY, the ICTR, and the ICJ on the matter. Tolimir's challenges to the Trial Chamber's definition of serious mental harm as genocidal act fail."[26]

Confirming that the concept of causing serious mental harm to members of a protected group should not be limited to "the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques", the ICTY Appeals Chamber clarified that "serious mental harm must be lasting but need not be permanent and irremediable"[27]. For the purpose of defining the crime of genocide, the bodily or mental harm inflicted on members of the group need not be permanent or irremediable in order to be considered "serious"[28]. This interpretation was adopted by the Court, which, in its Judgment in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro),* quoted a passage from the judgement of the ICTY Trial Chamber in the *Stakić* case clarifying that "[t]he harm inflicted need not be permanent and irremediable" in order for serious bodily or mental harm to be caused to members of the protected group[29].

23. In view of the elements of interpretation set out above, it is clear that acts of rape and sexual violence constitute serious bodily or mental harm within the meaning of Article II *(b)* of the 1948 Convention.

24. The Court has confirmed this interpretation in its jurisprudence relating to the application of the Convention. For example, in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment,

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[25] ICTY, *The Prosecutor* v. *Zdravko Tolimir*, Judgement, Trial Chamber II, 12 Dec. 2012, IT-05-88/2-T, pp. 326--327, para. 738 (references omitted). See also ICTY, *The Prosecutor* v. *Vujadin Popović et al.*, Judgement, Trial Chamber II, 10 June 2010, IT-05-88-T, p. 330, para. 811; ICTY, *Prosecutor* v. *Radovan Karadžić*, Judgement, Trial Chamber, 24 Mar. 2016, IT-95-5/18-T, p. 205, para. 543.

[26] ICTY, *The Prosecutor* v. *Zdravko Tolimir*, Judgement, Appeals Chamber, 8 Apr. 2015, IT-05-88/2-A, p. 84, para. 204 (references omitted).

[27] *Ibid*., p. 84, para. 203 (references omitted).

[28] ICTR, *The Prosecutor* v. *Jean-Paul Akayesu*, Judgement, Trial Chamber I, 2 Sept. 1998, ICTR-96-4-T, p. 207, para. 502; ICTR, *The Prosecutor* v. *Clément Kayishema and Obed Ruzindana*, Judgement, Trial Chamber II, 21 May 1999, ICTR-95-1-T, p. 47, para. 108; ICTR, *The Prosecutor* v. *Georges Anderson Nderubumwe Rutaganda*, Judgement and Sentence, Trial Chamber I, 6 Dec. 1999, ICTR-96-3-T, p. 26, para. 51; ICTR, *The Prosecutor* v. *Sylvestre Gacumbitsi*, Judgement, Trial Chamber III, 17 June 2004, TPIR-2001-64-T, p. 69, para. 291; ICTR, *The Prosecutor* v. *Laurent Semanza*, Judgement, Trial Chamber III, 15 May 2003, ICTR-97-20-T, pp. 95-96, paras. 320 and 322.

[29] *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. 167, para. 300.

the Court explicitly referred to the rape of members of the protected group as one of the elements taken into account in reaching its finding of serious bodily or mental harm corresponding to "the material element, as defined in Article II *(b)* of the Convention"[30]. Moreover, as the Court expressly noted, "there [was] no dispute between the Parties that rapes and sexual violence could constitute acts of genocide, if accompanied by a specific intent to destroy the protected group"[31].

25. Similarly, in its Judgment of 3 February 2015 in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court "recall[ed] 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"[32]. After examining the acts in question, the Court concluded that:

> "the JNA [Yugoslav People's Army] and Serb forces . . . perpetrated acts of ill-treatment, torture, sexual violence and rape. These acts caused such bodily or mental harm as to contribute to the physical or biological destruction of the protected group. The Court considers that the *actus reus* of genocide within the meaning of Article II *(b)* of the Convention has accordingly been established."[33]

26. The inclusion of rape and other acts of sexual violence in the *actus reus* of genocide is in keeping with the consistent jurisprudence of the ICTR and the ICTY, as shown by the excerpts from the ICTR *Akayesu* and ICTY *Stakić* judgements cited by the Court in the *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment[34]. For example, in the *Tolimir* judgement, the ICTY Trial Chamber clarified that the phrase "'serious bodily or mental harm' . . . is understood to mean, *inter alia*, acts of torture, inhumane or degrading treatment, sexual violence including rape, interrogations combined with beatings, threats of death and harm that damages health or causes disfigurement or injury"[35].

27. The same definition of bodily or mental harm, including rape and other acts of sexual violence, was adopted by the ICTR[36]. Without purporting to be exhaustive, the DRC draws the Court's attention to the following ICTR judgements, all of which refer to rape and other acts of sexual violence as acts causing serious bodily or mental harm to members of a protected group:

— In the trial judgement rendered in the *Akayesu* case, the ICTR established that "rape and sexual violence . . . constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such"[37].

— In the *Gacumbitsi* case, the ICTR recognized that sexual violence constituted an act that "causes serious bodily injury to the victim", and that the rape of Tutsi women and girls "caused serious

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[30] *Ibid.*, p. 175, para. 319.

[31] *Ibid.*, p. 167, para. 300.

[32] *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. 70, para. 158.

[33] *Ibid.*, p. 109, para. 360.

[34] ICJ, *Bosnia and Herzegovina* v. *Serbia and Montenegro* Judgment*, op. cit.*, p. 167, para. 300

[35] ICTY, *Tolimir*, Trial Judgement, *op. cit.*, p. 326, para. 737 (references omitted). See also ICTY, *The Prosecutor* v. *Radoslav Brđanin*, Judgement, Trial Chamber II, 1 Sept. 2004, IT-99-36-T, pp. 289-290, para. 690; ICTY, *Popović et al.*, Trial Judgement, *op. cit.*, p. 328, para. 812; ICTY, *Karadžić*, Trial Judgement, *op. cit.*, pp. 206-207, para. 545.

[36] ICTR, *Rutaganda*, Trial Judgement, *op. cit.*, p. 26, para. 51. See also ICTR, *The Prosecutor* v. *Alfred Musema*, Judgement and Sentence, Trial Chamber I, 27 Jan. 2000, ICTR-96-13-T, p. 54, para. 156; ICTR, *Kayishema and Ruzindana*, Trial Judgement, *op. cit.*, p. 47, para. 108.

[37] ICTR, *Akayesu*, Trial Judgement, *op. cit.*, pp. 288-289, para. 731 (references omitted).

physical harm to members of the Tutsi ethnic group"[38], finding the accused responsible "for the crime of genocide by instigating the rape of Tutsi women and girls"[39].

— In the *Édouard Karemera and Matthieu Ngirumpatse* case, Trial Chamber III of the ICTR came to the following conclusion:

> "Considering the nature of the crimes and the brutal and often public manner in which they were carried out, often repeatedly and by more than one assailant, the Chamber concludes that the sexual assaults, mutilations and rapes that Tutsi women were forced to endure from April to June 1994 certainly constituted acts of serious bodily and mental harm."[40]

— In the judgement rendered in the *Seromba* case, the ICTR Appeals Chamber stated that

> "[t]he quintessential examples of serious bodily harm are torture, rape, and non-fatal physical violence that causes disfigurement or serious injury to the external or internal organs . . . Indeed, *nearly all convictions for the causing of serious bodily or mental harm involve rapes* or killings."[41]

28. In a similar vein, the *Elements of Crimes* adopted by the Assembly of States Parties to the Statute of the International Criminal Court clarify that conduct causing serious bodily or mental harm to one or more persons belonging to a protected group "may include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment"[42]. To date, the International Criminal Court has not rendered a judgment on the crime of genocide. However, in the second decision on the prosecution's application for a warrant of arrest in the *Al Bashir* case, Pre-Trial Chamber I granted the prosecution's application to issue an arrest warrant for Omar Al Bashir, who was charged*, inter alia*, with the commission of "genocide by causing serious bodily or mental harm, within the meaning of article 6 *(b)* of the Statute"[43], including through acts of rape[44].

29. In view of the foregoing, there is no doubt that rape and other acts of sexual violence committed against members of a protected group are sufficiently grave as to constitute acts causing serious bodily or mental harm within the meaning of Article II *(b)* of the 1948 Convention. This was made abundantly clear by the ICTR in its judgement in the *Akayesu* case, when it stated that "*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*"[45]. The DRC fully subscribes to this interpretation.

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[38] ICTR, *Gacumbitsi*, Trial Judgement, *op. cit.*, p. 69, para. 291. Similarly, see ICTR, *Semanza*, Trial Judgement, *op. cit.*, p. 95, para. 320.

[39] *Ibid.*, para. 292.

[40] ICTR, *The Prosecutor* v. *Édouard Karemera and Matthieu Ngirumpatse*, Judgement and Sentence, ICTR-98-44-T, Trial Chamber III, 2 Feb. 2012, pp. 300-301, para. 166[6].

[41] ICTR, *The Prosecutor* v. *Athanase Seromba*, Judgement, Appeals Chamber, 12 Mar. 2008, ICTR-2001-66-A, p. 18, para. 46 (references omitted); emphasis added. See also ICTR, *The Prosecutor* v. *Pauline Nyiramasuhuko et al.*, Judgement and Sentence, Trial Chamber II, 24 June 2011, ICTR-98-42-T, pp. 1374-1375, para. 5731.

[42] Internation Criminal Court, *Elements of Crimes*, 2013, p. 2, fn. 3.

[43] Internation Criminal Court, Situation in Darfur, Sudan, *The Prosecutor* v. *Omar Al Bashir*, Second Decision on the Prosecution's Application for a Warrant of Arrest, Pre-Trial Chamber I, 12 July 2010, ICC-02/05-01/09, p. 28.

[44] *Ibid.*, pp. 17-18, paras. 25-26 and p. 20, para. 30.

[45] ICTR, *Akayesu*, Trial Judgement, *op. cit.*, pp. 288-289, para. 731 (references omitted); emphasis added.

30. In closing, the DRC reaffirms the conclusions of its [Declaration of intervention] of 10 December 2024[46], noting that a consensus can be established on the following points:

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

2. The 1948 Convention does not require genocidal intent to be the sole or even the primary intent.

3. An express manifestation of genocidal intent is not required; such intent may be deduced or inferred from certain types of conduct or from a pattern of conduct.

4. The concept of "substantial part" of the protected group does not refer to a purely quantitative criterion but is to be interpreted in light of several factors, including quantitative, qualitative and geographic ones.

5. A State's responsibility may be engaged for the acts provided for in Article III of the 1948 Convention (conspiracy to commit genocide, incitement to commit genocide, attempt to commit genocide or complicity in genocide)[47].

31. The DRC also puts forward the following additional points, as set out in these written observations:

1. The legal instruments relating to the crime of genocide adopted since 1948 and their application can provide guidance on the interpretation of the Genocide Convention.

2. The compliance of certain elements of a genocidal act with the law of armed conflict does not preclude the establishment of genocide within the meaning of Article II of the Convention.

3. Rape and other acts of sexual violence fall within the scope of Article II of the Convention, in particular because they cause serious bodily and mental harm to victims.

Done at Kinshasa, 22 September 2025

(Signed) Ivon MINGASHANG,

Agent of the Democratic Republic of the Congo.

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[46] Declaration of intervention of the Democratic Republic of the Congo, 10 Dec. 2024, para. 115.

[47] See above, para. 4.