JOINT DECLARATION OF INTERVENTION OF

CANADA, THE KINGDOM OF DENMARK, THE FRENCH REPUBLIC, THE FEDERAL REPUBLIC OF GERMANY, THE KINGDOM OF THE NETHERLANDS, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

Pursuant to Article 63 of the Statute of the International Court of Justice

In the case of

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

(THE GAMBIA v. MYANMAR)

To the Registrar of the International Court of Justice ("the Court"), the undersigned being duly authorized by Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland:

1. On behalf of Canada, the Kingdom of Denmark ("Denmark"), the French Republic ("France"), the Federal Republic of Germany ("Germany"), the Kingdom of the Netherlands ("the Netherlands"), and the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") (together "the Declarants"), we have the honour to submit to the Court a Joint Declaration of Intervention pursuant to the right to intervene set out in Article 63(2) of the Statute of the International Court of Justice (the "Statute"), in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar)*.

2. Article 82(2) of the Rules of Court (the "Rules") provides that a declaration of a State's desire to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall specify the case and the convention to which it relates and shall contain:

(a) particulars of the basis on which the declarant State considers itself a party to the convention;
(b) identification of the particular provisions of the convention the construction of which it considers to be in question;
(c) a statement of the construction of those provisions for which it contends;
(d) a list of documents in support, which documents shall be attached.

3. Those matters are addressed in sequence below, following some preliminary observations.

I. Preliminary observations

4. On 11 November 2019, the Republic of The Gambia ("The Gambia") instituted proceedings against the Republic of the Union of Myanmar ("Myanmar") in relation to a dispute concerning the

latter's violation of the *Convention on the Prevention and Punishment of the Crime of Genocide*[1] (the "Genocide Convention").[2]

5. According to its Application instituting proceedings, The Gambia considers that Myanmar "is responsible for violations of its obligations under the Genocide Convention, including Articles I, III, IV, V and VI."[3]

6. On 24 January 2020, pursuant to Article 63(1) of the Statute, the Registrar notified the Declarants, as States Parties to the Genocide Convention, that The Gambia "seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide [...] and alleges that the Respondent has violated Articles I, III, IV, V and VI of the Convention," concluding that "[i]t therefore appears that the construction of this instrument will be in question in the case."[4]

7. By this Declaration, the Declarants jointly avail themselves of the right to intervene in the dispute between The Gambia and Myanmar under Article 63(2) of the Statute, as States Parties to the Genocide Convention.

8. The Court has recognized that Article 63 confers a right of intervention[5] where the State seeking to intervene confines its intervention to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case."[6] The Court has also held that, "in accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention."[7]

9. Furthermore, bearing in mind the *jus cogens* character of the prohibition of genocide,[8] and the *erga omnes partes* nature of the obligations under the Genocide Convention, all States Parties have a common interest in the accomplishment of the high purposes of the Genocide Convention. In its order on provisional measures in the present case, the Court made the following statement relative to the interests of all States Parties to the Genocide Convention:

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

[2] Application instituting proceedings, filed in the Registry of the Court on 11 November 2019, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar).*

[3] *Ibid*, para 111.

[4] Letters of 24 January 2020 from the Registrar of the Court to the Ambassadors of Canada, Denmark, France, Germany and the United Kingdom to the Netherlands and the Minister of Foreign Affairs of the Kingdom of the Netherlands.

[5] *Haya de la Torre (Colombia v. Peru),* Judgment, I.C.J. Reports 1951, p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1981, p. 13, para. 21; *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, para. 7.

[6] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1981, p. 15, para. 26.

[7] *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, para. 7.

[8] *Armed activities on the territory of the Congo (New application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction of the Court and admissibility of the application*, Judgment, I.C.J. Reports 2006, p. 32, para. 64.

> The Court recalls that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it observed that "[i]n such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention." [...] In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.[9]

10. It is in this context, as States Parties to the Genocide Convention, that the Declarants put forward their Joint Declaration of Intervention. Given their common interest in the accomplishment of the high purposes of the Convention, as well as their consequent interest in its construction, the Declarants wish to avail themselves of the right of intervention in this case with the limited objective of placing before the Court their interpretation of the relevant provisions of the Convention.

11. On 11 November 2020, Canada and the Netherlands informed the Court, by means of a letter to the Registrar, of their intention to intervene jointly and requested that they be furnished with copies of pleadings and documents when they were filed with the Court in the case.[10] This request was denied.[11] The Declarants thus reserve their rights to supplement or amend this Joint Declaration, and any associated Written Observations submitted with respect to it, as they consider necessary in response to any development in the proceedings.

12. This Joint Declaration has been filed as soon as possible, and in any event well before the date fixed for the opening of the oral pleadings, in accordance with Article 82, paragraph 1, of the Rules.

II. The Case and Convention to which this Declaration Relates

13. This Joint Declaration relates to the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, instituted by The Gambia on 11 November 2019 against Myanmar. That case concerns the interpretation, application, and fulfilment of the Genocide Convention.

14. As States Parties to this Convention, the Declarants have a common interest in the construction of this Convention resulting from the case brought by The Gambia. The Declarants are accordingly exercising their right to intervene in these proceedings pursuant to Article 63(2) of the Statute. The Joint Declaration is directed at the questions of construction of the Genocide Convention arising in this case.

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[9] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures,* Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para. 41. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections*, Judgment of 22 July 2022, I.C.J. Reports 2022, p. 477, paras. 106-107.

[10] Letter of 11 November 2020 from the Governments of Canada and the Netherlands to the Registrar of the Court.

[11] Letter of 27 November 2020 from the Registrar of the Court to the Governments of Canada and the Netherlands.

III. Basis on which the Declarants are States Parties to the Genocide Convention

15. In accordance with Article XI of the Genocide Convention:

(a) Canada signed the Convention on 28 November 1949 and deposited its instrument of ratification with the Secretary-General of the United Nations on 3 September 1952;

(b) Denmark signed the Convention on 28 September 1949 and deposited its instrument of ratification with the Secretary-General of the United Nations on 15 June 1951;

(c) France signed the Convention on 11 December 1948 and deposited its instrument of ratification with the Secretary-General of the United Nations on 14 October 1950;

(d) Germany signed the Convention on 9 October 1954 and deposited its instrument of accession with the Secretary-General of the United Nations on 24 November 1954;

(e) The Netherlands deposited its instrument of accession to the Genocide Convention with the Secretary-General of the United Nations on 20 June 1966; and

(f) The United Kingdom deposited its instrument of accession to the Genocide Convention with the Secretary-General of the United Nations on 30 January 1970.

16. The Genocide Convention entered into force for the Declarants on the ninetieth day following the deposit of their respective instruments of ratification and accession. Accordingly, the Declarants are States Parties to this Convention. None of the Declarants have filed any reservations to the Convention.

IV. The Provisions of the Genocide Convention in Question in the Present Case

17. In its Application, The Gambia alleges violations of the Genocide Convention through "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group."[12] Specifically, The Gambia argues that:

> from around October 2016 the Myanmar military (the 'Tatmadaw') and other Myanmar security forces began widespread and systematic 'clearance operations' — the term that Myanmar itself uses — against the Rohingya group. The genocidal acts committed during these operations were intended to destroy the Rohingya as a group, in whole or in part, by the use of mass murder, rape and other forms of sexual violence, as well as the systematic destruction by fire of their villages, often with inhabitants locked inside burning houses. From August 2017 onwards, such genocidal acts continued with Myanmar's resumption of 'clearance operations' on a more massive and wider geographical scale.[13]

18. In its Application, The Gambia also alleges that Myanmar "is responsible for violations of its obligations under the Genocide Convention, including Articles I, III, IV, V and VI."[14]

19. In light of the above, the proper construction of Articles I, II, IV, V and VI of the Genocide Convention is in question in the case and is directly relevant to the resolution of the dispute placed before the Court by The Gambia's Application.

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[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Application instituting proceedings, 11 November 2019, para. 2.

[13] *Ibid,* para. 6.

[14] *Ibid*, para. 111.

20. These Articles provide:

> Article I
> 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.
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> Article II
> 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.
>
> Article IV
> Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.
>
> Article V
> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.
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> Article VI
> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

V. The Construction of the Provisions for which the Declarants Contend

21. The Declarants have based their construction of the Genocide Convention on the general rules of interpretation of treaties, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties ("VCLT").[15] Pursuant to Article 31(3)(b) of the VCLT, such interpretation must take account of the subsequent practice of the parties to the treaty to the extent that this establishes the agreement of the parties regarding the treaty's interpretation, as well as any relevant rules of international law applicable in the relations between the parties. Pursuant to Article 32 of the VCLT, in certain circumstances, recourse may also be had to supplementary means of interpretation, including the preparatory work of the treaty.

[15] Vienna Convention on the Law of Treaties (Vienna, 1969), UNTS v. 1155, p. 331.

22. Pursuant to Article 31(3)(c) of the VCLT, the Declarants will support their interpretation with other relevant rules of international law applicable between the parties to the dispute, including conventional and customary international law. The Declarants will also refer to the decisions of international courts and tribunals as subsidiary means of interpretation of the Genocide Convention, pursuant to Article 38(1)(d) of the Statute.

A. Construction of Article II of the Genocide Convention

1. Underlying Acts of Genocide

(a) Genocide is not limited to killings

23. Properly construed, Article II of the Genocide Convention makes it clear that genocide may be committed by means other than killings.

24. Article II(a) of the Genocide Convention stipulates that one of the underlying acts of genocide is "[k]illing members of the group." The other underlying acts of genocide in Article II(b)-(e) refer to egregious acts other than killing. The fact that "killing" is identified in Article II(a) as one of several types of acts by which genocide may be perpetrated makes it clear that killing is not a requirement for genocide, which may also be committed by acts falling within one of the other sub-paragraphs of Article II. This means that the Genocide Convention extends to acts other than killings, such as acts of sexual and gender-based violence, as well as other acts causing serious bodily or mental harm, including torture and forced displacement, provided that the other elements of the crime of genocide are satisfied. Such acts must be considered as part of a genocidal campaign.

25. There is no hierarchy amongst the underlying acts of genocide and the legal relevance of all acts targeting a protected group must be emphasized. A narrow construction of underlying acts of genocide obscures how killings and other underlying acts can be waged together in a coordinated strategy aimed at destroying a protected group. In this regard, the International Criminal Tribunal for Rwanda ("ICTR") held, in *Prosecutor* v. *Akayesu* ("*Akayesu*"), that "contrary to popular belief, the crime of genocide does not imply the actual extermination of a group in its entirety, but is understood as such once any one of the acts mentioned in Article 2(2)(a) through 2(2)(e) is committed with the specific intent to destroy 'in whole or in part' a national, ethnical, racial or religious group."[16]

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

26. It is well established that sexual and gender-based violence may fall within the underlying acts of genocide.[17] The ICTR stressed in *Akayesu* that rape and sexual violence are capable of constituting underlying acts of genocide in the same way as any other act falling within the sub-

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

[17] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, paras. 158 and 166; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, paras. 300-302; *Prosecutor v. Akayesu,* (Case No. ICTR-96-4-T), 2 September 1998, para. 731.

paragraphs of Article II, provided that it is perpetrated with the specific intent to destroy, in whole or in part, a particular group targeted as such.[18]

27. Sexual violence is often a cornerstone of genocidal campaigns because of its devastating effects on women, families, and communities. It often results in severe social stigma and can be used to humiliate, dominate, instill fear in, disperse and/or forcibly relocate members of a targeted group.[19]

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

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

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

30. The Court has confirmed that "rape and other acts of sexual violence are capable of constituting the *actus reus* of genocide within the meaning of Article II(b) of the Convention."[20] In *Bosnia v. Serbia*, the Court referred, in support of this proposition, to the following passage from *Akayesu*, in which the ICTR specifically recognized that rape and sexual violence may give rise to "bodily" and/or "mental" harm that is "serious" within the meaning of Article II(b):

> Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.[21]

31. In *Akayesu*, the ICTR further stated that "rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person,"[22] highlighting the "serious [...] mental harm" that such acts inflict.

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

[19] Resolution 1820 on Women, Peace and Security, adopted by the United Nations Security Council on June 19, 2008, recognizes that women and girls are "particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group." (PP6) The resolution acknowledges that rape and other forms of sexual violence "can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide." (OP4)

[20] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 158. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, paras. 300-302.

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

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

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

32. Article II(c) identifies "[d]eliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" as a category of underlying acts of genocide. The Declarants contend that the perpetration of sexual and gender-based violence is capable of falling within this description, as recognized by the Court.[23]

33. Given their ordinary meaning, the words "physical destruction" in Article II(c) are not limited to cases where members of the group immediately die as a result of the "conditions of life" inflicted on the group. Indeed, in *Kayishema*, the ICTR found that even though rape may not "immediately lead to the death of members of the group," it could nevertheless be a method of inflicting conditions of life calculated to bring about the destruction of the group in whole or in part under Article II(c).[24]

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

34. Article II(d) characterizes "measures intended to prevent births within the group" as an underlying act of genocide. The Court has specifically recognized that rape and sexual violence can be a measure intended to prevent births within the meaning of Article II(d) of the Genocide Convention.[25]

35. Clearly, measures will "prevent births" within the group if they create physical barriers to reproduction. International criminal tribunals have found that Article II(d) encompasses measures intended to diminish the capacity of the group to "reproduce normally,"[26] which must capture measures that undermine physical reproductive capacity.

36. International criminal tribunals have also held that the "measures" referred to in Article II(d) "may be physical, but can also be mental."[27] That is why, in *Akayesu,* the ICTR listed the measures intended to prevent births within the group as including not just measures directed towards a physical ability to procreate, but also those directed at a mental willingness to do so, consisting of rape; sexual mutilation; the practice of sterilization; forced birth control; separation of the sexes; prohibition of marriages; impregnation of a woman to deprive group identity (forced impregnation); and mental trauma resulting in a reluctance to procreate.[28] The ICTR noted in particular that "rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."[29]

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[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, paras. 161 and 166.

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

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

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

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

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

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

37. The Declarants further submit that, when assessing the role of rape and sexual violence as a measure intended to prevent births, consideration must be given to the cultural and social environment in which it occurs. The cultural and social context can be relevant to the determination of the impact of rape and sexual violence on the victims and its role in preventing births.[30]

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

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

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

39. The Declarants submit that, when applied to children, the term "serious bodily or mental harm" ought to be interpreted in light of the distinctive needs and vulnerabilities of children. The Court has held that for harm to be "serious" it "must be such as to contribute to the physical or biological destruction of the group, in whole or in part."[31] The International Criminal Tribunal for the former Yugoslavia ("ICTY") adopted a similar approach in *Prosecutor* v. *Tolimir*.[32] The Declarants contend that, when considering whether an act is "serious" or tends to contribute to the physical or biological destruction of a group, it is necessary to take into account not only the nature of the act but also the specific situation or position of the victims, particularly where they are children, as children have a higher susceptibility to harm. This susceptibility is acknowledged in, for example, the preamble to the United Nations Convention on the Rights of the Child, which states: "Bearing in mind that, as indicated in the Declaration of the Rights of the Child, 'the child, by reason of his physical and mental immaturity, needs special safeguards and care'."

40. In particular, the Declarants submit that there is a lower threshold for "serious bodily or mental harm" when the victim is a child. Thus, certain acts which may not meet the threshold of "seriousness," or which may not be regarded as contributing to the physical or biological destruction of the group when done to adults, might be regarded as meeting those thresholds when done to children. It is important to adopt a construction which recognizes that what it means for a child to suffer "grave and long-term disadvantage to [their] ability to lead a normal and constructive life"[33] may be different than for an adult.

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[30] *Prosecutor* v. *Akayesu,* (Case No. ICTR-96-4-T), 2 September 1998, para. 507. In this case, the ICTR stressed the social and cultural impact of rape in Rwanda, noting that "in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother's group."

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

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

[33] *Prosecutor* v. *Krajišnik*, (Case No. IT-00-39-T), Trial Chamber, 27 September 2006, para. 862, cited at *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 157.

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

41. The Court has already recognized that "Article II(c) of the Convention, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group."[34] Examples of such conduct recognized by the ICTR include "subjecting a group of people to a subsistence diet, systematic expulsion from homes and the induction of essential medical services below minimum requirement."[35]

42. The Declarants submit that, as with Article II(b) of the Genocide Convention, the conditions of life that will bring about the physical destruction of members of a group will depend on the characteristics of members of the group. When considering the deprivation of food or the imposition of a subsistence diet, it would be relevant to consider that the amount of food that would ultimately lead to the death of an adult is different than that which would lead to the death of a child. Similarly, the medical needs of children are different than those of adults, and account needs to be taken of those differences in considering whether the absence of particular medical services amounts to the imposition of conditions of life that would bring about the destruction of specific members of the group.

43. Turning to forced displacement, while the forced displacement of members of a group does not, without more, amount to an underlying act of genocide (see further below), the Court has recognized that such displacements may "[take] place in such circumstances that they [are] calculated to bring about the physical destruction of the group," stating that "[t]he circumstances in which the forced displacements [are] carried out are critical in this regard."[36] The circumstances of forced displacement could be such that it becomes evident that it will, and is calculated, to bring about the death and physical destruction of members of the group, even if such displacement did not bring about the death of adults. A situation in which children are unable to survive might additionally lead to the inability of the group as a whole to regenerate itself, thus falling within the scope of Article II(c).

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

44. Forced displacement includes both the physical displacement or deportation of members of the group carried out by the perpetrator, and the displacement of members of the group caused by other acts of the perpetrator. Acts by the perpetrator such as mistreatment, persecution or forms of violence, including sexual or gender-based violence, causing members of the group to flee a place can constitute forced displacement. Depending on the circumstances, such displacement can lead to an underlying act of genocide (as outlined below), and can constitute evidence of specific intent (as outlined in section 2(e) of this Joint Declaration).

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

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

[35] *Prosecutor* v. *Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 506.

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

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

46. In relation to Article II(b), the ICTY noted that "forced displacement may – depending on the circumstances of the case – inflict serious mental harm, by causing grave and long-term disadvantage to a person's ability to lead a normal and constructive life so as to contribute or tend to contribute to the destruction of the group as a whole or a part thereof."[37]

47. In relation to Article II(c), the Court has held that deliberate infliction on the group of conditions of life calculated to bring about its physical destruction in whole or in part, covers methods of physical destruction, other than killing, whereby the perpetrator ultimately seeks the death of the members of the group, such as via their expulsion from their homes.[38] Importantly, the opportunity to destroy a protected group is not based solely on the immediate effects of a perpetrator's acts. A perpetrator may allow some group members to flee, but if those members are subsequently subjected to conditions of life calculated to bring about their physical destruction, these acts may fall within the scope of Article II(c) of the Genocide Convention.

2. The specific intent to destroy, in whole or in part, a group, as such

(a) The framework for assessing specific intent

48. A distinguishing feature of genocide is the requirement that a perpetrator must intend, when committing one or more underlying acts of genocide, to destroy a protected group in whole or in part, as such. As the Court has noted, specific intent is the "essential characteristic of genocide, which distinguishes it from other serious crimes."[39] In its jurisprudence, the Court has identified factors that inform the interpretation of this "essential characteristic." Three aspects, outlined below, are of particular relevance.

49. First, the Declarants submit that specific intent can be established on the basis of circumstantial evidence. In this regard, in *Croatia* v. *Serbia*, the Court noted the parties' "agree[ment] that [...] the dolus specialis may be established by indirect evidence, i.e. deduced or inferred from certain types of conduct."[40] Both in that case and in *Bosnia* v. *Serbia*, the Court went to significant lengths to assess whether such specific intent could be inferred. The Court's approach in these two cases reflects a general feature of jurisprudence concerning genocide: while "general plans" or official governmental policies can yield direct evidence, genocidal intent is rarely formulated expressly. In *Croatia* v. *Serbia*, the parties accepted "that such [genocidal] intent will

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

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

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

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

seldom be expressly stated."[41] In the same vein, Trial and Appeals Chambers of the ICTY have noted, respectively, that "[i]ndications of [...] [genocidal] intent are rarely overt,"[42] and that, "by its nature, genocidal intent is not usually susceptible to direct proof."[43]

50. The Declarants agree with these observations, which rightly emphasize that circumstantial evidence will typically be highly significant in drawing inferences of specific intent. This must be borne in mind by international courts and tribunals when assessing allegations of genocide and should inform their approach to the standards governing the assessment of evidence. In this regard, the Court has identified aspects of the standard to infer specific intent, stressing that "in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question."[44]

51. Second, the Declarants note that the Court's approach has prompted mixed reactions among commentators, some of whom take the view that the standard of "the only inference that could reasonably be drawn" sets the bar unduly high.[45] The Declarants submit that, precisely because direct evidence of genocidal intent will often be rare, it is crucial for the Court to adopt a balanced approach that recognizes the special gravity of the crime of genocide, without rendering the threshold for inferring genocidal intent so difficult to meet so as to make findings of genocide near-impossible. The Declarants believe that the standard adopted by the Court in *Croatia* v. *Serbia* can, read properly, form the basis of such a balanced approach.

52. In this regard, the Declarants note that the Court's express reference to a "reasonableness criterion" is key to a balanced approach. The Court highlights the central importance of reasonableness by observing that "[t]he notion of 'reasonableness' must necessarily be regarded as implicit in the reasoning of the Court,"[46] not least to avoid an approach that would make it "impossible to reach conclusions by way of inference."[47] Thus, when determining whether or not specific intent can be inferred from conduct, a court or tribunal must weigh the evidence before it, and filter out inferences that are not reasonable. Put differently, the "only reasonable inference" test applies only between alternative explanations that have been found to be reasonably supported by the evidence.

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

[42] *Prosecutor* v. *Zdravko Tolimir*, (Case No. IT-05-88/2-T), Trial Chamber Judgment, 12 December 2012, para. 745.

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

[44] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia),* Judgment, I.C.J. Reports 2015, p. 3, at para. 148. See already *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 373.

[45] See Judge Cancado Trindade Dissenting Opinion in *Croatia v. Serbia, I.C.J. Reports 2015*, at pp. 360-361, para. 467 (arguing that "the International Court of Justice seems to have imposed too high a thresho ld for the determination of *mens rea* of genocide, which does not appear in line with the *jurisprudence constante* of international criminal tribunals on the matter").

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

[47] *Ibid.*

53. Furthermore, it is worth observing that the Court stated that the "only reasonable inference" test should be used with respect to drawing an inference of specific intent from a "pattern" of conduct only. This cannot be the threshold of the test when other methods of inference are also present, such as when examining the scope and severity of a perpetrator's conduct to evidence specific intent.

54. Third, when assessing whether specific intent can be inferred, a court or tribunal must assess the evidence available to it comprehensively and holistically. The jurisprudence of international criminal tribunals demonstrates that this approach is not only desirable, but an important element of the sound administration of justice. In this respect, the Declarants agree with the approach of the ICTY Appeals Chamber, which required trial chambers to assess "whether all of the evidence, taken together, demonstrated a genocidal mental state," while noting that a "compartmentalized mode of analysis [would] obscur[e] the proper inquiry."[48]

55. Beyond these general considerations, the Court's jurisprudence has clarified the relevance of a number of factors that can assist in establishing specific intent. The Declarants submit that the factors detailed below should guide the Court in the interpretation of the specific intent requirement outlined in Article II of the Genocide Convention.

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

56. Large-scale killing of group members is the most obvious and immediate manifestation of an intention to destroy a group in whole or in part. Nonetheless, the Declarants submit that other acts such as injuring, sterilizing, or impregnating members of the targeted group may also strongly evidence an intent to destroy the group to which they belong. Beyond killing, evidence of other acts committed against a targeted group can be equally relevant to the determination of specific intent. Moreover, the presence of several underlying acts of genocide can also be indicative of genocidal intent. Accordingly, the Declarants submit that the specific intent requirement in Article II should be construed in such a way that the overall factual picture is taken into account, rather than each individual incident or alleged underlying act of genocide being considered in isolation.[49]

57. The Declarants also submit that contextual factors such as the scale and nature of the atrocities constitute indicators of specific intent. As noted above, specific intent is rarely proven through direct evidence, and is frequently inferred from all the facts and circumstances.[50] In this regard, the ICTY found that "absent direct evidence, the intent to destroy may be inferred from a number of facts and circumstances, such as the general context, the perpetration of other culpable acts systematically directed against the same group, the scale of atrocities committed, the

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

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

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

systematic targeting of victims on account of their membership in a particular group, or the repetition of destructive and discriminatory acts."[51]

58. The Court has also found that, in the absence of direct proof of intent, "there must be evidence of acts on a scale that establishes an intent not only to target certain individuals because of their membership to a particular group, but also to destroy the group itself in whole or in part."[52] In assessing the scale and nature of relevant acts, international courts have taken into consideration a number of factors in addition to the number of individuals seriously injured or dead,[53] including the number of assailants involved,[54] the number of prohibited and other culpable acts "in close geographical and temporal proximity,"[55] and the intensity of the attack as well as the systemic and discriminatory nature of the attack.[56]

59. The Declarants submit that the question of scale – as a basis on which to infer intent – does not relate solely to killings. The number of victims killed is merely a starting point in considering the scale and nature of the atrocities.[57] In fact, in undertaking a quantitative assessment of the other relevant factors, the victimized population should be taken to include all victims targeted by the various underlying acts of genocide and not be limited to those victims who were killed.

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

> "the offence of genocide does not require proof that the perpetrator chose the most efficient method to accomplish his objective of destroying the targeted part. Even where the method selected did not implement the perpetrator's intent to the fullest, leaving that destruction incomplete, this ineffectiveness alone does not preclude a finding of genocidal intent."[58]

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

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

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[51] *Prosecutor* v. *Popović*, (Case IT-05-88-T), 10 June 2010, para. 823. Also see *Prosecutor* v. *Popović*, (Case IT-05-88-A), 30 January 2015, para. 503.
[52] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 139.
[53] *Prosecutor* v. *Muhimana* (Case No. ICTR-95-1B-T, trial judgment), 28 April 2005, para. 516.
[54] *Prosecutor* v. *Muhimana* (Case No. ICTR-95-1B-T, trial judgment), 28 April 2005, para. 516.
[55] *Prosecutor* v. *Mladic* (Case No. IT-09-92-T, trial judgement), 22 November 2017, para. 3515.
[56] *Prosecutor* v. *Mladic* (Case No. IT-09-92-T, trial judgement), 22 November 2017, para. 3515.
[57] *Prosecutor* v. *Krstić,* (Case No. IT-98-33-A), Judgement, 19 April 2004, para. 12. See also *Prosecutor v. Mladic,* (Case No. MICT-13-56-A), 8 June 2021, para. 576.
[58] *Prosecutor* v. *Krstić,* (Case No. IT-98-33-A), Judgement, 19 April 2004, para. 32.

biological destruction of the group. It is noteworthy that the scope of the Genocide Convention covers not only physical but also biological destruction of a targeted group, as further elaborated upon below.

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

63. In the context of Article II, the word "destroy" encompasses both the physical and the biological destruction of the targeted group.[59] Whereas physical destruction focuses on the annihilation of the existing group, biological destruction is aimed at the regenerative power of the group. The Court has confirmed that an intent to destroy the group, in whole or in part, can manifest itself in measures that "have consequences for the group's capacity to renew itself, and hence to ensure its long-term survival."[60] Other courts have also inferred specific intent from the long-term implications of underlying acts of genocide on a targeted group, including its regenerative power and capacity to ensure its long-term survival.[61] The Declarants submit that sexual and gender-based violence can affect a group's ability to regenerate itself. It can directly affect the physical ability to procreate and can create other barriers to procreation, including through the impacts of social stigma.

64. The Declarants also contend that the fact that sexual and gender-based violence is not capable of advancing any military objective means that it can provide compelling evidence of specific intent to destroy a protected group.[62] Furthermore, sexual and gender-based violence may reveal an intent to physically and/or biologically destroy a protected group given its impact not only on individuals but also on the group itself. Sexual violence, when employed as a genocidal strategy, aims to destroy the victim as an incremental step to annihilating the group, as confirmed in *Akayesu*.[63] It is simultaneously an assault on the victim and on the existence of the group and can therefore be used as a strategy of genocide.

65. As recognized by the United Nations Security Council in resolution 1820 (2008), sexual and gender-based violence can be used to humiliate, subordinate, and destroy entire communities.[64] It causes chaos and terror, makes people flee, projects the dominance of the perpetrator group, and ostracizes survivors from their community. As a result, sexual and gender-based violence can lead to the destruction of a protected group, can evince a specific intent, and can thus amount to genocide.

66. In this regard, in *Akayesu*, the ICTR held that "sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole."[65] The ICTR added that "sexual

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[59] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 136.
[60] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 136.
[61] *Prosecutor v. Karadzić*, (Case No. IT-95-5/18-T), 24 March 2016, para. 5671.
[62] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 413.
[63] *Prosecutor* v. *Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, paras. 731-732.
[64] United Nations Security Council Resolution 1820 on Women, Peace and Security, 19 June 2008, sixth preambular paragraph.
[65] *Prosecutor* v. *Akayesu*, (Case No. ICTR-96-4-T), 2 September 1998, para. 731.

violence was a step in the process of the destruction of the [T]utsi group—destruction of the spirit, of the will to live, and of life itself."[66] The Declarants submit that this finding should be reflected in the construction of Article II of the Genocide Convention in circumstances where sexual and gender-based violence has been documented on a significant scale. The continuum of a planned system of widespread sexual violence – from the fear it generates, to the physical and psychological scars it causes, and from the pregnancies it may induce, to the stigma it generates amongst victims – can serve to demonstrate the perpetrators' intent to both physically and biologically destroy a protected group.

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

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

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

69. Secondly, the Court has determined that a finding of genocide requires that the intent was to destroy "at least a substantial part of the particular group." As noted above, what counts as a "substantial part of the particular group" will depend on all the circumstances, including whether a specific part of the "group is emblematic of the overall group, or is essential to its survival."[67] The Declarants submit that children form a substantial part of the groups protected by the Genocide Convention, and that the targeting of children provides an indication of the intention to destroy a group as such, at least in part. Children are essential to the survival of any group as such, since the physical destruction of the group is assured where it is unable to regenerate itself.

70. Thirdly, where children are targeted through underlying acts of genocide, this may assist in demonstrating the existence of the requisite intent. Given the significance of children to the survival of all groups, evidence of harm to children may contribute to an inference that the perpetrators intended to destroy a substantial part of the protected group. In *Akayesu*, for example, the ICTR emphasized that evidence demonstrating that "even newborn babies were not spared" demonstrated the perpetrators' "intention to wipe out the Tutsi group in its entirety."[68]

71. Thus, the Declarants submit that the targeting of children is relevant to the determination of specific intent.

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

[67] See *Prosecutor* v. *Krstić*, Judgment, (Case No. IT-98-33-A), Appeals Chamber, 19 April 2004, para. 12.

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

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

72. The Declarants submit that, in addition to leading to the underlying acts of genocide (as outlined in section 1(d) of this Joint Declaration), forced displacement may also constitute evidence of specific intent and this may be so even in cases where affected members of the group are not transferred to a place where they are subjected to conditions leading to their death or destruction.[69]

73. In *Bosnia v. Serbia,* the Court affirmed that "deportation or displacement of the members of a group, even if effected by force, is not necessarily equivalent to destruction of the group, nor is such destruction an automatic consequence of the displacement," but nevertheless recognized that "acts of 'ethnic cleansing' may occur in parallel to acts prohibited by Article II of the Convention, and may be significant as indicative of the presence of a specific intent (*dolus specialis*) inspiring those acts."[70]

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

3. Conclusion

75. As outlined above, the Declarants submit that genocide, as defined in Article II of the Genocide Convention, is not limited to killings and that the number of victims killed is not determinative of a State's specific intent. Underlying acts of genocide may take the form of sexual and gender-based violence. Forced displacement can also lead to an underlying act of genocide. Furthermore, the underlying acts of genocide need to be assessed differently when acts are committed against children, bearing in mind the particular impact of these acts on children. Finally, sexual and gender-based violence, acts committed against children, and forced displacement play an important role in determining the specific intent required under Article II.

76. As a final consideration, the Declarants further submit that it is particularly important for the Court to consider the evidentiary value of certain documents in its construction of Article II of the Genocide Convention, bearing in mind the *erga omnes partes* nature of the obligations under this convention. Specifically, certain sources must be regarded as having particular probative value in establishing the elements required to demonstrate the existence of genocide, including the facts

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[69] *Prosecutor* v. *Tolimir*, (Case No. IT-05-88/2-A), 8 April 2015, para. 254. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para. 434, where this Court stated: "that the mass forced displacement of Croats is a significant factor in assessing whether there was an intent to destroy the group, in whole or in part". Even though the Court found that Croatia had not demonstrated that such forced displacement constituted the *actus reus* of genocide within the meaning of Article II*(c)* of the Convention, it nonetheless considered that "the fact of forced displacement occurring in parallel to acts falling under Article II of the Convention may be "indicative of the presence of a specific intent *(dolus specialis)* inspiring those acts."

[70] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 43, para. 190; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015*, p. 3, para 434.

that allow the Court to draw inferences as to specific intent.[71] In this regard, the Declarants submit that reports generated by the United Nations, such as reports produced by fact finding missions, commissions of inquiry, and reports that the Secretary-General of the United Nations may prepare for the United Nations Security Council or General Assembly, can have special importance. Indeed, such reports can be particularly credible because they emanate from a "disinterested witness," namely "one who is not a party to the proceedings and stands to gain or lose nothing from its outcome."[72]

B. Construction of Articles IV to VI of the Genocide Convention

77. Under Article I of the Genocide Convention, States Parties have confirmed that genocide is a crime under international law "which they undertake to prevent and to punish." The Declarants contend that the duty to punish outlined in Article I must be construed in light of Articles IV to VI of the Genocide Convention, and thus interpreted as an obligation to investigate and prosecute persons accused of genocide, and to punish persons found to be guilty of genocide. In the view of the Declarants, pursuant to these provisions, a State Party discharges its obligation to punish genocide by prosecuting persons subject to criminal jurisdiction within its own criminal courts; by cooperating with competent international tribunals when it has accepted their jurisdiction; and by extraditing persons accused of genocide for trial in other States, as relevant.

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

79. Although the Genocide Convention does not specify how a prosecution and trial must be conducted in order to fulfill the obligation of investigation, prosecution, and trial by a "competent tribunal", the Declarants submit that the relevant provision must be interpreted as encompassing guarantees of fair trial, including that such a tribunal be independent and impartial.[73] These are fundamental requirements recognized under international human rights law[74] and international humanitarian law,[75] and as mentioned above, the obligations under the Genocide Convention must,

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[71] *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*, para. 227-230.

[72] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment I.C.J. Reports 1986*, p. 14, para. 69.

[73] Pursuant to Article 31 of the Vienna Convention on the Law of Treaties, "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."

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

[75] See e.g. common Article 3(1)(d) to the 1949 Geneva Conventions, prohibiting "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples." This provision reflects "elementary considerations of humanity" which are applicable irrespective of reservations to the

under Article 31(3)(c) of the VCLT, be interpretated taking into account other relevant and applicable rules of international law. Furthermore, the Declarants submit that failure to respect the judicial standards which guarantee a fair trial would frustrate the object and purpose of the Genocide Convention given that in those circumstances, the trial would remain an empty promise, unable to attain the aim of combating impunity. A judicial system which in effect maintains impunity, or which conducts sham trials meant only to shield the accused from justice, does not meet the Genocide Convention's purpose of "liberat[ing] mankind" from the "odious scourge" of genocide.[76]

80. Another standard of relevance relates to sufficient transparency in the prosecution and trial. International human rights treaty bodies and decisions of regional human rights courts have determined that duties to investigate, prosecute, and punish within their respective treaties include a duty to do so transparently, to ensure that society is duly and appropriately informed to be able to assess the integrity of the process, and to safeguard public confidence in the judicial process.[77]

VI. Documents in Support of the Declaration

81. The following is a list of the documents in support of this Joint Declaration, which documents are attached hereto:

(a) Letters of 24 January 2020 from the Registrar of the International Court of Justice to the Ambassadors of Canada, Denmark, France, Germany, and the United Kingdom to the Kingdom of the Netherlands and to the Ministry of Foreign Affairs of the Netherlands;
(b) Letter of 11 November 2020, from Canada and the Netherlands requesting copies of the pleadings and documents annexed in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar);*
(c) Letter of 13 November 2020, from the Registrar acknowledging receipt of the request from Canada and Netherlands be furnished with copies of the pleadings and documents annexed filed in the case;
(d) Letter of 27 November 2020, from the Registrar informing Canada and the Netherlands that the Court decided that it would not be appropriate the grant the above-mentioned request;
(e) Instrument of ratification by the Government of Canada of the Genocide Convention;
(f) Instrument of ratification by the Government of Denmark of the Genocide Convention;
(g) Instrument of ratification by the Government of France of the Genocide Convention;
(h) Instrument of ratification by the Government of Germany of the Genocide Convention;
(i) Instrument of accession by the Kingdom of the Netherlands to the Genocide Convention;
(j) Instrument of accession by the United Kingdom of the Genocide Convention.

Geneva Conventions, see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment. I.C.J. Reports 1986*, p. 14, para. 218.

[76] Genocide Convention, Preambular paragraph 1.

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

VII. Conclusion

82. Based on the information set out above, the Declarants avail themselves of the right conferred upon them by Article 63(2) of the Statute to intervene as non-parties in the proceedings brought by The Gambia against Myanmar in this case.

83. The Government of Canada has appointed the undersigned, Alan H. Kessel, as Agent for the purposes of the present Declaration.

84. The Government of Denmark has appointed the undersigned, Vibeke P. Jørgensen, as Agent for the purposes of the present Declaration.

85. The Government of France has appointed the undersigned, Diégo Colas, as Agent for the purposes of the present Declaration.

86. The Government of Germany has appointed the undersigned, Tania von Uslar-Gleichen, as Agent for the purposes of the present Declaration.

87. The Kingdom of the Netherlands has appointed the undersigned, Prof. Dr. René Lefeber, as Agent for the purposes of the present Declaration.

88. The Government of the United Kingdom has appointed the undersigned Sally Langrish as Agent for the purposes of the present Declaration.

89. It is requested that all communications in this case be sent to the following addresses:

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Respectfully,

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CERTIFICATION

I certify that the documents attached by way of Annexes to this Declaration are true copies of the originals thereof.

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