

INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and

Punishment of the Crime of Genocide

(The Gambia v. Myanmar)

WRITTEN OBSERVATIONS OF IRELAND

25 September 2025

To the Registrar, International Court of Justice

1. On 25 July 2025, the International Court of Justice (the ‘Court’) decided that the declaration of intervention under Article 63 of the Statute of the Court (the ‘Statute’) submitted by Ireland in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (‘these Proceedings’) was admissible.¹ The Court fixed 25 September 2025 as the time-limit for the filing of the written observations referred to in Article 86, paragraph 1, of the Rules of the Court. Accordingly, I have the honour to submit to the Court the following Written Observations on behalf of Ireland.
2. Ireland is intervening in its capacity as a Contracting Party to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the ‘Genocide Convention’ or the ‘Convention’).² The present intervention is made pursuant to Article 63 of the Statute, which involves the exercise of a right by a State party to a convention the construction of which is in question in a case before the Court.³ As determined by the Court in its Order of 25 July 2025, the construction of Articles I to VI of the Genocide Convention is in question at the merits stage of these Proceedings. The Court noted in particular that:

*‘the definition of the specific intent in Article II is relevant to the construction of the Convention. Article II is a key provision of the Convention, since it defines the acts and specific intent constituting genocide and informs several other provisions of the Convention, such as Articles I, III, IV, V and VI.’*⁴

3. In accordance with its Order of 25 July 2025, these Written Observations solely concern the construction of provisions of the Genocide Convention – specifically Articles I, II and III of the Convention, the construction of which appears to be particularly relevant to the Court’s deliberations in this case. They do not address other matters, such as the

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order on Admissibility of the Declarations of Intervention, 25 July 2025 (the ‘Order of 25 July 2025’), § 64.

² Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

³ Order of 25 July 2025, § 23.

⁴ Order of 25 July 2025, § 59.

evidentiary value of certain categories of documents, the facts in this case or the application of the Convention to them.⁵

CONSTRUCTION OF ARTICLE I FOR WHICH IRELAND CONTENDS

4. Article I of the Convention provides:

‘The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.’

5. Accordingly, Article I records the agreement of the Contracting Parties that genocide is a crime under international law and obliges them to prevent and punish it. While Article I does not expressly require that Contracting Parties must not themselves commit genocide, it has always been Ireland’s view that Article I must necessarily be construed as so requiring. This is also the construction placed on Article I by the Court itself, which found in its judgment in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (the ‘Bosnia Judgment’) that:

‘Under Article I the States parties are bound to prevent such an act, which it describes as a ‘crime under international law’, from being committed. The Article does not expressis verbis require States to refrain from themselves committing genocide. However, in the view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide. Such a prohibition follows, first, from the fact that the Article categorizes genocide as ‘a crime under international law’: by agreeing to such a categorization, the States parties must logically be undertaking not to commit the act so described. Secondly, it follows from the expressly stated obligation to prevent the commission of acts of genocide [...] It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over

⁵ Order of 25 July 2025, § 60.

*whom they have a certain influence, but were not forbidden to commit such acts through their own organs, or persons over whom they have such firm control that their conduct is attributable to the State concerned under international law. In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.*⁶

6. It follows from the above that Article I addresses genocide both as a crime under international law entailing the criminal responsibility of an individual, and as an internationally wrongful act entailing the responsibility of a State. In the same judgment, the Court referred to this ‘*duality of responsibility*’ as a ‘*constant feature of international law*.’⁷ This construction is supported by an analysis of Article IX of the Convention, which, as the Court pointed out in its *Bosnia* Judgment, confirms that ‘*Contracting Parties may be responsible for genocide and the other acts enumerated in article III*.’⁸
7. Accordingly, Ireland has construed and applied Article I of the Convention as obliging Contracting Parties to prevent and punish commission of the crime of genocide and to refrain themselves from committing genocide.
8. The obligation of a Contracting Party to prevent genocide is not limited to the prevention of genocide by persons acting on behalf of that Party or within its effective control. As the Court has clarified, the obligation to prevent genocide – while being an obligation of conduct rather than result – extends beyond preventing the acts of such persons to preventing those of any ‘*persons likely to commit, or already committing, genocide*’ whose actions it has ‘*the capacity to influence effectively*’.⁹ The Court explained that:

‘This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ Reports 2007, p. 43, § 166.

⁷ *Bosnia* Judgment, § 173.

⁸ *Bosnia* Judgment, § 169.

⁹ *Bosnia* Judgment, § 430.

*State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.'*¹⁰

9. Where the Contracting Party has such capacity to influence these actors, its '*obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.*'¹¹

10. Accordingly, State responsibility under Article I will be engaged where the State:

- (i) has itself committed genocide;
- (ii) has failed to prevent its commission by persons acting on its behalf (whether *ultra vires* or not) or within its effective control;
- (iii) failed to punish its commission by any such person; and
- (iv) failed to prevent commission of genocide by actors beyond its effective control whose actions it nevertheless has the capacity to influence effectively.

11. In Ireland's view, therefore, the Convention should be considered to be not solely a criminal law instrument that obliges Contracting Parties to establish jurisdiction over, and punish commission of, the crime of genocide by individuals acting on its behalf or within their effective control. It must also be treated as a human rights instrument that obliges States themselves not to commit genocide as well as to prevent genocide against any national, ethnical, racial or religious group (a 'protected group') within their power or under their protection and, more broadly, by any actors whose actions it has the capacity to influence effectively.

¹⁰ *Ibid.*

¹¹ *Bosnia Judgment*, § 431.

CONSTRUCTION OF ARTICLE II FOR WHICH IRELAND CONTENTS

12. Article II of the Genocide Convention provides:

'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.'*

13. Article II defines the term 'genocide' for the purposes of the Convention. It follows that the obligations imposed on Contracting Parties by other provisions of the Convention concerning the prohibition, prevention and punishment of genocide can only be understood and interpreted by reference to the meaning of that term as defined by Article II.

Specific Intent and the Crime of Genocide

14. Ireland understands that what is defined by Article II is both the crime of genocide under international law and the internationally wrongful act of genocide. It sets out both the material element of genocide and its mental element. The legal regimes governing, on the one hand, a crime under international law for which an individual may be held criminally responsible and, on the other, an internationally wrongful act entailing the international responsibility of a State, are clearly quite different and should import distinct standards of proof. Having regard to this clear difference, Ireland takes the view that different approaches to establishing the necessary mental element are required, depending on whether, in any given case, one is considering the legal responsibility of an individual or that of a State.

15. Genocide as a crime under international law is a crime of specific intent, meaning that a perpetrator must both intend to commit the act which is the basis of the crime and intend to cause the prohibited result. As may be the case in a municipal criminal code, an inference of specific intent for any such crime can be drawn from knowing or reckless commission of the prohibited act where certain criteria are met.¹²
16. The acts enumerated in Article II of the Convention, where committed with the necessary specific intent, constitute genocidal acts. For the purposes of the crime of genocide, they constitute the *actus reus* of that crime, or the material element of it. The *mens rea*, or mental element, of the crime requires that the material element be accompanied by a specific '*intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.*'¹³ As the Court has noted:

*'It is not enough to establish, for instance in terms of paragraph (a), that deliberate unlawful killings of members of the group have occurred. The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or dolus specialis; [...] The acts listed in Article II must be done with intent to destroy the group as such in whole or in part. The words "as such" emphasize that intent to destroy the protected group.'*¹⁴

17. Except in the most extreme of instances, an individual cannot realistically expect to destroy the protected group in whole or in part by his or her own actions or by acting alone. On that basis, in the great majority of cases it is likely that the individual's intent will in some way relate to a wider destructive campaign or effort, which he or she understands those actions will facilitate or to which they will contribute.¹⁵

¹² cf. Paragraph 22 *infra*.

¹³ Genocide Convention, Article II, chapeau.

¹⁴ *Bosnia* Judgment, § 187.

¹⁵ By analogy, see International Criminal Tribunal for the former Yugoslavia (the 'ICTY'), *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, § 330, where the Trial Chamber was '*satisfied that the Accused intentionally made a substantial contribution towards creating a climate where people were prepared to tolerate the commission of crimes and to commit crimes*'; and *Prosecutor v. Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, § 741, where the Majority of the Trial Chamber concluded '*that the criminal acts were not sporadic acts of soldiers out of control but were carried out pursuant to a deliberate campaign of attacking civilians, which must have emanated from a higher authority or at least had its approval.*'

18. Ireland understands the mental element of the crime of genocide as being satisfied where the perpetrator has acted deliberately, in a manner designed to destroy, or contribute to the destruction of, the protected group in whole or in part where this is his or her purpose. Additionally, in Ireland's view, specific intent can also be inferred from the commission of an act or acts in any case where a reasonable person would have known or foreseen that the certain, or natural and probable, consequence of the act or acts concerned was to so destroy or contribute to such destruction, or was reckless as to such consequences occurring.
19. Accordingly, Ireland respectfully submits that the perpetrator does not need to have, as his or her *purpose*, the commission of the crime of genocide when committing any one or more of the material elements of the crime in order to satisfy the mental element of it. The crime may also be committed where a perpetrator – regardless of his or her purpose – knows or should know that the certain, or natural and probable, consequence of these acts is to destroy – or to contribute to the destruction of – the protected group, in whole or in part, as such, and proceeds regardless.
20. This construction is reflected in the case law of relevant international criminal tribunals that have tried persons on charges of genocide. For instance, on the question of specific intent (*dolus specialis*), the International Criminal Tribunal for Rwanda (the 'ICTR') in the case of *Prosecutor v. Akayesu* found that an '*offender is culpable because he knew or should have known that the act committed would destroy, in whole or in part, a group.*'¹⁶
21. It is evident also from the drafting history of the Convention that the term *intent* is not limited to the *purpose* of the perpetrator, but can also comprehend knowledge of the inevitable or foreseeable *consequence* of the act committed.¹⁷ Accordingly, Ireland has

¹⁶ *Prosecutor v. Akayesu*, ICTR-96-4-T, Trial Chamber Judgment, 2 September 1998, § 520.

¹⁷ The formulation 'with the purpose of' was used in the first draft of the Convention (Draft Convention on the Crime of Genocide', 26 June 1947 (UN Doc. E/447)), but was substituted by 'with the intent to' in later drafts – *cf.* 'Draft Convention on Prevention and Punishment of the Crime of Genocide (drawn up by the Committee)', 19 May 1948 (UN Doc. E/AC.25/12); 'Report of the Committee and draft Convention drawn up by the Committee / Ad Hoc Committee on Genocide (Dr. Karim Azkoul – Rapporteur)', 24 May 1948 (UN Doc. E/794); and 'Genocide: draft Convention and report of the Economic and Social Council (E/794): draft resolutions / proposed by the Drafting Committee', 23 November 1948 (UN Doc. A/C.6/289). During the negotiations, a proposal was made to restore the term 'purpose' to the text but it was defeated by vote – *cf.* 'UN

construed the term '*intent*' in Article II of the Convention as not being limited to *purpose* but also encompassing *knowledge of certain or very likely consequence* too.

22. In this connection, Ireland observes that such construction also corresponds to the law regulating crimes of specific intent in Ireland.¹⁸

State Responsibility

23. By definition, only States and other entities enjoying international legal personality may commit internationally wrongful acts. The international law of State responsibility is separate to – and different from – criminal law rules on commission and complicity. In Ireland's view, establishing the international responsibility of a State for commission of – or complicity in – genocide by applying, in identical fashion, a legal definition formulated primarily for the purpose of establishing the criminal responsibility of an individual is not the appropriate approach. It is respectfully submitted that the consequence of such an approach could lead to State impunity for genocide and defeat the overall purpose of the Convention.
24. As submitted above, the crime of genocide is committed only where the perpetrator acts with the necessary specific intent. In the case of an internationally wrongful act of genocide, Ireland has construed the specific intent element of genocide as taking the form of a genocidal policy, plan or campaign, invariably demonstrated by reference to a pattern of widespread and systematic violence against – and/or ill-treatment of – the protected group. In Ireland's view this means that in order to establish State responsibility for genocide, it is not necessary to demonstrate that the State's organs, or persons or entities empowered to exercise governmental authority, possessed specific intent in the criminal sense (and to the criminal standard of proof).
25. Rather, this element of the internationally wrongful act of genocide may be established by adducing evidence, to a distinct standard of proof, of a genocidal policy, plan or campaign. Ireland submits that, in the absence of *direct evidence* of such a policy, plan

Ad Hoc Committee on Genocide: summary record of the 24th meeting, Lake Success, New York, Wednesday, 28 April 1948', 12 May 1948 (UN Doc. E/AC.25/SR.24).

¹⁸ *The People (DPP) v. Douglas and Hayes*, [1985] ILRM 25.

or campaign, this element of the internationally wrongful act of genocide may be established by consideration of *indirect* or *circumstantial evidence*, including evidence of a general pattern of widespread and systematic acts directed at the protected group that leads to their destruction, in whole or in part, from which it can be inferred that the said destruction was the intended result.

26. In Ireland's view, the role of indirect or circumstantial evidence is especially important in the context of the obligation of Contracting Parties to prevent the commission of genocide. As discussed above, the Court has clarified that the obligation of a Contracting Party to prevent the commission of genocide extends beyond the prevention of genocide by persons or authorities under the control or within the jurisdiction of that Contracting Party.¹⁹ Each Contracting Party also has an obligation to prevent the commission of genocide by other actors where it has the capacity to do so. This obligation is engaged '*at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.*'²⁰ However, in order to prevent the commission of genocide, a Contracting Party must first be able to apprehend the risk of its commission and, in this connection, will necessarily have to assess any evidence of such a risk. Needless to say, absent an open declaration of genocidal policy, any such evidence is highly likely to be indirect and circumstantial.

Only Reasonable Inference Test

27. Absent direct evidence of a general policy, plan or campaign – which is rarely available²¹ – the specific intent element of the internationally wrongful act will have to be established by way of indirect or circumstantial evidence. The Court stated in its *Bosnia* Judgment, where the Applicant in that case sought to convince it of the specific intent which it alleged inspired the actions of the Respondent State, that:

¹⁹ *cf.* Paragraph 8 *ultra*.

²⁰ *Bosnia* Judgment, § 431.

²¹ As acknowledged by the parties in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (Judgment, ICJ Reports 2015, p. 65, § 143), and by the ICTY in *Prosecutor v. Tolimir*, IT-05-88/2-T, Trial Chamber Judgment, 12 December 2012, § 745.

‘*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.*’²²

28. The Court restated this test in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)* (the ‘Croatia case’), where it said in its judgment that:

‘*for a pattern of conduct, that is to say, a consistent series of acts carried out over a specific period of time, to be accepted as evidence of genocidal intent, it would have to be such that it could only point to the existence of such intent, that is to say, that it can only reasonably be understood as reflecting that intent.*’²³

29. This has been characterised as the *only reasonable inference* test.²⁴

30. That the pattern of conduct could *only point* to the existence of such intent is not to say that it could point to such intent *only*. The human mind can of course accommodate and act upon more than one intention and the same conduct can be intended to achieve two or more results, however practically attainable each may be. It follows that it is perfectly possible that a pattern of conduct, upon examination, could point to two separate intentions, only one of which is genocidal. This possibility was recognised by Judge Bhandari in his separate opinion in the *Croatia* case where, in warning against conflating *punitive motive* with *genocidal intent*, he noted that ‘*genocidal intent may exist simultaneously with other, ulterior motives.*’²⁵ The co-existence of two or more intents does not rule out, exclude or displace either intent.

²² *Bosnia* Judgment, § 373.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports 2015, p. 151, § 510.

²⁴ *cf. Croatia* case, Judgment, § 148.

²⁵ *Croatia* case, Separate Opinion of Judge Bhandari, 3 February 2015, § 50.

31. A clear example of this is where genocide is committed during the course of a large-scale counter-terrorism operation in which, depending on the conduct of the State concerned over the course of that operation, it may be the case that two reasonable inferences could be drawn from the pattern of that conduct – firstly, that the State authorities sought to apprehend terrorist operatives and, secondly, that they intended to destroy a protected group in whole or in part, as such. Likewise, for a State engaged in an armed conflict, the pattern of its conduct may admit of two reasonable inferences – firstly, that that State sought to defeat the adverse party and, secondly, that it intended to destroy a protected group in whole or in part, as such. Indeed, this possibility was considered by Judge Cançado Trindade in the *Croatia* case:

‘One cannot characterize a situation as one of armed conflict, so as to discard genocide. The two do not exclude each other. In this connection, it has been pertinently warned that perpetrators of genocide will almost always allege that they were in an armed conflict, and their actions were taken “pursuant to an ongoing military conflict”; yet, “genocide may be a means for achieving military objectives just as readily as military conflict may be a means for instigating a genocidal plan”.’²⁶

32. If the conduct of counter-terrorism operations by State authorities or of military operations by a party to an armed conflict result in the destruction of a protected group, in whole or in part, it must follow that the Convention is not intended in such cases to exclude the possibility of the commission of genocide simply because the destruction of the group has occurred – or been attempted – during the course of such operations and no open declaration of genocidal policy was made. Nor, it is submitted, does the commission of crimes against humanity or war crimes preclude the possibility of commission of genocide by the same acts. This is not to assert that every crime against humanity or war crime also amounts to genocide. Clearly, that is not the case. However, in Ireland’s view, the mere fact of counter-terrorism operations or an armed conflict cannot preclude the possibility that genocide has been – or may be – committed. Ireland submits that, in examining a pattern of conduct during counter-terrorism or military operations, the application of the Court’s ‘*only reasonable inference*’ test

²⁶ *Croatia* case, Dissenting Opinion of Judge Cançado Trindade, 3 February 2015, § 144.

should clarify whether the pattern of conduct can only be fully explained as intended to destroy – at least in part – the protected group, not that such intent is the only explanation for that pattern of conduct. In applying the test, therefore, it should not be necessary that the acts constituting that conduct are exclusively intended to destroy the group – rather, they could also be committed with the intent of achieving one or more other objectives, including a legitimate counter-terrorism or military objective.

‘Fully Conclusive’ Standard of Proof

33. In Ireland’s view, with respect to the *‘fully conclusive’* standard of proof which the Court has developed in cases involving charges of *‘exceptional gravity’*,²⁷ special care is required in applying this standard in cases involving allegations of serious violations of human rights by State organs and by persons or entities empowered to exercise governmental authority, not least because the Convention seeks to protect essential humanitarian values.

34. As the Court explained in its *Bosnia* Judgment, this standard means that:

*‘The Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.’*²⁸

35. What Ireland understands by this is that the *‘fully conclusive’* standard of proof is the standard appropriate to a civil, international law case. It is a different standard to that required for the conviction of an individual on a charge of committing a crime under international law. It is submitted that the *‘fully conclusive’* standard is whatever is necessary for the Court to be *‘fully convinced’* that the Contracting Party concerned has breached its obligations under the Convention. In Ireland’s submission, that standard can be satisfied by consideration of a pattern of conduct that can only be fully explained as intended to destroy – at least in part – the protected group.

²⁷ cf. *Corfu Channel (United Kingdom v. Albania)*, Judgment, ICJ Reports 1949, p. 17.

²⁸ *Bosnia* Judgment, § 209.

36. While it may be argued that the standard of proof required to establish a breach of an obligation under the Convention is not a question of the construction of the Convention, in Ireland's view, it is actually one of particular importance having regard to the obligation of Contracting Parties to prevent genocide. If that obligation is to be engaged in any given case, a Contracting Party must be able to establish whether genocidal acts are being committed, or whether there is a significant risk that they will be committed. As contended above,²⁹ that inevitably requires an assessment of evidence, not just of the commission of acts enumerated in Article III, but of the intent of the relevant actors. If a criminal standard of proof were required for this exercise then, in Ireland's view, it would only be possible to prevent very few genocidal acts.
37. In addition, it may be questioned whether, having regard to the International Law Commission's 2001 draft Articles on Responsibility of States for Internationally Wrongful Acts (the 'draft Articles'),³⁰ different standards of proof are appropriate for a serious breach of an obligation arising under a peremptory norm of general international law and for conduct amounting to an internationally wrongful act. It is noteworthy that, notwithstanding the fact that questions of evidence and proof were beyond their scope, pursuant to the draft Articles the legal consequences for the State concerned for breach of a peremptory norm and for breach of any other international obligation are the same (*i.e.* cessation, non-repetition and reparation).
38. In Ireland's view, a pattern of conduct from which genocidal intent may be inferred on the part of a State should be assessed having regard to the fundamental object and purpose of the Convention, namely the prevention and punishment of genocide. Ireland respectfully submits that the Court should be open to assessing breaches of the Convention on the balance of the evidence.

²⁹ *cf.* Paragraphs 8 and 25 *ultra*.

³⁰ International Law Commission, 'Draft Articles on the Responsibility of States for Internationally Wrongful Acts', 2001.

Pattern of Conduct

39. Instances of the acts enumerated in Article II (a)-(e), together with circumstantial evidence such as statements or incitement by State organs, or persons or entities empowered to exercise governmental authority, may form a pattern of conduct from which the existence of a general policy, plan or campaign may reasonably be inferred. Absent direct evidence of a general policy, plan or campaign, the mere commission of one or more of the material acts enumerated in Article II cannot be regarded as genocidal unless indirect or circumstantial evidence of such a policy, plan or campaign is adduced. It is submitted that the severity, intensity and foreseeable consequences of these acts may provide such evidence. Ireland offers the following observations on the nature of these acts:

a) *Killing members of the group*

In its construction of the Convention, Ireland recognises that the killing of a large proportion of the protected group (or part thereof) will be a strong indicator of a policy, plan or campaign to destroy that group, in whole or in part, as such. However, the killing of a smaller proportion does not necessarily reduce cause for concern if such killings have been carried out in combination with other material acts enumerated in Article II, directed against the protected group, on a scale, of a nature and to an extent that a reasonable inference of specific intent can be drawn from them. In particular, the killing of members of the protected group, in combination with the maiming, starvation, impregnation and/or imposition of long-term psychological damage on other members of the group, in a systematic manner directed at that group, will be a clear factor in assessing the existence of a policy, plan or campaign.

b) *Causing serious bodily or mental harm to members of the group*

- i. The Court has acknowledged that a wide range of different acts may cause serious mental or bodily harm within the meaning of Article II (b) and Ireland has construed this provision accordingly. In its *Bosnia* Judgment, the Court expressly held that the following acts, conducted systematically, were capable

of satisfying the material elements of Article II (b): ‘*massive mistreatment, beatings, rape and torture causing serious bodily and mental harm*’.³¹

- ii. The Court noted in the same Judgment that there was no dispute between the Parties that rape and sexual violence could also constitute the material elements of genocide, where accompanied by the requisite specific intent.³² It recalled also that, in the jurisprudence of the ICTR and the ICTY, the language of Article II (b) of the Convention, as replicated in the Statutes of those Tribunals, was interpreted as encompassing a broad range of criminal acts.³³
- iii. Additionally, the ICTY (in *Prosecutor v. Karadzic*) found 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 the corresponding provision of the Statute of that tribunal.³⁴

c) ***Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part***

In respect of Article II (c) of the Convention, Ireland contends that the imposition of conditions of life calculated to bring about its physical destruction must also be construed and applied broadly. The Court has recognised Article II (c) as including ‘*methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group*’.³⁵ In its *Bosnia* Judgment, the Court, while declining to reach a finding of genocide against the Respondent in that case, acknowledged that acts of encirclement, shelling and starvation could constitute material elements of genocide for the purposes of Article II (c).³⁶ Again, the conditions of life imposed on the protected group, in whole or in part, will have different impacts on different

³¹ *Bosnia* Judgment, § 319.

³² *Bosnia* Judgment, § 300.

³³ *Ibid.*

³⁴ *Prosecutor v. Karadzic*, IT-95-5/18-T, Trial Chamber Judgment, 24 March 2016, § 545.

³⁵ *Croatia* case, Judgment, § 161.

³⁶ *Bosnia* Judgment, § 324.

categories of group members, with vulnerable members such as children being more susceptible to adverse conditions, such as starvation.

d) *Foreseeability of the probable consequences of the conduct concerned*

In Ireland's view, when considering whether a pattern of conduct can provide indirect or circumstantial evidence of a genocidal policy, plan or campaign, it is essential to assess whether the foreseeable and probable consequences of the conduct concerned will lead to the destruction of the protected group, in whole or in part. Where such destruction is the reasonably foreseeable result, it is a strong indicator of the existence of a genocidal policy, plan or campaign, as will be the failure to stop or prevent the continuation of the conduct concerned. This is particularly the case where, in proceedings under the Convention, the Court has indicated provisional measures that the Respondent State subsequently fails to implement.

e) *Particular effects of conduct on children*

- i. In assessing whether a pattern of conduct may disclose a genocidal policy, plan or campaign, Ireland respectfully submits that extra weight should be given to evidence of the effects of the material acts of genocide on children, and on the consequences of such acts for the long term viability of the protected group. This is especially important in the context of armed conflict where recent studies have concluded that children are up to seven times more likely to be killed by explosive weapons, and that hunger and malnutrition affects them much earlier and more severely.³⁷
- ii. Where there is evidence that children of the protected group have been particularly targeted, or that the conduct targeting the group made no distinction between child and adult members of it, certain conclusions can be drawn. As

³⁷ *cf.* For instance Guha-Sapir et al (2018) 'Patterns of civilian and child deaths due to war-related violence in Syria: a comparative analysis from the Violation Documentation Center dataset, 2011-16', *The Lancet Global Health*, Volume 6, ISSUE 1; and '2024 Global Report on Food Crises', Food Security Information Network (FSIN) and Global Network against Food Crises, 2024.

children are essential to the continued existence of any human group, acts constituting the material elements of genocide directed at, or without making distinction for, child members of the group will clearly have a significantly greater impact on the resilience and ultimate survival of the group than the same acts directed at a similar or larger number of adult members of that group. Moreover, the psychological effects of these acts on surviving children may greatly impair their capacity to contribute to the growth of the group in the future. It therefore follows that certain inferences can reasonably be drawn from acts directed against, or failing to distinguish, child members of the group.

f) *Impact on victims*

- i. As regards the severity of the impact of these acts on victims, the Court, in its *Bosnia* Judgment, cited in full the relevant paragraph of the ICTR in *Prosecutor v. Akayesu* in which it stated that rape and sexual violence constitute particularly egregious acts for the purposes of Article II (b),³⁸ while also noting the *dicta* of the ICTY in *Prosecutor v. Stakić* that:

‘Causing serious bodily and 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. The harm inflicted need not be permanent and irremediable.’³⁹

- ii. In the context of the impact on victims subject to the offence of rape, in particular, the ICTR in *Prosecutor v. Akayesu* found that:

‘These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi

³⁸ *Bosnia* Judgment, § 300, quoting *Prosecutor v. Akayesu*, § 731.

³⁹ *Prosecutor v. Stakić*, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, § 516.

*women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.*⁴⁰

- iii. In its construction of Article II (b) both the Court and relevant international criminal tribunals have developed a broad approach to what may constitute a material act causing ‘*serious bodily or mental harm.*’ As set out above, in its *Bosnia* Judgment the Court construed Article II (b) to admit of a wide range of different acts, clarifying that they were capable of constituting the material element of genocide.
- iv. Ireland draws particular attention in any assessment of specific intent to the factor of intensity of attacks against a protected group as an indicator of genocidal intent or of a plan or policy. In *Prosecutor v. Galić*, for instance, in a passage quoted with approval by the Court in the *Bosnia* Judgment,⁴¹ the ICTY found that:

*‘the attacks on civilians were numerous, but were not consistently so intense as to suggest an attempt by the SRK to wipe out or even deplete the civilian population through attrition [...] the only reasonable conclusion in light of the evidence in the Trial Record is that the primary purpose of the campaign was to instil in the civilian population a state of extreme fear’.*⁴²

- v. Another important factor in Ireland’s construction of Article II (b) is the severity of impact of the acts in question on different categories of the protected group, particularly on children and young adults. In this regard, the Court may consider the relative effect of these acts on more vulnerable victims, the impact of which is clearly considerably greater.

⁴⁰ *Prosecutor v. Akayesu*, § 731.

⁴¹ *Bosnia* Judgment, § 328.

⁴² *Prosecutor v. Galić*, IT-98-29-T, Trial Chamber Judgment, 5 December 2003, § 593.

g) *Public statements and discriminatory measures*

Regular public statements made on behalf of State organs, or by persons or entities empowered to exercise governmental authority, that denigrate the protected group, as such, or that incite hatred or fear of it should, in Ireland's view, be considered as forming a pattern of conduct from which reasonable inferences can be drawn for the purposes of the Convention.⁴³ Likewise, measures that systematically discriminate against or persecute the group should also form part of a pattern of conduct to be assessed. In its construction of the Convention, Ireland has attached importance to the role that a tolerant political environment plays in safeguarding the existence of any protected group within a wider society.

CONSTRUCTION OF ARTICLE III FOR WHICH IRELAND CONTENDS

40. Article III of the Genocide Convention provides:

'The following acts shall be punishable:

- (a) Genocide;*
- (b) Conspiracy to commit genocide;*
- (c) Direct and public incitement to commit genocide;*
- (d) Attempt to commit genocide;*
- (e) Complicity in genocide.'*

41. As a Contracting party to the Convention, Ireland has construed Article III as establishing modes of both criminal and State responsibility. As regards criminal liability, Contracting Parties are obliged to create and punish the offence of genocide itself in domestic law, as well as conspiracy, incitement, attempt and complicity. Ireland has enacted the necessary legislation to give effect to the Genocide Convention, and, *'in particular, to provide effective penalties for persons guilty of genocide or any*

⁴³ *Prosecutor v. Brđanin*, IT-99-36-T, Trial Chamber Judgment, 1 September 2004, § 330.

of the other acts enumerated in article III.’^{44,45} Moreover, Ireland acknowledges and supports the important distinction between commission of the complete offence of genocide and the inchoate offences enumerated in Article III (b)-(e).⁴⁶ In particular, Ireland recalls the Court’s clear ruling in its *Bosnia* Judgment that commission of these inchoate offences does not require the commission of the complete offence of genocide:

*‘On the other hand, there is no doubt that a finding by the Court that no acts that constitute genocide, within the meaning of Article II and Article III, paragraph (a), of the Convention, can be attributed to the Respondent will not free the Court from the obligation to determine whether the Respondent’s responsibility may nevertheless have been incurred through the attribution to it of the acts, or some of the acts, referred to in Article III, paragraphs (b) to (e). In particular, it is clear that acts of complicity in genocide can be attributed to a State to which no act of genocide could be attributed under the rules of State responsibility’.*⁴⁷

42. As regards State responsibility for the acts enumerated at paragraphs (b)-(e) of Article III, the Court in the *Bosnia* Judgment clearly recognised these acts not simply as crimes but as internationally wrongful acts for which the responsibility of a State may be entailed. In the *Bosnia* Judgment the Court did not make a finding of responsibility against the Respondent State for any such act, by reason of an insufficiency of evidence:

*‘It has not been proved that organs of the FRY, or persons acting on the instructions or under the effective control of that State, committed acts that could be characterized as ‘[c]onspiracy to commit genocide’ (Art. III, para. (b)), or as ‘[d]irect and public incitement to commit genocide’ (Art. III, para. (c)), if one considers, as is appropriate, only the events in Srebrenica.’*⁴⁸

⁴⁴ In the terms of Article V of the Genocide Convention.

⁴⁵ cf. Sections 7 and 10 of the International Criminal Court Act 2006, which replaced the Genocide Act 1973.

⁴⁶ Section 7(1) of the Criminal Law Act 1997 provides: ‘Any person who aids, abets, counsels or procures the commission of an indictable offence shall be liable to be indicted, tried and punished as a principal offender.’ Section 71 of the Criminal Justice Act 2006 contains an offence of conspiracy to commit a serious offence (both ‘indictable’ and ‘serious’ offences include the offence of genocide). Section 8 of the International Criminal Court Act 2006 also criminalises ‘crimes ancillary to genocide’. Incitement to commit an offence is itself an offence in Ireland at common law.

⁴⁷ *Bosnia* Judgment, § 381.

⁴⁸ *Bosnia* Judgment, § 417.

43. In that case, the Court considered evidence on the question of whether the relevant actors were organs of the Respondent government or persons acting on its instructions or under its effective control, but found it insufficient to establish State responsibility.⁴⁹ Clearly, however, the case establishes that where sufficient evidence is available, State responsibility may be engaged.

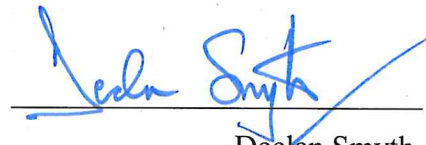
CONCLUSION

44. By way of summary, and for the reasons set out above, Ireland contends for the following construction of the Genocide Convention:

- a. Pursuant to Article I, State responsibility will be engaged where the State:
 - i. has itself committed genocide;
 - ii. has failed to prevent its commission by persons acting on its behalf (whether *ultra vires* or not) or within its effective control;
 - iii. failed to punish its commission by any such person; and
 - iv. failed to prevent commission of genocide by actors beyond its effective control whose actions it nevertheless has the capacity to influence effectively.
- b. The obligation to prevent genocide is an obligation of conduct, not result.
- c. Article II of the Convention defines both the crime of genocide under international law and the internationally wrongful act of genocide.
- d. The crime of genocide is one of specific intent, meaning that a perpetrator must both intend to commit the act, which is the basis of the crime, and intend to cause the prohibited result.

⁴⁹ *Bosnia Judgment*, §§ 416 *et seq.*

- e. Specific intent may be inferred where the perpetrator of the material element of the crime knew or should have known of the certain or likely consequences of his or her acts.
- f. The corresponding element of the internationally wrongful act of genocide may be established by adducing direct or indirect evidence of a genocidal policy, plan or campaign.
- g. In the absence of direct evidence, the intent element may be inferred from a pattern of conduct; however, that such a pattern of conduct should *only point* to the existence of the relevant intent is not to say that it could point to such intent *only*. Human actions may reasonably be explained by reference to two or more intentions.
- h. In assessing whether a pattern of conduct may disclose a genocidal policy, plan or campaign, extra weight should be given to evidence of the effects of the material acts of genocide on children, and on the consequences of such acts for the long-term viability of the protected group.
- i. Article III of the Convention establishes modes of both criminal and State responsibility.



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