INTERNATIONAL COURT OF JUSTICE

Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)

DECLARATION OF INTERVENTION BY IRELAND

pursuant to Article 63 of the

Statute of the International Court of Justice

6 January 2025

To the Registrar, International Court of Justice

1. On behalf of the Government of Ireland, I have the honour to submit to the International Court of Justice ('*the Court*') the following Declaration of Intervention pursuant to Article 63, paragraph 2, of the Statute of the Court ('*the Statute*') in the Case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.

2. Article 82, paragraph 2, of the Rules of the Court 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. These matters are addressed in sequence below.

CASE AND CONVENTION TO WHICH THIS DECLARATION RELATES

4. On 29 December 2023, the Republic of South Africa ('*South Africa*') instituted proceedings against the State of Israel ('*Israel*') before the Court under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('*the Convention*'), to which both South Africa and Israel are Contracting Parties.

5. In its Application instituting proceedings (the '*Application*'), which was accompanied by a Request to the Court for the indication of provisional measures, South Africa alleges that Israel has violated the Convention through '*acts threatened, adopted, condoned, taken and being taken by the Government and military of the State of Israel against the Palestinian people, a distinct national, racial and ethnical group, in the*

wake of the attacks in Israel on 7 October 2023.'[1] Specifically, South Africa alleges that:

> *'The acts in question include killing Palestinians in Gaza, causing them serious bodily and mental harm, and inflicting on them conditions of life calculated to bring about their physical destruction. The acts are all attributable to Israel, which has failed to prevent genocide and is committing genocide in manifest violation of the Genocide Convention, and which has also violated and is continuing to violate its other fundamental obligations under the Genocide Convention, including by failing to prevent or punish the direct and public incitement to genocide by senior Israeli officials and others.'*[2]

6. On 26 January 2024, in response to the Request of South Africa for the indication of provisional measures, the Court made an Order indicating the following provisional measures:

> '*(1) ... The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular:*
>
> *(a) killing members of the group;*
>
> *(b) causing serious bodily or mental harm to the 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; and*
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> *(d) imposing measures intended to prevent births within the group;...*
>
> *(2) ... The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above;...*

[1] Application of South Africa dated 29 December 2023, § 1
[2] *Ibid.* § 1

(3)... The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip;...

(4)... The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip;...

(5)... The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip;...

(6) ... The State of Israel shall submit a report to the Court on all measures taken to give effect to this Order within one month as from the date of this Order.'[3]

7. On 6 February 2024, pursuant to Article 63(1) of the Statute, the Registrar notified Ireland, as a Contracting Party to the Convention, that South Africa '*seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention and alleges that the Respondent has violated Articles I, III, IV, V and VI of the Convention*' and that it '*therefore appears that the construction of this instrument will be in question in the case.*'[4]

8. On 28 March 2024, the Court reaffirmed the provisional measures indicated in its Order of 26 January 2024 and indicated further provisional measures.[5]

9. On 5 April 2024, the Court fixed 28 October 2024 as the time-limit for the filing of the Memorial of South Africa, and 28 July 2025 for the Counter-Memorial of Israel.[6]

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[3] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, § 86

[4] Letter of Registrar attached at Annex A hereto.

[5] Provisional Measures, Order of 28 March 2024, § 51

[6] Order of 5 April 2024, p.2

10. On 24 May 2024, the Court reaffirmed the provisional measures indicated in its Orders of 26 January 2024 and 28 March 2024, which it said '*should be immediately and effectively implemented*', and indicated further provisional measures.[7]

11. Ireland is acutely sensitive to the context within which these proceedings have been initiated. The heinous terror attack perpetrated by Hamas against Israel on 7 October 2023 was reprehensible and Ireland has condemned and continues to condemn it unequivocally. The murder of civilians, destruction of civilian property, taking and keeping of hostages including children, use of human shields and the firing of indiscriminate rockets at urban centres constitute serious violations of international humanitarian law for which those involved must be held accountable. It is unconscionable that hostages remain in captivity after more than fourteen months. Ireland has consistently called for their immediate and unconditional release. Ireland recognises, also, the deep hurt and sorrow that this attack caused and continues to cause for the Government and people of Israel.

12. The prohibition of genocide is a peremptory norm of general international law. Ireland recalls that the Court has described this and other such peremptory norms as obligations necessary '*to protect essential humanitarian values*'[8], which values all States have a common interest in protecting and observing.[9] Ireland further recalls that the Court has recognised '*the rights and obligations enshrined by the Convention [as] rights and obligations* erga omnes.'[10] The prohibition of genocide has an essential function in ensuring the interests of humanity and the *erga omnes* nature of the rights and obligations of States enshrined by the Convention. Accordingly, Ireland, as a Contracting Party, has a direct interest in the construction that may be placed by the Court on the relevant provisions of the Convention and wishes to see the consistent interpretation, application and fulfilment of the Convention among all Contracting

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[7] Provisional Measures, Order of 24 May 2024, § 57

[8] *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 (the '*Bosnia Judgment*'), § 147.

[9] *Barcelona Traction (Merits)* [1970] ICJ Rep (I) p.3, §§ 33-35; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* [2012] ICJ Rep (I) p.422, §§ 68-69; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar) (Order on Request for the Indication of Provisional Measures)* [2020] ICJ Rep 3, § 41

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I.C.J. Reports 1996 (II), §. 31

Parties. In view of this, Ireland has decided to avail itself of the right conferred upon it by Article 63, paragraph 2, of the Statute to intervene in the present proceedings.

13. In intervening in these proceedings, Ireland acknowledges that it is '*limited to submitting observations on the construction of the convention in question and does not ... become a party to the proceedings, [nor is it permitted] to deal with any other aspect of the case before the Court [and that] such an intervention cannot affect the equality of the Parties to the dispute.*'[11]

PARTICULARS OF THE BASIS ON WHICH IRELAND CONSIDERS ITSELF A PARTY TO THE CONVENTION

14. In accordance with Article XI, paragraph 4, of the Convention, Ireland deposited its instrument of accession thereto with the Secretary-General of the United Nations on 22 June 1976.[12] In accordance with Article XIII of the Convention, the accession of Ireland became effective on 20 September 1976.

PROVISIONS OF THE CONVENTION THE CONSTRUCTION OF WHICH APPEARS TO BE IN QUESTION

15. In its Application, South Africa requests the Court to adjudge and declare, *inter alia*, that Israel '*has breached and continues to breach its obligations under the Genocide Convention, in particular the obligations provided under Article I, read in conjunction with Article II, and Articles III (a), III (b), III (c), III (d), III (e), IV, V and VI.*'[13]

16. Accordingly, Ireland considers that Articles I, II, III, IV, V and VI of the Convention are in question. Ireland sets out in the following how, in its practice as a Contracting Party in the application of the Convention, and in light of the Convention's object and purpose, it has construed Articles I, II and III of the Convention, the construction of

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[11] *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, at p. 9, §. 18.

[12] Copy of Notification by Director of the General Legal Division of the Office of Legal Affairs, United Nations Secretariat, of the Accession by Ireland to the Convention attached at Annex B hereto.

[13] Application of South Africa, § 111 (2)(a)

which in these proceedings appears to be particularly relevant to the Court's deliberations.

CONSTRUCTION OF ARTICLE I FOR WHICH IRELAND CONTENDS

17. 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.'*

18. 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 provide that Contracting Parties must not themselves commit genocide, it has always been Ireland's view that Article I must necessarily be construed as so providing. This is also the construction placed on Article I by the Court itself, which found in its *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 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.'[14]

19. 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. This '*duality of responsibility*' was recognised by the Court in the same Judgment.[15] It is supported by an analysis of Article IX of the Convention, which clearly contemplates '*the responsibility of a State for genocide or for any of the other acts enumerated in article III...*'[16]

20. 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. State responsibility under Article I will be engaged where the State has itself committed genocide or where it has failed to prevent its commission by persons acting on its behalf (whether *ultra vires* or not) or within its effective control.

21. Therefore, in Ireland's view the Convention should be considered not only as a criminal law instrument that obliges Contracting Parties to establish jurisdiction over, and punish commission of, the crime of genocide by individuals, but also as a human rights instrument that obliges them not to commit genocide as well as to prevent genocide against any national, ethnical, racial and religious group (a '*protected group*') under their protection or within their power.

CONSTRUCTION OF ARTICLE II FOR WHICH IRELAND CONTENDS

22. Article II of the Genocide Convention provides:

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[14] *Bosnia Judgment*, § 166

[15] *Bosnia Judgment*, § 163

[16] Article IX of the Convention provides: '*Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.*'

'*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.'

23. 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 must be understood and interpreted by reference to the meaning of the term defined in Article II.

Specific Intent and the Crime of Genocide

24. 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, *i.e.* both a crime and a tort. It sets out both the material element of genocide and its mental element. Given the quite different regimes of, 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, it is Ireland's respectful submission that different approaches to establishing the necessary mental element are required depending on whether, in any given case, one is considering the responsibility of an individual or of a State.

25. 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 in many municipal criminal codes, an inference of specific intent can be drawn from reckless commission of the prohibited act where certain criteria are met.

26. The acts enumerated in Article II of the Convention, where committed with the necessary 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.' 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.*'[17]

27. Moreover, 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. On that basis, the individual's intent must relate in some way to a wider destructive campaign or effort which he or she understands those actions will facilitate, or to which they will contribute.[18]

28. Ireland construes 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 as his or her purpose. Furthermore, in Ireland's view, specific intent can also be inferred in any case where a reasonable person would have foreseen that the natural and probable consequence of the acts of the perpetrator was to so destroy or contribute to destruction of the protected group, and the perpetrator was reckless as to whether those acts would do so. This is on the basis that the greater the probability of a consequence the more likely it is that it has been foreseen and, if foreseen, the greater the likelihood that it is also intended.

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[17] *Bosnia Judgment*, § 187

[18] By analogy, see International Criminal Tribunal for the former Yugoslavia ('*the ICTY*'), ***Prosecutor* v. *Brđanin***, IT-99-36-T, Judgment, 1 September 2004, § 330; and ***Prosecutor* v. *Galic***, IT-98-29-T, Judgment, 5 December 2003, § 741

29. 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. The crime may also be committed where a perpetrator – regardless of his or her purpose – *knows* (or should know) that the natural and probable consequence of these acts is either to destroy or contribute to the destruction of the protected group, in whole or part, as such, and proceeds regardless.

30. It is evident 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 foreseeable *consequence* of the act committed. The formulation '*with the purpose of*' was used in the first draft of the Convention[19] but was substituted in later[20] and final drafts[21] by '*with the intent to.*' During the negotiations a proposal was made to restore the term 'purpose' to the text but it was defeated by vote.[22] Accordingly, Ireland has construed the term '*intent*' in Article II of the Convention as not being limited to *purpose* but also encompassing *knowledge of foreseeable consequence* too.

31. This construction is also 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 ('ICTR') in *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.*'[23]

32. It merits observing that this construction also corresponds to the law regulating crimes of specific intent in Ireland and many other States.[24]

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[19] UN Doc. E/447, 6/26/47

[20] UN Doc. E/AC.25/12, 5/19/48; UN Doc. E/794, 5/24/48

[21] UN Doc. A/C.6/289,11/23/48

[22] UN Doc. E/AC.25/SR.24, 5/12/48

[23] ICTR Chamber I, *Prosecutor* v. *Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment, 2 September 1998, § 520 - https://www.un.org/en/preventgenocide/rwanda/pdf/AKAYESU%20-%20JUDGEMENT.pdf

[24] In Ireland for instance: *The People (DPP)* v. *Douglas and Hayes*, [1985] ILRM 28

State Responsibility

33. 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.

34. 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 or plan, invariably demonstrated by reference to a pattern of widespread and systematic violence against 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). Rather, evidence of a policy, plan or campaign should be capable of being adduced in that broader context. Ireland submits that, in the absence of *direct evidence* of a policy or campaign, this element of the internationally wrongful act of genocide may be established by consideration of *indirect* or *circumstantial evidence*. This includes evidence of a general pattern of widespread and systematic acts directed at the protected group which leads to their destruction, in whole or part, from which it can be inferred that the said destruction was the intended result or foreseeable consequence.

Only Reasonable Inference test

35. Absent direct evidence of a general policy, plan or campaign – which is rarely available[25] – 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 the *Bosnia Judgment* that, where the Applicant in that case sought to convince it of the specific intent inspiring the actions of the Respondent State, that:

> '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.*'[26]

36. The Court restated this test where it said 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* [...]'[27]

37. This can be characterised as the '*only reasonable inference*' test.

38. 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 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

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[25] As acknowledged by the parties in ***Croatia* v. *Serbia***, Judgment, ICJ Reports 2015, § 143, and by the ICTY in ***Prosecutor* v. *Tolimir***, Case No. IT-05-88/2-T, Trial Chamber Judgment, 12 December 2012, §. 745.

[26] *Bosnia Judgment*, § 373

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015 ('*Croatia Judgment*'), § 510

conflating *punitive motive* with *genocidal intent*, he noted that 'genocidal intent may exist simultaneously with other, ulterior motives.'[28] The co-existence of two or more intents does not rule out, exclude or displace either intent.

39. A clear example of this is where genocide is committed during the course of an armed conflict, where two reasonable inferences might be drawn from the conduct of the State concerned – both that it sought to defeat the enemy and that it intended to destroy a protected group in whole or part. This possibility was considered by Judge Cançado Trindade in the same 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.*'[29]

40. Ireland submits that, in order to avoid the possibility of genocide being excluded in most, if not all, cases of armed conflict the application of the '*only reasonable inference*' test clarifies that a pattern of conduct can only be fully explained as intended to destroy - at least in part - the protected group. In applying the test, Ireland respectfully submits that it is not necessary that the acts concerned should be exclusively intended to destroy the group but could also be committed with the intent of achieving one or more other objectives.

41. With respect to the '*fully conclusive*' standard of proof which the Court has developed in cases '*involving charges of exceptional gravity*'[30], Ireland contends that a qualification to this standard ought to arise in cases involving allegations of serious violations of human rights by State organs and by persons or entities empowered to

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[28] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Separate Opinion of Judge Bandari, 3 February 2015, § 50 118-20150203-JUD-01-10-EN.pdf

[29] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Dissenting Opinion of Judge Cançado Trindade, 3 February 2015, §. 144 - 118-20150203-JUD-01-05-EN.pdf

[30] *cf. Corfu Channel (United Kingdom v. Albania)*, Judgment, I.C.J. Reports 1949, p. 17

exercise governmental authority, not least because of the requirement underpinning this Convention to protect essential humanitarian values. In addition, such an approach would be consistent with customary law rules of attribution, as reflected in the International Law Commission's 2001 draft Articles on Responsibility of States for Internationally Wrongful Acts (the '*draft Articles*').[31]

42. Moreover, it is noteworthy that the draft Articles do not establish any separate or higher standard for the attribution to a State of conduct constituting a serious breach of an obligation arising under a peremptory norm of general international law. In fact, the legal consequences for the State concerned of responsibility for such a serious breach and for a mere internationally wrongful act are the same, *i.e.* cessation, non-repetition and reparation. 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.

Pattern of Conduct

43. 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, can 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 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 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:

[31] Chapter II, Articles 4-11

- ***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. 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 can be drawn from them.

In particular, the killing of members of the protected group, in combination with the maiming or other serious injury, or starvation of, 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 plan or campaign.

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

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* [...]'[32]

Additionally, the ICTY (in *Prosecutor* v. *Karadzic*) has 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.[33]

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[32] *Bosnia Judgment*, § 319

[33] ICTY Case No. IT-95-5/18-T, 24 March 2016, § 545

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.*' 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.[34]

Ireland draws particular attention to the factor of *intensity of attacks* against a protected group as an indicator of genocidal intent or of a plan or policy. In the *Galić* case for instance, in a passage quoted with approval by the Court in the *Bosnia Judgment*[35], 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.*'[36]

It follows from this that the intensity of attacks on civilians, where established, is an important factor in assessing specific intent.

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 (in particular children), the impact of which is clearly considerably greater.

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[34] *cf. Bosnia Judgment,* § 300, quoting *Akayesu* ICTR 96-4-T, Trial Chamber Judgment, 2 September 1998, §. 731, and *Prosecutor v. Stakic,* ICTY, IT-97-24-T, Trial Chamber Judgment, 31 July 2003, §. 516

[35] § 328

[36] *Prosecutor* v. *Galić,* IT-98-29-T, ICTY, Trial Chamber Judgment, 5 December 2003, §. 593

- ***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, having regard to the object and purpose of the Convention, Ireland contends that the infliction of conditions of life calculated to bring about the physical destruction of the protected group 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.*'[37]

In its *Bosnia Judgment*, the Court, while declining to reach a finding of genocide in that case, acknowledged that acts of encirclement, shelling and starvation could constitute material elements of genocide for the purposes of Article II (c).[38] Again, the conditions of life imposed on the protected group, in whole or part, will have different impacts on different categories of group members, with vulnerable members such as children being more susceptible to adverse conditions, such as starvation.

In assessing whether a State has violated Article II (c) in the conduct of military operations, consideration must be given to the impact of those operations on the protected group. In particular, any such assessment should have regard to the following factors:

- military attacks that directly result in very large numbers of civilian deaths and injuries within the protected group;
- the forced displacement of a substantial proportion of the protected group and, in particular, whether objects indispensable to the survival of the civilian population are provided or available in places to which they are displaced;
- the use of starvation of the civilian population as a method of warfare;
- attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population;

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[37] *Croatia Judgment, § 161.*

[38] *Bosnia Judgment, ICJ Reports 2007, § 324.*

- whether the use of force exceeds what is permitted by international law, and in particular, whether its cumulative effect significantly exceeds what is either necessary or proportionate;
- the extent to which military operations comply with fundamental principles of international humanitarian law, in particular the principles of discrimination and precautions in attack, and whether there is a pattern of conduct in which these principles are not observed; and
- whether hindering or impeding provision of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care, to the protected group lead to the spread of famine and starvation within it.

- ***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 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 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.

- ***Particular effects of conduct on children***

In assessing whether a pattern of conduct may disclose a genocidal 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.[39]

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 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 have an obviously 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.

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 reasonable inferences can be drawn from acts directed against, or failing to distinguish, child members of the group.

- ***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.[40] 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 a tolerant political environment plays in safeguarding the existence of any protected group within a wider society.

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[39] *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 the 2024 Global Report on Food Crises (FSIN and Global Network against Food Crises, GRFC 2024. Rome - https://www.fsinplatform.org/grfc2024

[40] ICTY, *Prosecutor* v. *Brđanin*, IT-99-36-T, Judgment, 1 September 2004, § 330

CONSTRUCTION OF ARTICLE III FOR WHICH IRELAND CONTENDS

44. 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.*

45. 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 done this by means of statute law giving effect to the Convention.[41] 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). In particular, Ireland recalls the Court's clear ruling in the *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...*'[42]

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[41] Genocide Act 1973, s. 2

[42] *Bosnia Judgment*, § 381

46. As regards State responsibility for the acts enumerated at paras (b)-(e) of Article III, the Court in the *Bosnia Judgment* clearly recognised these not simply as crimes but 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, 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.*' [43]

47. 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.[44] Clearly, however, the case establishes that where sufficient evidence is available State responsibility may be engaged.

DOCUMENTS IN SUPPORT OF THE PRESENT DECLARATION

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

(a) Letter from the Registrar of the International Court of Justice to the Ambassador of Ireland to the Kingdom of the Netherlands, dated 6 February 2024; and

(b) Notification by the Director of the General Legal Division of the Office of Legal Affairs, United Nations Secretariat, of the Accession by Ireland to the

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[43] *Bosnia Judgment*, § 417

[44] *Bosnia Judgment*, §s 416 *et seq.*

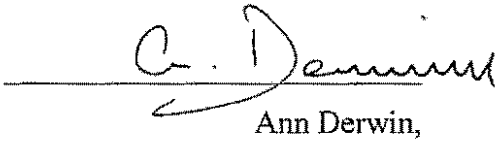
Convention on the Prevention and Punishment of the Crime of Genocide, dated 9 July 1976.

CONCLUSION

49. On the basis of the foregoing, Ireland hereby avails itself of the right conferred upon it by Article 63, paragraph 2 of the Statute to intervene in the proceedings brought by South Africa against Israel.

50. The Government of Ireland has appointed Mr. Declan Smyth, Legal Adviser at the Department of Foreign Affairs, as Agent and Ms. Ann Derwin, Ambassador of Ireland to the Kingdom of the Netherlands, as Co-Agent for the purposes of the present Declaration. The Registrar of the Court is kindly requested to transmit all communications with respect to these proceedings to the following address:

Embassy of Ireland to the Kingdom of the Netherlands
Scheveningseweg 112, 2584 AE
The Hague



Ann Derwin,
Ambassador of Ireland,
Co-Agent of the Government of Ireland

Annex A: Copy of the letter from the Registrar of the International Court of Justice to the Ambassador of Ireland to the Kingdom of the Netherlands, dated 6 February 2024; and

Annex B: Copy of the Notification by the Director of the General Legal Division of the Office of Legal Affairs, United Nations Secretariat, of the Accession by Ireland to the Convention on the Prevention and Punishment of the Crime of Genocide, dated 9 July 1976.

Annex A

COUR INTERNATIONALE DE JUSTICE | INTERNATIONAL COURT OF JUSTICE

By email only

161308 6 February 2024

Excellency,

I have the honour to refer to my letter (No. 161010) dated 3 January 2024 informing your Government that, on 29 December 2023, South Africa filed in the Registry of the Court an Application instituting proceedings against the State of Israel in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa* v. *Israel)*. A copy of the Application was appended to that letter. The text of the Application is also available on the website of the Court (www.icj-cij.org).

Article 63, paragraph 1, of the Statute of the Court provides that:

> [w]henever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith".

Further, under Article 43, paragraph 1, of the Rules of Court:

> "Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter."

On the instructions of the Court, given in accordance with the said provision of the Rules of Court, I have the honour to notify your Government of the following.

In the above-mentioned Application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention") is invoked both as a basis of the Court's jurisdiction and as a substantive basis of the Applicant's claims on the merits. In particular, the Applicant seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention and alleges violations of Articles I, III, IV, V and VI of the Convention. It therefore appears that the construction of this instrument will be in question in the case.

./.

[Letter to the States parties to the Genocide Convention
(except South Africa and Israel)]

Palais de la Paix, Carnegieplein 2
2517 KJ La Haye - Pays-Bas
Téléphone : +31 (0) 70 302 23 23 - Facsimilé : +31 (0) 70 364 99 28
Site Internet : www.icj-cij.org

Peace Palace, Carnegieplein 2
2517 KJ The Hague - Netherlands
Telephone: +31 (0) 70 302 23 23 - Telefax: +31 (0) 70 364 99 28
Website: www.icj-cij.org

Your country is included in the list of parties to the Genocide Convention. The present letter should accordingly be regarded as the notification contemplated by Article 63, paragraph 1, of the Statute. I would add that this notification in no way prejudges any question of the possible application of Article 63, paragraph 2, of the Statute, which the Court may later be called upon to determine in this case.

Accept, Excellency, the assurances of my highest consideration.

Philippe Gautier
Registrar

Annex B

(IV.1)

UNITED NATIONS NATIONS UNIES

POSTAL ADDRESS—ADRESSE POSTALE: UNITED NATIONS, N.Y. 10017
CABLE ADDRESS—ADRESSE TELEGRAPHIQUE: UNATIONS NEWYORK

REFERENCE: C.N.204.1976.TREATIES-1 9 July 1976

CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE ADOPTED BY THE GENERAL ASSEMBLY OF THE UNITED NATIONS ON 9 DECEMBER 1948

ACCESSION BY IRELAND

Sir,

I have the honour, upon instructions from the Secretary-General, to inform you that, on 22 June 1976, the instrument of accession by the Government of Ireland to the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948, was deposited with the Secretary-General.

In accordance with paragraph 3 of its article XIII, the Convention will enter into force for Ireland on the ninethieth day following the deposit of the instrument of accession, that is to say on 20 September 1976.

Accept, Sir, the assurances of my highest consideration.

Blaine Sloan

Blaine Sloan
Director of the General Legal Division,
in charge of the Office of Legal Affairs