

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
THE REPUBLIC OF NAMIBIA

12 March 2026

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INTRODUCTION

1. By an Application dated 29 December 2023, the Republic of South Africa instituted proceedings against the State of Israel before this Court, alleging violations of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the “**Genocide Convention**” or the “**Convention**”).¹ Having acceded to the Convention on 28 November 1994 without reservation, the Republic of Namibia is a Contracting Party thereto.² As such, Namibia was notified by the Registrar of the Application pursuant to Article 63, paragraph 1, of the Statute of the Court, and hereby avails itself of its right to intervene in the proceedings under Article 63, paragraph 2, of the Statute.³ This Declaration sets out (I) the Convention’s provisions whose construction Namibia considers to be in question⁴ and (II) the construction thereof for which Namibia contends.⁵
2. Namibia approaches this intervention guided by its longstanding commitment to international law, accountability for international crimes, and the protection of civilian populations, particularly in armed conflicts. Namibia recalls that the obligations under the Convention are owed by each State Party to all other States Parties – they are obligations *erga omnes partes*, such that every Contracting Party has a common interest in their observance.⁶ As the Convention embodies a fundamental commitment of the international community to prevent and to punish genocide as a matter of common concern, its provisions must be interpreted in this light.

¹ 9 December 1948, *United Nations, Treaty Series*, vol. 78, p. 277. Rules of Court (1978) (as amended on 1 June 2024, the ‘**Rules of Court**’), Art. 82, para. 5.

² Rules of Court, Art. 82, para. 5, lit. (a).

³ Rules of Court, Art. 82, para. 1.

⁴ Rules of Court, Art. 82, para. 5, lit. (b).

⁵ Rules of Court, Art. 82, para. 5, lit. (c).

⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2022, pp. 515-516, paras. 107-108.

I. THE PROVISIONS WHOSE CONSTRUCTION IS IN QUESTION

3. South Africa's Application alleges Israel's violation of its obligations under Articles I, III to VI, read with Article II, of the Convention.⁷ Namibia agrees that their construction is, therefore, "in question".⁸ The English text of those provisions is reproduced below.⁹

"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.

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 III

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.

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* ('*South Africa v. Israel*'), Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, paras. 110 ("South Africa considers that the conduct of Israel [...] is in violation of its obligations under the Genocide Convention, including Articles I, III, IV, V. and VI, read in conjunction with Article II"), 111(2), 117, 126, 129.

⁸ Due to the nature and rules of treaty interpretation, Namibia notes that the construction of the entire text of the Convention is also "in question", including Articles VIII and X, as well as its preamble. Namibia reserves its right under Art. 63, para. 2, of the Statute to contend for the construction of other Articles of the Convention not expressly referenced in this Declaration.

⁹ Namibia notes that the Chinese, French, Russian and Spanish texts are "equally authentic". Genocide Convention, Art. X. Cf. Vienna Convention on the Law of Treaties, 23 May 1969, *United Nations, Treaty Series*, vol. 1155, p. 331, Art. 33.

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.

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.”

4. South Africa also invokes Article IX of the Convention as the basis of the Court’s jurisdiction. While Israel has not raised any preliminary objection within the prescribed time-limit,¹⁰ Namibia considers that the construction of Article IX remains in question. The construction of Article IX bears on access to the Court for disputes concerning compliance with the Convention and the effectiveness of its enforcement.

“ARTICLE IX

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.”

II. CONSTRUCTION OF THE PROVISIONS FOR WHICH NAMIBIA CONTENDS

5. In this Declaration, Namibia focuses on the construction of Articles I, II, and III, paragraph (c) in particular.

¹⁰ Rules of Court, Art. 79bis, para. 1; *South Africa v. Israel*, Order of 14 April 2025.

A. Article I

6. As the Court has confirmed, Article I of the Convention imposes distinct sets of obligations on Contracting Parties:¹¹ not only “to prevent and to punish” the crime of genocide, but also not to themselves to commit genocide or the other acts enumerated in Article III.¹² In respect of these obligations, Namibia wishes to first clarify what it means under international law for a State to be *responsible* under the Convention.
7. With regard to the obligation not to *commit* genocide, Namibia recalls the Court’s determination in the *Bosnian Genocide* case that:

“the Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and the other acts enumerated in Article III. Thus if an organ of the State, or a person or group whose acts are legally attributable to the State, commits any of the acts proscribed by Article III of the Convention, the international responsibility of that State is incurred.”¹³

8. In a particular situation, it may be the case that the wrongful acts or omissions that give rise to responsibility are those of the senior civilian or military leadership of the State concerned. For instance, in relation to the commission of acts of genocide, it may be the conduct of the Prime Minister, the Secretary of Defence, or the members of a War Cabinet. In relation to the obligation to prevent and to punish genocide, as well as to prevent and punish direct and public incitement to genocide, the relevant conduct may be the omissions of senior military, police, or legal officials.
9. However, Namibia wishes to stress that there is no requirement in law that the relevant conduct is that of *senior political, military or civilian leadership* of the State. As is the case in general in international law, the State is responsible for the conduct of all of its organs and officials.¹⁴ This is the core rule in the law of state responsibility, set out in

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I) (*‘Bosnia v. Serbia’*), p. 113, para. 165.

¹² *Bosnia v. Serbia*, pp. 114, 118-119, paras. 167, 179.

¹³ *Bosnia v. Serbia*, pp. 118-119, para. 179. 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 (*‘Croatia v. Serbia’*), p. 61, paras. 128-129.

¹⁴ Namibia notes that States are also responsible in accordance with the rules of attribution set out in other Articles of the ILC’s Articles on the Responsibility of States for Internationally Wrongful Acts, Annex to General Assembly resolution 56/83, 12 December 2001 (the “**ILC Articles on State Responsibility**”), including Arts. 5, 8, and 11. In particular, Namibia notes that conduct giving rise to responsibility under the Convention is not limited

Article 4 of the Articles on State Responsibility of the International Law Commission (the “ILC”), universally accepted in practice, and found to reflect customary international law by the Court:¹⁵

“Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.
 2. An organ includes any person or entity which has that status in accordance with the internal law of the State.”¹⁶
10. Moreover, as confirmed by the ILC, a State remains responsible for the conduct of its organs “even if it exceeds its authority or contravenes instructions”.¹⁷ As the ILC noted, a “State cannot take refuge behind the notion that, according to the provisions of its internal law or to instructions which may have been given to its organs or agents, their actions or omissions ought not to have occurred or ought to have taken a different form”.¹⁸
11. In short, Contracting Parties to the Genocide Convention are responsible for the wrongful conduct – whether acts or omissions – of each and every one of its organs and officials.¹⁹

B. Article II

12. Article II of the Genocide Convention enumerates (1) five underlying “acts” that constitute genocide when committed with (2) the specific “intent”.

to acts carried out by formal State organs. Where private individuals or groups act on the instructions, direction, or control of the State, their conduct is likewise attributable to the State under international law. See *Bosnia v. Serbia*, pp. 207-208, paras. 397-398, quoting ILC Articles on State Responsibility, Art. 8.

¹⁵ *Bosnia v. Serbia*, pp. 118-119, para. 179.

¹⁶ ILC Articles on State Responsibility, Art. 4.

¹⁷ ILC Articles on State Responsibility, Art. 7.

¹⁸ ILC, Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Report of the International Law Commission on the work of its fifty-third session, A/56/10, 2001, Commentary on Art. 7, para. 2.

¹⁹ Namibia notes that, even where acts of genocide are not attributable, Contracting Parties remain bound by their obligations under Articles I, IV, V, and VI of the Convention to prevent, suppress, investigate, and punish genocide and related acts committed by private persons within their jurisdiction or control. Armed conflict does not diminish or suspend these obligations. The Convention applies in time of peace and in time of war, and no military necessity, security rationale, or context of hostilities can justify or excuse acts falling within Articles II or III of the Convention.

1. Underlying Acts of Genocide

13. Namibia first recalls that Contracting Parties may be responsible for genocide through the commission of any one of the five enumerated acts in Article II.²⁰ Thus, even though a genocidal campaign will often entail conduct constituting multiple of these acts in practice, there is no such requirement in law.
14. In the present Declaration, Namibia will focus on the acts in Article II, paragraphs (a) to (c), specifically: (i) their material and mental elements, (ii) the position of victims and their distinctive characteristics in their construction, and (iii) their relationship with the denial of humanitarian aid.

i. Material and Mental Elements

15. As a preliminary matter, Namibia wishes to briefly clarify the analytical framework of material and mental elements of genocide under Article II of the Convention. Namibia recalls that:
 - (1) In *Bosnia v. Serbia*, the Court recognised that the underlying “acts [...] themselves include mental elements”,²¹ and it was “[i]n addition to those mental elements” that the chapeau imposes the specific intent (“*dolus specialis*”).²²
 - (2) In *Croatia v. Serbia*, the Court referred to the underlying acts in paragraphs (a) to (e) as the “*actus reus*” and the specific intent in the chapeau as the “*mens rea*” of genocide, adding that “[a]lthough analytically distinct, the two elements are linked. The determination of *actus reus* can require an inquiry into intent.”²³
16. In Namibia’s view, to avoid confusion, it is simpler to analyse Article II in terms of:
 - (1) the *material elements* of the “acts” of genocide; and

²⁰ See ICTR, *Akayesu*, ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998 (“*Akayesu*”), para. 497; *Bosnia v. Serbia*, pp. 144 ff., paras. 245 *et seq.*

²¹ *Bosnia v. Serbia*, p. 121, para. 186 (“Mental elements are made explicit in paragraphs (c) and (d) of Article II by the words ‘deliberately’ and ‘intended’, quite apart from the implications of the words ‘inflicting’ and ‘imposing’ [...] The acts, in the words of the ILC, are by their very nature conscious, intentional or volitional acts”).

²² *Bosnia v. Serbia*, p. 121, para. 187.

²³ *Croatia v. Serbia*, p. 62, para. 130. See also *ibid.*, para. 132 (referring to “a specific intent, which, in order for genocide to be established, must be present in addition to the intent required for each of the individual acts involved”, citing *Bosnia v. Serbia*, p. 121, para. 187).

- (2) the *mental elements*, both (a) the explicit or implicit ones within the “acts” of genocide, as well as (b) the specific “intent” requirement in the chapeau.

Paragraph (a)

17. Namibia turns now to the material and mental elements of genocide by “Killing members of the group” under paragraph (a) of Article II.
18. The *material* element of this act is simply causing the death of the group’s members, whether by action or omission. As to its *mental element*, as noted by the Court in *Bosnia v. Serbia*, the killing must be “intentional”.²⁴ Namibia contends that this has two layers: (a) the *action or omission* itself must be intentional; and (b) the required consequence – death of the group’s members – must also be intended. The latter element requires either that the perpetrator meant to cause death or was aware that death would result in the ordinary course of events.²⁵
19. For example, these material and mental elements of Article II, paragraph (a), may be satisfied by failing to provide life-sustaining necessities in breach of a duty to do so, such as where the State knew that withholding food, water, medical care, or other essentials would cause death in the ordinary course of events. This omission-based liability is particularly relevant where State authorities control access to humanitarian assistance and deliberately restrict or deny it to members of the protected group.
20. In relation to the requirement of intentional killing, one specific issue is whether it is informed or limited by the rules on the conduct of hostilities in international humanitarian law. In *Croatia v. Serbia*, the Court made the following statement of principle:

“There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another. Thus it cannot be excluded in principle that an act carried out during an armed conflict and lawful under international humanitarian law can at the same time constitute a violation by the State in question of some other international obligation incumbent upon it.”²⁶

²⁴ *Bosnia v. Serbia*, p. 121, para. 186.

²⁵ See Statute of the International Criminal Court, 17 July 1998, *United Nations, Treaty Series*, vol. 2187, p. 90 (the “**Rome Statute**”), Art. 30.

²⁶ *Croatia v. Serbia*, p. 138, para. 474.

21. Namibia notes that this position is correct as a statement of principle of general application in international law. However, in *Croatia v. Serbia*, the Court also held that:

“‘Killing’ within the meaning of Article II (a) of the Convention always presupposes the existence of an intentional element (which is altogether distinct from the “specific intent” necessary to establish genocide), namely the intent to cause death [...]. It follows that, if one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention.”²⁷

22. On the basis of this construction, the Court held that “the artillery attacks on the Krajina towns in August 1995, in so far as they resulted in civilian casualties”, did not constitute “the *actus reus* of genocide”.²⁸

23. Namibia respectfully submits that this approach to the construction of Article II, paragraph (a), is incorrect. Paragraph (a) encompasses *all* intentional killings of the members of the protected group, and is not limited by or with reference to any other body of law, including international humanitarian law. Although compliance – or not – with international humanitarian law may be relevant to the question of specific intent, it is not relevant to determining whether the requirement of intentional killing in Article II, paragraph (a), is met. In this respect, Namibia aligns itself with the position set out in Judge Donoghue’s Declaration in the same case:

“I disagree with the suggestion [...] that the term ‘killing’, as used in subparagraph (a) of Article II, does not extend to deaths resulting from attacks that are directed exclusively at military targets and that do not deliberately target civilians. It is certainly possible for the deaths resulting from such attacks to be intentional killings, even if the attack did not deliberately target civilians [...] At the stage of examining whether deaths comprise the *actus reus* of genocide [...] I consider it sufficient for the Court to decide whether the killings were intentional.”²⁹

24. In Namibia’s view, this is an analytically sound approach to the construction of Article II, paragraph (a). As set out above, in relation to the relevant consequence – death –

²⁷ *Croatia v. Serbia*, p. 138, para. 474.

²⁸ *Croatia v. Serbia*, p. 138, para. 474.

²⁹ *Croatia v. Serbia*, Declaration of Judge Donoghue, p. 393, para. 11.

intentional killing includes all situations where the perpetrator was aware that their conduct would cause death in the ordinary course of events.³⁰

25. In sum, genocide by “Killing members of the group” under Article II, paragraph (a), comprises:

- (1) the material element that the perpetrator caused the death(s) of the members of the group, whether by action or omission;³¹ and
- (2) three mental elements:
 - (a) the perpetrator’s action or omission was intentional;
 - (b) the perpetrator intended to cause those deaths – that is, they meant to cause death or knew that their action or omission would cause death in the ordinary course of events; and
 - (c) the specific intent (“*dolus specialis*”).

Paragraph (b)

26. On the same basis, these observations apply to the implicit mental element in genocide by “Causing serious bodily or mental harm to members of the group” set out in Article 2, paragraph (b), of the Convention. Here, Namibia will focus on its material elements.

27. In this respect, Namibia notes that *Croatia v. Serbia* does provide some guidance on the meaning of the material elements of paragraph 2(b). In this respect, the Court held that “the bodily or mental harm [...] must be such as to contribute to the physical or biological destruction of the group, in whole or in part”.³² In addition, the Court held that rape and other acts of sexual violence are capable of falling within the terms of Article II(b).³³

28. However, Namibia submits that further clarification of the meaning of the provision would assist Contracting Parties in the implementation of the Convention. In this respect, Namibia notes and proposes that the Court adopt the consistent case law of the

³⁰ See Rome Statute, Art. 30. As Namibia further submits *infra*, the large-scale or repeated killings of members of a group, even when occurring over a relatively short period or in the context of hostilities, are capable of supporting an inference of genocidal intent when assessed cumulatively and in their broader factual context.

³¹ See Section II.B.1.iii below on omission.

³² *Croatia v. Serbia*, p. 69, para. 157.

³³ *Croatia v. Serbia*, p. 72, para. 166.

International Criminal Tribunal for the former Yugoslavia (the “ICTY”)³⁴ holding that serious bodily or mental harm entails harm that results in “a grave and long-term disadvantage to a person’s ability to lead a normal and constructive life”.³⁵

29. Any such determination of harm must be context-specific and assessed on a case-by-case basis.³⁶ In the context of the present proceedings, Namibia highlights the gravity of harms and long-term effects of hunger specifically, which is further detailed in the following section. Namibia further notes that serious bodily or mental harm under paragraph (b) encompasses not only physical injury but also acts that cause severe psychological trauma, including through terrorisation, repeated displacement, separation of families, and prolonged deprivation of basic necessities, where such harm contributes to the destruction of the group in whole or in part.³⁷
30. In sum, genocide by “Causing serious bodily or mental harm to members of the group” under Article II, paragraph (b), comprises:
 - (1) the material element that the perpetrator caused, whether by action or omission, serious bodily or mental harm to members of the group; and
 - (2) three mental elements:
 - (a) the perpetrator’s action or omission was intentional;
 - (b) the perpetrator intended to cause serious bodily or mental harm – that is, they meant to cause such harm or knew that their action or omission would cause such harm in the ordinary course of events; and
 - (c) the specific intent (“*dolus specialis*”).

³⁴ International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991.

³⁵ ICTY, *Krstić*, IT-98-33-T, Trial Chamber, Judgment, 2 August 2001 (“*Krstić, Trial Judgment*”), para. 513; *Krajišnik*, IT-00-39-T, Trial Chamber, Judgment, 27 September 2006, para. 862; *Tolimir*, IT-05-88/2-T, Trial Chamber Judgment, 12 December 2012 (“*Tolimir, Trial Judgment*”), para. 738 and IT-05-88/2-A, Appeals Chamber Judgment, 8 April 2015, paras. 201-202. See also *Croatia v. Serbia*, p. 69, para. 157 (approvingly referring to the “interpretation of ‘serious harm’ adopted by the ICTY”).

³⁶ *Tolimir*, Trial Judgment, para. 738.

³⁷ See *Akayesu*, paras. 502-504.

ii. The Distinctive Vulnerabilities of Victims

31. In interpreting and applying Article II in general, and paragraphs (b) and (c) in particular, Namibia submits that the Court should be alive to the distinctive characteristics of victims of the acts, particularly where those characteristics entail different vulnerabilities. In this respect, it is well established that what is required is a case-by-case, contextually sensitive application of the Convention.³⁸ Here, Namibia draws attention to five characteristics that bear on their construction, while noting that they may intersect and overlap.³⁹ These relate to the position of children, the elderly, women, persons with disabilities, and those who are ill.

Paragraph (b)

32. In considering both the material and mental elements of paragraph (b), the threshold of seriousness in the term “serious bodily or mental” harm must be informed by the specific needs and vulnerability of individuals concerned.
- (1) Thus, for instance, certain acts, when done to *children*, may meet this threshold even if those acts might not have been sufficient in relation to an adult.⁴⁰
 - (2) The same is true for *the elderly*, for whom the natural frailties occurring towards the end of life exacerbate the effects – and harm – of the relevant acts.
 - (3) The destruction of medical facilities or prevention of the supply of anaesthetics and other medical supplies have distinctive effects on *women*, including in relation to maternal health and care during the process of giving birth, as well as on their new-born babies.

³⁸ See *Tolimir*, Trial Judgment, para. 738.

³⁹ See *Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, Advisory Opinion*, 19 July 2024, Declaration of Judge Charlesworth, paras. 2 *et seq.*

⁴⁰ See, e.g., Committee on the Rights of the Child, “General Comment No. 7 (2005): Implementing child rights in early childhood”, UN doc. CRC/C/GC/7/Rev.1, para. 36; *idem*, “General Comment No. 13 (2011): The right of the child to freedom from all forms of violence”, UN doc. CRC/C/GC/13; Committee against Torture, “General comment No. 4 (2017) on the implementation of Article 3 of the Convention in the context of Article 22”, UN Doc. CAT/C/GC/4, para. 17.

- (4) Likewise, *persons with disabilities* have distinctive needs⁴¹ and are seriously harmed by acts that destroy accessible medical and rehabilitation services, interrupt the supply of medicines, assistive devices or personal support, or render evacuation and shelter inaccessible.
 - (5) Finally, for people who are *ill*, certain acts, such as repeated forced evacuations and displacements, which necessarily interrupt medical care, more easily meet the threshold of causing serious bodily and mental harm.
33. In the factual context of these proceedings, Namibia also notes that the effect of *hunger* could be particularly acute for some of these vulnerable groups.
- Paragraph (c)
34. The same reasoning applies to the construction of the material and mental elements of paragraph (c) (“Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part”).
35. In the first instance, Namibia draws attention to the trial judgment of the International Criminal Tribunal for Rwanda (the ‘ICTR’) in *Akayesu*, which held that this act may be committed through “subjecting a group of people to a subsistence diet, systematic expulsion from homes and the reduction of essential medical services below minimum requirement”.⁴² This approach was confirmed by the Court itself in *Croatia v. Serbia* in finding that methods of destruction may include the “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes”.⁴³
36. Moreover, in construing paragraph (c), two context-specific points are relevant.
37. *First*, the pre-existing situation of the group *as a whole* should be taken into account, including its access to food, shelter, medical services, and other supplies. A particular

⁴¹ See Convention on the Rights of Persons with Disabilities, Arts. 11, 25 and 26 (recognizing the distinctive position of persons with disabilities in situations of risk and requires disability-sensitive health, rehabilitation and protection measures).

⁴² *Akayesu*, para. 506.

⁴³ *Croatia v. Serbia*, p. 70, para. 161. As Namibia further observes *infra*, the deliberate obstruction or denial of humanitarian assistance, including food, water, medical supplies, fuel, and shelter, where such deprivation threatens the physical survival of a group of people, may constitute the infliction of conditions of life within the meaning of Article II(c), and may also be relevant to establishing genocidal intent.

population may be more or less vulnerable, depending on their pre-existing situation. This is essential context for determining the severity of the measures and restrictions imposed.

38. *Second*, as above, the “conditions of life” standard must be informed by the distinctive needs and vulnerabilities of the individual members of the protected group targeted. Thus, to give one example, to forcibly displace members of the group, or to repeatedly and persistently refuse to provide or allow aid to the group, has particularly grave effects on children and the elderly, and is more liable to bring about their physical destruction.⁴⁴
39. In sum, Namibia emphasises that in construing Article II in general, and paragraphs (b) and (c) in particular, the distinctive needs and vulnerabilities of members of the group are relevant. The underlying acts in Article II must be assessed cumulatively and within their broader factual context: a combined pattern of conduct may support both the material and mental elements.

iii. Refusal to Provide or Facilitate Aid

40. Finally, Namibia also wishes to emphasise that certain underlying acts of genocide may be committed through actions or omissions that entail a refusal to provide or facilitate aid to a civilian population. Such conduct may also constitute, but is not limited to, violations of a party to a conflict’s obligations under international humanitarian law in relation the provision of supplies to a population under occupation. In this respect, in relation to an Occupying Power’s own obligations, Article 55 of the Fourth Geneva Convention,⁴⁵ as supplemented by the customary rule reflected in Article 69 thereof, imposes demanding duties of supply on the occupant. In addition, as set out in Article 59(1) of that Convention:

“If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.”

41. As noted in Section II.B.1.i above, Namibia contends that the material element of each of the underlying acts in paragraphs (a) to (c) – killing, harming, and inflicting conditions

⁴⁴ As Namibia further submits *infra*, State responsibility attaches where authorities deliberately restrict humanitarian access with knowledge that such deprivation will cause death or serious harm to members of vulnerable groups.

⁴⁵ Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949, *United Nations, Treaty Series*, vol. 75, p. 287.

of life – may be fulfilled not only by actions but also by omissions. Accordingly, in a particular factual situation, a refusal to provide aid or to agree to and facilitate its provision by other actors may constitute an *omission* which constitutes the enumerated acts of genocide.

Paragraph (c)

42. *First*, such a refusal may be the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction under paragraph (c). In *Croatia v. Serbia*, the Court noted that this provision includes at least the following methods of destruction: “deprivation of food, medical care, shelter or clothing, as well as lack of hygiene, systematic expulsion from homes, or exhaustion as a result of excessive work or physical exertion”.⁴⁶

Paragraph (b)

43. *Second*, such a refusal may be a way to cause serious bodily or mental harm to members of the group under paragraph (b). It is well established that the proscribed harm may be caused through acts or omissions.⁴⁷ In particular, the denial of food, water, and medical supplies may be “such as to contribute to the physical or biological destruction of the group, in whole or in part”, as the Court put it in *Croatia v. Serbia*.⁴⁸

Paragraph (a)

44. *Third*, such refusal may even amount, in specific cases, to the intentional killing of individual members of the group under paragraph (a). Here, too, killing may be committed through an omission, the wrongfulness of the omission being determined by the existence of a duty to act in the specific situation.⁴⁹
45. In each case, a State’s violation of its duties to provide or facilitate aid to a civilian population under international humanitarian law – or other body of law – would constitute

⁴⁶ *Croatia v. Serbia*, p. 70, para. 161.

⁴⁷ See, e.g., *Krstić*, Trial Judgment, para. 513: (“The Trial Chamber finds that serious bodily or mental harm for purposes of Article 4 *actus reus* is an intentional act or omission causing serious bodily or mental suffering.”).

⁴⁸ *Croatia v. Serbia*, p. 69, para. 157.

⁴⁹ See, e.g., ICTY, *Blaškić*, IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, para. 663 (interpreting Art. 7, para. 1, of the ICTY Statute).

not only an independent violation of that body of law, but potentially also an enumerated act of genocide.

2. Specific Intent

46. Namibia now turns to the construction of the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such” in the chapeau of Article II, which the Court has held to be an essential characteristic of genocide.⁵⁰ Here, Namibia focuses on the proof of such intent, particularly by inference.
47. Namibia recalls that specific intent may be established by the demonstration of an express plan or by inference from certain types of conduct.⁵¹ As to the strength of the inference, in *Croatia v. Serbia*, the Court clarified 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”.⁵²
48. Namibia begins with three points in relation to the general approach for assessing specific intent.
49. *First*, Namibia rejects any attempt to narrow the applicable test above as set out in *Croatia v. Serbia*. In this respect, the Court’s own warning against adopting an interpretation that “would make it impossible to reach conclusions by way of inference” is compelling.⁵³ An unduly narrow approach would risk undermining the Convention’s protective purpose precisely where protection is needed – in situations where perpetrators deliberately obscure their intent.
50. *Second*, in making a determination of specific intent, the evidence is to be assessed holistically. As noted by the Appeals Chamber of the ICTY in *Stakić*, a “piecemeal” or “compartmentalised” mode of analysis will obscure the proper inquiry.⁵⁴ The correct approach is to ask “whether all of the evidence, taken together, demonstrated a genocidal

⁵⁰ *Croatia v. Serbia*, p. 62, para. 132.

⁵¹ *Bosnia v. Serbia*, pp. 196-197, para. 373; *Croatia v. Serbia*, p. 66, para. 145.

⁵² *Croatia v. Serbia*, p. 67, para. 148.

⁵³ *Croatia v. Serbia*, p. 67, para. 148.

⁵⁴ ICTY, *Stakić*, IT-97-24-A, Appeals Chamber Judgment, 22 March 2006 (*‘Stakić’*), para. 55

mental state”.⁵⁵ This requires that the Court examine cumulative patterns, contexts, and circumstances together, recognising that genocidal campaigns rarely proceed through explicit declarations of intent but instead through systematic patterns of violence, deprivation, and discrimination.

51. *Third*, and crucially, a wide range of underlying evidence is to be examined in making a determination of the specific intent requirement. As the Appeals Chamber of the ICTY held in *Jelisić*:

“As to proof of specific intent, it may, in the absence of direct explicit evidence, 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 systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts.”⁵⁶

52. Drawing on this general approach – particularly this last point – Namibia contends that, upon a proper instruction of the “intent” requirement, the following factors are particularly pertinent and probative of genocidal specific intent.

i. Acts of Genocide and Other “Culpable” Acts

53. To start with, Namibia emphasises the importance of the underlying acts of genocide for the determination of specific intent. More specifically, the *scale, systematicity, intensity*, and *repetition* of those underlying acts is of fundamental importance in inferring the genocidal intent with which they were committed.

- (1) To take the act of killing under Article II, paragraph (a), for example, the specific intent is evident in the number of deaths of members of the protected group and the persistent repetition of those killings over months or even years.
- (2) As to other enumerated acts of genocide, genocidal intent is evident, in part, in the number of members of the protected group subject to the wrongful acts, and in the intensity, systematicity and prolonged character of the treatment.

⁵⁵ *Stakić*, para. 55

⁵⁶ *Jelisić*, IT-95-10-A, Appeals Chamber Judgment, 5 July 2001 (“*Jelisić*”), para. 47

- (3) Specific intent is also evident in the existence of wrongful conduct falling within multiple enumerated acts of genocide under Article II.

Together, these factors provide evidence 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”.⁵⁷

54. In addition, as noted in *Jelisić*, “other culpable acts” not constituting genocide may also be relevant for the purposes of specific intent.⁵⁸ In Namibia’s contention, the *identity of the victims* is the key criterion in assessing the relevance and probative value of such acts in inferring specific intent. The most relevant and probative acts are those that are – in the wording of *Jelisić* – “systematically directed against the same group” or that entail “the systematic targeting of victims on account of their membership of a particular group, or the repetition of destructive and discriminatory acts”.⁵⁹ In this regard, the general, systemic discriminatory treatment of members of the protected group more broadly – especially in its most egregious forms, namely racial segregation and apartheid – is particularly probative towards the inference of specific intent.
55. Finally, one specific example of such acts is the practice of forced displacement or so-called “ethnic cleansing”. As the Court has noted, acts of this kind can constitute the infliction of conditions of life as an underlying “act” of genocide under Article II, paragraph (c).⁶⁰ In addition, even where such practices do not constitute an underlying act as such, Namibia emphasises the Court’s own finding in relation to their relevance in determining specific intent: “it is clear 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”.⁶¹

⁵⁷ *Croatia v. Serbia*, p. 64, para. 139.

⁵⁸ *Jelisić*, para. 47.

⁵⁹ *Jelisić*, para. 47.

⁶⁰ *Bosnia v. Serbia*, pp. 122-123, para. 190.

⁶¹ *Bosnia v. Serbia*, p. 123, para. 190. See also ICTY, *Krstić*, IT-98-33-A, Appeals Chamber, Judgment, 19 April 2004 (“**Krstić, Appeals Judgment**”), para. 33 (“The fact that the forcible transfer does not constitute in and of itself a genocidal act does not preclude a Trial Chamber from relying on it as evidence of the intentions of members of the VRS Main Staff. The genocidal intent may be inferred, among other facts, from evidence of ‘other culpable acts systematically directed against the same group.’”).

ii. Protected Status of Victims

56. In addition to their identity or membership in a group, the *protected status* of the victims is another relevant factor in assessing the existence of specific intent, especially in situations of armed conflict.
57. To begin, the *civilian* status of the victims is a telling sign of specific intent. Thus, genocidal acts aimed at an entire or large civilian population – for instance, the use of starvation as a method of warfare or a general refusal to facilitate delivery of essential supplies – are *prima facie* indicative of both the character and scale of genocidal intent. In this context, too, the vulnerabilities of the particular groups of victims discussed above are, once again, crucial.
58. Similarly, Namibia emphasises that the systematic, repeated killing of *children* at scale provides compelling evidence genocidal intent.
- (1) It is the case that children are critical to the survival of any group and its “capacity to renew itself”.⁶² Such killings indicate the aim to destroy at least a substantial part of the group.
 - (2) The identity of the victims as children renders unconvincing any claim that the members of the protected group were targeted for some lawful reason.
 - (3) The killing of children at a certain level and scale makes it implausible for the State to allege that the killings were, for instance, foreseen incidental civilian harm under the rule of proportionality.
59. In addition, and relatedly, Namibia also draws the Court’s attention to an important finding of the Appeals Chamber of the ICTY in *Krstić*. In that context, one question concerned the Bosnian Serb forces’ decision *not to kill women and children* at Srebrenica and whether it undermined a finding of specific intent.⁶³ The Appeals Chamber found:

“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 will not implement the perpetrator’s intent to the fullest, leaving that destruction incomplete, this ineffectiveness

⁶² *Croatia v. Serbia*, p. 63, para. 136.

⁶³ *Krstić*, Appeals Judgment, paras. 30-32.

alone does not preclude a finding of genocidal intent. The international attention focused on Srebrenica, combined with the presence of the UN troops in the area, prevented those members of the VRS Main Staff who devised the genocidal plan from putting it into action in the most direct and efficient way. Constrained by the circumstances, they adopted the method which would allow them to implement the genocidal design while minimizing the risk of retribution.”⁶⁴

60. In any particular situation, it may be the case that a State has the actual military and bureaucratic capacity to kill, cause harm, or inflict conditions of life on a protected group in excess of what it has, in fact, done. However, in accordance with the approach of the Appeals Chamber in *Krstić*, this does not mean that specific intent to destroy the group in whole or in part does not exist. As in everyday life, the implementation of one’s intentions may be constrained and shaped by other aims. These might include maintaining political support from allies, evading public scrutiny, or the maintenance of some semblance of plausible deniability.⁶⁵

iii. Derogatory, Stigmatising and Dehumanising Language

61. Finally, Namibia notes the particular importance of derogatory, stigmatising, and dehumanising language aimed at members of the protected group. The relevance of language of this kind to an inference of genocidal intent has been affirmed in numerous decisions of international criminal tribunals,⁶⁶ as well as in the Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar.⁶⁷
62. As a starting point, a careful assessment of content and prevalence is required. In addition, weight should be placed on who is making the statements and their role within the State; whether the statements are made openly, thus indicating a general acceptance; and how

⁶⁴ *Krstić*, Appeals Judgment, para. 32.

⁶⁵ See similarly *Krstić*, Appeals Judgment, para. 31 (“The decision not to kill the women or children may be explained by the Bosnian Serbs’ sensitivity to public opinion. In contrast to the killing of the captured military men, such an action could not easily be kept secret, or disguised as a military operation, and so carried an increased risk of attracting international censure”).

⁶⁶ ICTR, *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, Trial Chamber, Judgment, 21 May 1999, paras. 93, 527; ICTY, *Popović et al*, IT-05-88-T, Trial Chamber, Judgment and Sentence, 10 June 2001, para. 1177; ICTR, *Muhimana*, ICTR-95-1B-T, Trial Chamber, Judgment, 28 April 2005, para. 496.

⁶⁷ Human Rights Council, “Report of the Detailed Findings of the Independent Fact-Finding Mission on Myanmar”, UN doc. A/HRC/39/CRP.2, 17 September 2018, paras. 1419-1426. In its Provisional Measures Order in *Gambia v. Myanmar*, the Court recalled the findings in this Report.

others, including governing authorities of the State, respond to them. This may be approached on two levels simultaneously.

63. On the one hand, weight should naturally be placed on the statements of high-ranking members of the political and military leadership of the State, as well as whether those making such statements suffered legal, institutional, or political consequences. In this respect, material consequences matter. For instance, an individual who makes repeated racist and dehumanising statements against the protected group, and remains part of the State's Cabinet carries greater weight than the fact of some mild criticism of those statements by other leaders.
64. On the other hand, weight should also be placed on the statements of individual agents of the State, including soldiers, physically responsible for the commission of underlying wrongful acts.⁶⁸ In this respect, as emphasised in Section II.A above: States are responsible for wrongful acts undertaken with genocidal intent of each and every individual agent of the State. More widely, the specific disclosures and statements of individual soldiers provide a critical insight into their intentions.
65. In both instances, Namibia notes the significance of language that dehumanises the population of the protected group, that diminishes or denies any distinction between combatants and the civilian population, or that suggests culpability of all members of that population for the wrongs of other individuals. Of particular importance are statements that there are no innocent civilians among the population of the protected group. In the context of ongoing conflict, these are genocidal statements.
66. In addition, Namibia notes that it may be helpful to also focus on a sub-category of statements falling into this category of derogatory, stigmatising, or dehumanising language: those that constitute direct and public incitement to genocide under Article III, paragraph (c), of the Convention. The following section of this Declaration addresses certain issues relating to the construction of this provision; at present, the issue is its relevance to an assessment of specific intent.

⁶⁸ For application, see ICTR, *Nahimana et al.*, ICTR-99-52-A, Appeals Chamber, Judgment, 28 November 2007 ('*Nahimana et al.*'), para. 567.

67. In this respect, a State’s refusal to punish direct and public incitement to commit genocide constitutes important evidence of the genocidal intent at the highest level of the State. By definition, the relevant statements will be public, and may even be collected and presented to the investigative and prosecutorial organs of the State. Refusal to act is a choice – it is a choice indicative of the intent of the relevant officials. This is particularly so when those responsible for the incitement statements are high-profile and are known to have a large audience, which will likely include individuals serving in the armed forces or otherwise responsible for the treatment of the protected group.

C. Article III, paragraph (c)

68. In this Declaration, Namibia focuses its contentions on Article III, paragraph (c), as read in conjunction with other Articles of the Convention.
69. As to the construction of the punishable act of direct and public incitement itself, Namibia makes the following submissions, drawing on the detailed attention the issue has received before international criminal tribunals.
70. *First*, direct and public incitement is an inchoate wrong – there is no requirement that the object of the incitement comes to fruition.⁶⁹ It follows that it is completed as a wrong at the moment of the incitement.
71. *Second*, although directness requires more than a “mere vague or indirect suggestion”,⁷⁰ it may be satisfied through the use of implicit language that would be understood by the intended audience. Thus, for instance, the International Criminal Tribunal for Rwanda found that: “exhorting a crowd to unite against the ‘sole enemy’, or to ‘get to work’, or calling on ‘the majority’ to ‘rise up and look everywhere possible’ and not to ‘spare anybody’, in the context of the Rwandan genocide has been found in the particular circumstances of other cases to amount to calls to exterminate the Tutsi people”.⁷¹ In a context where one group is already being systematically killed or deprived of life-sustaining necessities, coded or implicit language calling for action against that group may constitute direct incitement understood by those in a position to implement it.

⁶⁹ *Nahimana et al.*, para. 678.

⁷⁰ ICTR, *Kalimanzira*, ICTR-05-88-T, Trial Chamber, Judgment, 22 June 2009, para. 514.

⁷¹ *Kalimanzira*, para. 514.

72. *Third*, in determining whether the requirement of publicness is met, the Appeals Chamber of the ICTY has held that “the place where the incitement occurred and whether the attendance was selected or limited” should be taken into account.⁷² This requirement may be met through public speeches, publication in traditional news and broadcast media, and all forms of social media.
73. It is also worth clarifying the *obligations* imposed by the Convention in relation to direct and public incitement to genocide, read together with other Articles of the Convention.
74. *First*, as mentioned in Section II.A above, the State is itself bound not to commit acts of direct and public incitement to genocide;⁷³ and the State is responsible for the conduct (including, in the context of the crime of genocide, both its material and mental elements) of each and every one of its agents or organs, including conduct which constitutes direct and public incitement to commit genocide.
75. *Second*, Contracting Parties are also bound to prevent and to punish direct and public incitement to commit genocide committed by both agents of the State and private individuals.⁷⁴ This obligation arises, at least,⁷⁵ in relation to all acts of direct and public incitement taking place in the territory of the State concerned.
76. *Third*, Namibia draws attention to the terms of Article IV of the Convention: “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.”⁷⁶ Again, this provision means what it states – the State is obliged to punish those responsible no matter who they are. It applies with as much force to a Cabinet Member as to a private in the armed forces; with as much force to a television host as to the Head of State.

⁷² ICTR, *Nzabonimana*, ICTR-98-44D-A, Appeals Chamber, Judgment, 29 September 2014, para. 384.

⁷³ *Bosnia v. Serbia*, p. 119, para. 179. See also *Croatia v. Serbia*, p. 61, paras. 128-129.

⁷⁴ *Bosnia v. Serbia*, p. 119, para. 179 (“Contracting Parties are bound by the obligation under the Convention not to commit, through their organs or persons or groups whose conduct is attributable to them, genocide and *the other acts enumerated in Article III*.”) (emphasis added).

⁷⁵ Namibia reserves the right to address in more detail the application of the Convention to acts committed in *occupied territory* if that matter becomes an issue of dispute.

⁷⁶ Genocide Convention, Art. IV.

77. Finally, Namibia draws the Court's attention to one additional point in relation to whether a State has complied with its obligation to punish direct and public incitement to genocide. It is true that the investigation and prosecution of criminal offences can take some time, particularly where there is evidentiary or other practical complexity in relation to investigating the offence. In the general sweep of cases, however, these complexities do not arise for direct and public incitement to commit genocide. The statements will be public, and in many cases will have been published in print or online or recorded. The offence is discrete and precisely defined, and raises in the core case no issues of complex assessment as to the existence of wrongful intent.
78. Contracting Parties cannot evade their responsibility for failing to discharge their obligation to punish direct and public incitement by simply asserting that investigative efforts are underway while failing to take timely and concrete steps toward prosecution.

CONCLUSION

79. For the foregoing reasons, Namibia hereby avails itself of its right to intervene in the proceedings of the present case under Article 63, paragraph 2, of the Court's Statute.
80. Namibia has appointed the undersigned as its Agent for the purposes of its intervention,⁷⁷ and requests that all communications in this case be sent to the following address:

Embassy of Namibia
Avenue de Tervueren 454
BE 1150 Brussels

Respectfully submitted,


Dr. Alfredo Tjiurimo Hengari

Ambassador of the Republic of Namibia to
the Kingdoms of Belgium and the Netherlands,
the Grand Duchy of Luxembourg, and
the European Union

Agent of the Republic of Namibia

Brussels, 12 March 2026

⁷⁷ Rules of Court, Art. 86, para. 5.