INTERNATIONAL COURT OF JUSTICE

DECLARATION OF INTERVENTION

OF THE GOVERNMENT OF SWEDEN

filed in the Registry of the Court
on 9 September 2022
in the case of

ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(UKRAINE v. RUSSIAN FEDERATION)

COUR INTERNATIONALE DE JUSTICE

DÉCLARATION D'INTERVENTION

DU GOUVERNEMENT DE SUEDE

enregistrée au Greffe de la Cour
le 9 septembre 2022
dans le cas de

ALLÉGATIONS DE GÉNOCIDE AU TITRE DE LA CONVENTION POUR LA PRÉVENTION ET LA RÉPRESSION DU CRIME DE GÉNOCIDE

(UKRAINE c. FÉDÉRATION DE RUSSIE)

I. LETTER FROM THE AMBASSADOR OF THE KINGDOM OF SWEDEN TO THE KINGDOM OF THE NETHERLANDS TO THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE

The Hague, 8 September 2022

I have the honour to attach a Declaration by the Government of the Kingdom of Sweden of its intervention pursuant to Article 63, paragraph 2, of the Statute of the Court in the case concerning Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).

I also attach an instrument signed by the Minister for Foreign Affairs appointing the Agent and Co-Agent of Sweden for the purposes of these proceedings. I certify that the signatures on the Declaration are those of the appointed Agent, Ambassador Carl Magnus Nesser, and Co-Agent, Deputy Director Daniel Gillgren.

Finally, I have the further honour to advise that the address for service to which all communications concerning these proceedings should be sent is that of this Embassy.

Yours sincerely,

Johannes Oljelund
Ambassador of the Kingdom of Sweden to the Kingdom of the Netherlands

II. APPOINTMENT OF AGENT AND CO-AGENT

Stockholm, 31 August 2022

For the purposes of intervention pursuant to Article 63 of the Statute of the Court in the present case before the International Court of Justice, Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), I hereby appoint Carl Magnus Nesser, Director-General for Legal Affairs, Ministry for Foreign Affairs, as Agent for Sweden and Daniel Gillgren, Deputy Director at the Department for International Law, Human Rights and Treaty Law within said Ministry, as Co-Agent for Sweden.

(Signed)
Ann Linde
Minister for Foreign Affairs

III. DECLARATION OF INTERVENTION OF THE GOVERNMENT OF THE KINGDOM OF SWEDEN

I. THE RIGHT TO INTERVENE

1. On behalf of the Government of Sweden, and following your letter n°156413 of 30 March 2022[1] addressed to the States Parties to the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention") pursuant to Article 63, paragraph 1, of the Statute of the Court ("the Statute"), we have the honour to submit to the Court a Declaration of Intervention, relying on the right to intervene set out in Article 63, paragraph 2, of the Statute, in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).

2. As this Court has recognised, Article 63 of the Statute confers a "right" of intervention,[2] where the State seeking to intervene confines its intervention to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case".[3] Sweden's right to intervene in the present case arises from its status as a Party to the Convention, and it is in this limited context that Sweden intervenes before the Court, taking due notice of the Registrar's message in the abovementioned letter that "the construction of this instrument [the Convention] will be in question in the case", particularly concerning Articles I–III and IX.

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

(a) particulars of the basis on which the declarant State considers itself a party to the convention;

(b) identification of the particular provisions of the convention the construction of which it considers to be in question;

(c) a statement of the construction of those provisions for which it contends; and

(d) a list of documents in support, which documents shall be attached.

4. All these matters are addressed in sequence below, following some preliminary observations regarding the case at hand and a short summary of the legal proceedings in it.

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[1] See Annex A to this Declaration.

[2] *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76, and *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 13, para. 21.

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

II. THE LEGAL PROCEEDINGS

5. On 26 February 2022, Ukraine filed an application instituting proceedings against the Russian Federation before the Court ("the Application") concerning "a dispute . . . relating to the interpretation, application and fulfilment" of the Convention (General List No. 182, hereinafter "the Proceedings").[4]

6. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute and on Article IX of the Convention, to which both States are Parties.[5]

7. Together with the Application, Ukraine filed a Request for the indication of provisional measures, pursuant to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules ("the Request"), in which it requested that the Court indicate provisional measures "in order to prevent irreparable prejudice to the rights of Ukraine and its people and to avoid aggravating or extending the dispute between the parties under the Genocide Convention".[6]

8. The Court held a public hearing in the case on 7 March 2022 devoted to the Request and unattended by the Russian Federation. On the same day, the Russian Federation filed a document (with annexes) setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case ("the Document"), arguing that both the Application and the Request manifestly fall beyond the scope of the Convention.[7]

9. On 16 March 2022, the Court delivered a binding Order ("the Order"), in which it found that, *prima facie*, it had jurisdiction over the dispute, indicating the following provisional measures:

(1) the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

(2) the Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above; and

(3) both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

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[4] Application, para. 2.

[5] Application, Section II, paras. 4–12.

[6] Request, para. 20.

[7] Document, para. 23.

10. As of the date of this Declaration, the Russian Federation has failed to comply with the Order, has intensified and expanded its military operations on the territory of Ukraine and has thus aggravated the dispute pending before the Court.[8]

III. PRELIMINARY OBSERVATIONS

11. The Government of Sweden believes that the Convention is of the utmost importance to prevent and punish genocide. Any act committed with an intent to destroy – in whole or in part – national, ethnical, racial or religious groups constitutes a crime under international law. Indeed, the prohibition of genocide is a *jus cogens* norm in international law, and the rights and obligations enshrined in the Convention are owed to the international community as a whole.[9] As this Court has repeatedly affirmed, all the States Parties to the Convention therefore have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention.[10] In the view of the Court, such a common interest also implies that the obligations are *erga omnes partes*, in the sense that each State Party has an interest in compliance with them in any given case.[11]

12. To further underline the universal nature of the interests enshrined in the Articles of the Convention, the Court's own explanation of the legal relationship established among the States Parties can be reiterated:

> "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[12]

13. It is against this backdrop, and as a keen proponent of a rules-based world order in which human rights, democracy and the rule of law are highly valued, that Sweden has determined

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[8] In a new Order issued on 23 March 2022, the Court fixed the time-limits for the filing of the written pleadings, giving Ukraine until 23 September 2022 to file its Memorial, and the Russian Federation until 23 March 2023 to file its Counter-Memorial, reserving the subsequent procedure for further decision. Ukraine filed its Memorial on 1 July 2022.

[9] See, *e.g.*, *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 111, paras. 161–162.

[10] In the words of the late Judge Cançado Trindade, all States Parties are called upon to contribute to the proper interpretation of treaties embodying matters of collective interest as sort of a "collective guarantee of the observance of the obligations contracted by [them]", see Separate Opinion of Judge Cançado Trindade, attached to *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 33, para. 53.

[11] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 449, para. 68, see also *Barcelona Traction, Light and Power Company, Limited (New Application: 1962) (Belgium v. Spain)*, Second Phase, Judgment, I.C.J. Reports 1970, p. 32, para. 33, and, most recently, the 22 July 2022 Judgment in the case of *Application of the Convention on the prevention and punishment of the crime of genocide (The Gambia v. Myanmar)*, p. 36, para. 107.

[12] *Advisory Opinion on Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1951, p. 23.

that it is necessary for it to intervene in this case, in order to place its interpretation of the relevant provisions of the Convention before the Court, applying customary rules of interpretation as reflected in the Vienna Convention on the Law of Treaties.[13]

14. In line with the statements of the Court cited above concerning the scope of the right of intervention, Sweden will present its views to the Court on pertinent issues of interpretation under the Convention relevant to the determination of the case, not the application of its Articles on it. In that regard, Sweden wishes to emphasise that it seeks neither to be a (third) Party to the Proceedings, nor to affect the equality of the Parties to the dispute.[14] But, in accordance with Article 63 of the Statute, Sweden confirms that, by availing itself of its right to intervene, it accepts that the construction given by the judgment in the case will be equally binding upon it.

15. In addition to the matters set out above, Article 82, paragraph 1, of the Rules further provides that a declaration of a State desiring to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall be filed "as soon as possible, and not later than the date fixed for the opening of the oral proceedings". In accordance with that requirement, this Declaration has been filed at the earliest opportunity reasonably open to Sweden, well in advance of the oral stage of the Proceedings.

16. If its intervention is deemed admissible, Sweden requests to be provided with copies of all pleadings filed by the Parties, as well as any annexed documents, in line with Article 85, paragraph 1, of the Rules. As Agents of the Swedish Government, we further wish to inform the Court that we are willing to assist the Court in grouping this intervention with similar interventions from other States for future stages of the Proceedings, should the Court deem such a move useful in the interest of good and expedient administration of justice.

IV. CASE AND CONVENTION TO WHICH THIS DECLARATION RELATES

17. This Declaration relates to the Proceedings, which concern the construction of the Convention.

18. As a Party to the Convention, Sweden has a direct and undisputed interest in the construction that might be placed upon the Convention by the Court in its decision in these Proceedings. For that reason, Sweden is now exercising its right to intervene conferred by Article 63 of the Statute. Sweden's intervention is accordingly directed to the questions of construction of the Convention arising in this case, in particular concerning Articles I–III and IX, but also Article VIII. Having said that, Sweden reserves the right to supplement or

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[13] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 87: "The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969"; see also *Application of the International Convention On the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, p. 24, para. 75 with further references.

[14] Compare *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. reports 2013, p. 9, para. 18.

amend this Declaration and any associated further observations, pending the contents of the Parties' future arguments and the overall development of the Proceedings.

V. BASIS ON WHICH SWEDEN IS PARTY TO THE CONVENTION

19. Having signed the Convention on 30 December 1949, on 27 May 1952 Sweden deposited its instrument of ratification[15] with the Secretary-General of the United Nations in accordance with Article XI of the Convention, to which Sweden still is a Party.

VI. PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE

20. In its Application, Ukraine in particular:

(a) seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Convention;

(b) asks the Court to declare that it has not committed acts of genocide as defined in Article III of the Convention; and

(c) raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention.[16]

21. Sweden will briefly address the construction of these Articles below, starting with the strictly jurisdictional issues pertaining to the construction of Article IX – *i.e.* mainly part (a) above – with due regard to the comments made in that respect by the Russian Federation in its Document, and ending with a few remarks on the more meritorious questions raised by the legal-technical construction of Articles I–III – *i.e.* mainly parts (b)–(c) above.[17] At the very end, Sweden will also touch upon Article VIII, which it deems is of relevance in the case at hand.

VII. CONSTRUCTION OF THOSE PROVISIONS FOR WHICH SWEDEN CONTENDS

Section A – Jurisdiction

i. Jurisdiction under Article IX of the Convention

22. In this context, it first should be highlighted that Article 63 of the Statute expressly allows interventions "[w]henever the construction of a convention to which states other than those

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[15] See Annex B to this Declaration.

[16] Application, paras. 12 and 30.

[17] Construction of provisions concerning jurisdiction is dealt with in section A in the next chapter, while construction of provisions more aimed at the merits is dealt with in section B.

concerned in the case are parties is in question". It would thus appear that there is no statutory bar to interventions on mere jurisdictional issues.[18] Furthermore, the only temporal constraint in Article 82 of the Rules is that, as has already been touched upon, an intervention must be declared "as soon as possible, and not later than the date fixed for the opening of the oral proceedings" (except in exceptional circumstances). This lack of obstacles for early intervenors focusing solely on the issue of jurisdiction is also mirrored in the Court's Practice Directions, which address neither the timeframe nor the scope of possible interventions.

23. The basic documents of the Court thus in no way suggest that States are prohibited from making interventions 'too early' (*i.e.* during the preliminary phase, at which stage the question of the Court's jurisdiction often is discussed). From this, available commentary[19] and (limited) legal opinion[20], Sweden draws the conclusion that ideas on purely jurisdictional matters may also be entertained in this Declaration, as long as they relate to the (construction of the) Convention itself, rather than its application in the case at hand.

24. Article IX of the Convention reads as follows:

> "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."

25. Ukraine contends that its dispute with the Russian Federation concerns the latter's public statements that genocide was occurring in the regions of Donetsk and Luhansk. It specifically invites the Court to "[a]djudge and declare that, contrary to what the Russian Federation claims, no acts of genocide [...] have been committed in the Luhansk and Donetsk oblasts of Ukraine".[21] This raises the principal question if the Convention grants the Court jurisdiction to make such a negative declaration. Put differently, the issue at stake here is whether Article IX confers on the Court jurisdiction *ratione materiae* to declare the absence of genocide.[22] In that regard, Sweden wishes to make the following points.

26. Article IX confers jurisdiction over "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention". There is nothing in

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[18] According to Judge Schwebel "intervention in the jurisdictional phase of a proceeding is within the scope of rights with which States are endowed by the terms of Article 63", see *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Declaration of Intervention of El Salvador), Order of 4 October 1984, I.C.J. Reports 1984, p. 223, at pp. 235–236, Dissenting Opinion of Judge Schwebel.

[19] MN Shaw (ed), *Rosenne's Law and Practice of the International Court 1920–2015* (5th ed, Vol III, Brill Nijhoff 2016), p. 1 533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol I, OUP 2013), p. 1 031; A. Miron/C. Chinkin, "Article 63" in: Zimmermann/Tams/Oellers-Frahm/Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed, OUP 2019), p. 1 741, at p. 1 763, note 46.

[20] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984, p. 215 at pp. 234–236 and 240, Dissenting Opinion of Judge Schwebel.

[21] Application, para. 30(a).

[22] Even if the Russian Federation does not participate in the forthcoming Proceedings, or if it participates but raises no preliminary objections to this effect, the Court may *ex officio* choose to address this issue when establishing its jurisdiction.

this language that limits the Court's jurisdiction to cases where it is the applicant State accusing the respondent State of breaching its obligations under the Convention. On the contrary, the term "dispute" has long been given a broad meaning by international courts and tribunals. Indeed, it is well established in international law that a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or interests" between the Parties, in this case the States.[23]

27. In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other".[24] The two sides must "hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations",[25] and it is a further prerequisite "that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant".[26] Moreover, "in case the respondent has failed to reply to the applicant's claims, it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists".[27] It is against this background that the existence of a dispute under Article IX of the Convention is to be determined.

28. In its Document, the Russian Federation submitted that the legal justification for its use of force in Ukraine was found in "the United Nations Charter, its Article 51 and customary international law".[28] Since the Russian Federation, at least during the initial stage of the Proceedings, did not seek to defend its conduct under the provisions of the Convention, it could be argued that no 'dispute' exists between the Parties as to the interpretation, application or fulfilment of the Convention, since it has not been invoked to justify the Russian Federation's conduct in Ukraine.[29]

29. Sweden submits that the existence of a dispute as a jurisdictional precondition in accordance with Article IX must be construed from the text given to it by its authors. That text must in turn be interpreted "in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose", as stipulated by Article 31 of the Vienna Convention on the Law of Treaties. This entails that the term 'dispute' is understood in those broad terms discussed above and without prejudice

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[23] *Mavrommatis Palestine Concessions*, PCIJ, Series A, No. 2, 1924, p. 11.

[24] *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, at p. 328.

[25] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, p. 406, at p. 414, para. 18; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 3, at p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

[26] See, *e.g.*, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 833, para. 41.

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 27, para. 71.

[28] Document, para. 15.

[29] It should here be mentioned that President Putin, in his address on 24 February 2022, appended in its entirety to the Document, said that "[w]e had to stop that atrocity" and "bring to trial those who perpetrated numerous bloody crimes against civilians", referring to the "genocide perpetrated by the Kiev regime" targeting "the millions of people who live [in Donbass]". This inevitably brings attention to the "undertak[ing] to prevent and punish" genocide in Article I of the Convention, even though that obligation is not referred to by the Russian Federation as a justification for its use of force in Ukraine.

to whether it is the Applicant's or the Respondent's actions that are brought before the Court. It further means that one Party's unilateral denial of a dispute's existence for the purposes of the application of Article IX of the Convention cannot be determinative of whether a dispute really exists.[30] In fact, the objection that no dispute exists may sometimes show the opposite, since it can mean that the Parties take different views on how to interpret, apply and fulfil (their obligations under) the Convention.[31]

30. In this context it should also be underlined that Article IX is a broad jurisdictional clause, allowing the Court to adjudicate upon disputes concerning the alleged fulfilment by a Contracting Party of its obligations under the Convention. The addition of the word "fulfilment" to the traditional formulation of "interpretation and application" in compromissory clauses may here serve to broaden the Court's jurisdiction.[32] Since Article IX expressly extends to disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", it is difficult to see how this wording of the clause limits the Court's jurisdiction to the determination of the responsibility of a respondent State. A further testament to the legal value of the construction of Article IX contended by Sweden could be found in the very last part of the clause, where it is made clear that the Court may establish its jurisdiction "at the request of any of the parties to the dispute".

31. To elaborate further, the *ordinary meaning* of the phrase "relating to the interpretation, application or fulfilment of the Convention" may be divided in two sub-categories. The first point ("relating to") establishes a link between the dispute and the Convention, while the second point ("interpretation, application or fulfilment of the Convention") encompasses many different scenarios.[33] There can for instance be a dispute about the interpretation, application or fulfilment of the Convention when one State alleges that another State has committed genocide.[34] In that scenario, the Court verifies the factual basis for such allegation: if it is not satisfied that there were any acts of genocide actually committed by the respondent State, it may decline jurisdiction, even *prima facie*.[35]

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[30] See, *e.g.*, *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 833, paras. 37–43.

[31] Indeed, it could in this case be argued that Ukraine's Application, and the Russian Federation's Document, together evidence that there is a fundamental difference of views between the Parties as to whether there is a dispute within the scope of Article IX of the Convention giving rise to the jurisdiction of the Court.

[32] As Judge Oda has noted, the inclusion of the word "fulfilment" is "unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission of the International Court of such disputes between Contracting Parties as relate to the *interpretation or application* of the treaties in question", see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Declaration of Judge Oda, I.C.J. Reports 1996 (II), p. 627, para. 5 (emphasis in the original).

[33] As Professor Kolb has observed, Article IX of the Convention is "a model of clarity and simplicity, opening the seizing of the Court as largely as possible", see R. Kolb, "The Compromissory Clause of the Convention", in: Paola Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP 2009), p. 420.

[34] See, *e.g.*, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 75, para. 169.

[35] *Case Concerning Legality of Use of Force (Yugoslavia v. France)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 363, at pp. 372–373, paras. 24–31. Later, the Court declined its jurisdiction on the ground that Serbia and Montenegro, at the time of the institution of the proceedings, did not have access to the Court under Article 35 of the Statute (see *e.g. Case Concerning Legality of Use of Force [Serbia and Montenegro v. France]*, Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004, p. 595).

32. While this scenario of (alleged) responsibility for acts of genocide constitutes an important type of dispute on the "interpretation, application or fulfilment" of the Convention, it is not the only one. For example, in *The Gambia v. Myanmar* (pending), the Applicant claimed that the Respondent not only was responsible for prohibited acts under Article III, but was also violating its obligations under the Convention by failing to prevent genocide in violation of Article I, and by failing to punish genocide in violation of Articles I, IV and V.[36] In that scenario, one State alleges that another State is not honouring its commitment to "prevent" and "punish" genocide, because it grants impunity to acts of genocide committed on its territory. There can thus also be disputes about 'non-action' as a violation of the substantive obligations under the Articles mentioned.

33. The ordinary meaning of Article IX therefore makes it clear that there is no need to establish genocidal acts as a basis to affirm the Court's jurisdiction. Rather, the Court has jurisdiction *over the question* of whether genocidal acts have been or are being committed or not.[37] Hence, it also has jurisdiction *ratione materiae* to declare the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of the law. More specifically, the jurisdiction of the Court extends to disputes concerning the unilateral use of military force for the stated purpose of preventing and punishing alleged genocide.[38]

34. The *context* of the phrase "relating to" further confirms this reading. In particular, the unusual feature of the word "including" in the intermediate sentence indicates a broader scope of Article IX of the Convention as compared to many other compromissory clauses.[39] Disputes relating to the responsibility of a State for genocide, or for any of the other acts enumerated in Article III, are therefore to be considered as only one type of dispute covered by Article IX, which are "included" in the wider phrase of disputes "relating to the interpretation, application and fulfilment" of the Convention.[40] Since "any of the parties" to the dispute can request the Court's attention, this language overall suggests that a State accused of committing genocide has the same right to submit the dispute to the Court as the State making the accusation. Such a State may also choose to seek a 'negative' declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual grounds.

35. Hence, the context of the phrase "relating to" in Article IX also confirms that the Court's jurisdiction goes beyond disputes between States about responsibility for alleged genocidal

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[36] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 12, para. 24, points 1 (c), (d) and (e).

[37] See the Court's Order in this case of 16 March 2022, p. 10, para. 43, and also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, I.C.J. Reports 2020, p. 14, para. 30.

[38] Order, p. 11, para. 45.

[39] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 75, para. 169.

[40] See also the Written Observations of The Gambia on the Preliminary Objections raised by Myanmar, 20 April 2021, pp. 28–29, para. 3.22: "The inclusion of disputes 'relating to the responsibility of a State for genocide' among those that can be brought before the Court unmistakably means that responsibility for genocide can be the object of a dispute brought before the Court by any contracting party".

acts, and that it indeed covers disputes between States about the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of the law.

36. Finally, the *object and purpose* of the Convention gives further support to the wide interpretation of Article IX contended by Sweden. In its 1951 Advisory Opinion, after noting the *erga omnes* nature of the provisions included in the Convention, the Court famously held that:

> "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."[41]

37. Indeed, the Convention's object to protect the most elementary principles of morality also precludes any possibility for a State Party to abuse its provisions for other means. It would undermine the Convention's credibility as a universal instrument to outlaw the most abhorrent crime of genocide if its authority could be abused by any State Party without a possibility for the victim of such abuse to turn to the Court. The purpose of the Convention thus speaks loudly in favour of a reading of Article IX whereby disputes relating to the interpretation, application or fulfilment include disputes about the abuse of the Convention's authority to justify a State's action vis-à-vis another State Party to the Convention, even if its provisions are not explicitly referred to by the acting State.[42]

38. In conclusion, the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the entire Convention show that a dispute regarding acts carried out by one State against another State based on purportedly false claims of genocide falls under the notion of "dispute between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention". Accordingly, the Court may entertain disputes concerning the unilateral use of military force for the stated purpose of preventing and punishing alleged genocide and has jurisdiction to declare the absence of genocide.

39. Sweden therefore holds, *in summa*, that the language used in Article IX of the Convention clearly suggests that a State accused of committing genocide has the same right to submit a dispute to the Court as the State making the accusation. Sweden furthermore holds that the term 'dispute' is sufficiently broad as to encompass a disagreement over the lawfulness of the conduct of an applicant State, and importantly contends that the threshold for when a dispute "relating to the interpretation, application or fulfilment" of the Convention has arisen

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[41] *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

[42] See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 72, citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 70, at p. 85, para. 30.

cannot be set so low that, by denying the existence of such a dispute and invoking other norms under international law to justify its actions, a respondent State can unilaterally bar the Court from establishing jurisdiction in accordance with Article IX.

40. With respect, and in support of the current interpretation of that clause derived from earlier case-law, Sweden invites the Court to reflect these general positions when assessing the issue of jurisdiction under Article IX in this and future cases concerning allegations of genocide under the Convention.

Section B – Merits

ii. The obligation to prevent and punish genocide according to Article I of the Convention

41. In this section, Sweden wishes to share with the Court its interpretation of several Articles of the Convention of relevance to the merits of the case.

42. As discussed in the Court's Order, the substance of the Parties' dispute concerns two central questions, namely "whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention".[43] On that basis, Sweden considers that issues raised in the case turn on a proper interpretation of the obligation in Article I, whereby States "undertake to prevent and punish" the crime of genocide. That obligation, in turn, must be interpreted in light of Articles II, III and VIII of the Convention.

43. Article I of the Convention reads as follows:

> "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."

44. According to Article I of the Convention, all States Parties are obliged to prevent and punish genocide. As the Court already has emphasised, Sweden recalls that in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law.[44] Moreover, the duty under Article I must be performed in *good faith*, as provided by Article 26 of the Vienna Convention on the Law of Treaties, and consequently in accordance with the principle of *pacta sunt servanda*. As the Court has observed, the principle of good faith "obliges the Parties to apply [a treaty] in a reasonable way and in such

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[43] Order, p. 11, para. 45.

[44] Order, para. 57, see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430.

a manner that its purpose can be realized".[45] Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Convention. As "one of the basic principles governing the creation and performance of legal obligations", good faith is also directly linked to the "trust and confidence [that] are inherent in international co-operation".[46]

45. In Sweden's view, the notion of 'undertaking to prevent' implies that each State Party must assess whether genocide, or at least a serious risk of genocide, exists prior to taking action pursuant to Article I.[47] Importantly, such an assessment must also be justified by substantial evidence "that is fully conclusive".[48]

46. It can here be reiterated that the Human Rights Council of the UN has called upon all States "in order to deter future occurrences of genocide, to cooperate, including through the United Nations system, in strengthening appropriate collaboration between existing mechanisms that contribute to the early detection and prevention of massive, serious and systematic violations of human rights that, if not halted, could lead to genocide".[49] It therefore constitutes good practice to rely on the results of independent investigations under UN auspices before qualifying a situation as genocide and taking any further action pursuant to the Convention.[50] That fact that the prohibition of genocide is a peremptory norm, from which no derogation is allowed, does not, in other words, legitimise all efforts to punish its violators.

47. The scope of 'undertaking to prevent' is further coloured by the final recital in the preamble, which emphasises the need for "international co-operation". One must also bear in mind that under Article VIII, States may call upon the competent organs of the UN to take action (see further below), and that Article IX, as we have already seen, provides for judicial settlement. All this speaks in favour of a duty to employ multilateral and peaceful means to prevent genocide, where all Contracting Parties must act within the parameters of international law and preferably through established common institutions such as the UN. Such a reading also coincides with Chapter VI of the UN Charter, which entails a general obligation for States to settle disputes by peaceful means. Sweden underlines that all States Parties are engaged in the mission to prevent genocide worldwide for the benefit of humanity, and not in order to protect their own national interests.

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[45] *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

[46] *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

[47] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 221–222, paras. 430–431.

[48] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 90, para. 209.

[49] UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

[50] See *e.g.* the reliance of The Gambia on the reports of the Independent International Fact-Finding Mission on Myanmar established by the UN Human Rights Council before bringing a case to the Court; for details see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, at pp. 25–27, paras. 65–69.

48. It follows from the obligation to carry out a good faith assessment of the existence of genocide or serious risk of genocide that, where a State has not carried out such an assessment, it cannot invoke the "undertak[ing] to prevent" genocide in Article I of the Convention as a justification for its conduct. Thus, a Contracting Party cannot invoke Article I in order to render lawful conduct that would otherwise be unlawful under international law if it has not established, on an objective basis and pursuant to a good faith assessment of all relevant evidence from independent sources, that genocide is occurring or that there is a serious risk of genocide occurring. What is more, any act undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.[51] This includes, in particular, the prohibition of aggression.

49. Turning specifically to the undertaking "to punish" in Article I of the Convention, Sweden contends that the obligation is limited to punitive measures of a criminal law nature directed against individuals. This is confirmed by Articles IV–VI of the Convention. In other words, a State should use its domestic criminal law or rely on international criminal investigations before the International Criminal Court to suppress genocide by individual perpetrators ("punishment") and not engage in any other type of measures, in particular military or other coercive measures, to "punish" a State or a people.

50. The *travaux préparatoires* of the Convention reinforce this construction of Article I and are relevant under the customary rule reflected in Article 32 of the Vienna Convention as a supplementary means of interpretation confirming the ordinary meaning. During the drafting of the Convention, the State delegates were concerned about the Convention being used as a pretext for interference and sought to keep the definition of genocide as precise as possible. A proposal to include the protection of political groups was rejected as it would "provide a very convenient pretext for interference in the internal affairs of States".[52] The delegates also voted to reject proposals by the USSR to penalise all forms of public propaganda aimed at provoking genocide and to disband any organisations aimed at inciting hatred or encouraging crimes of genocide because, in the words of the United States, it "would merely serve as pretexts to harass States parties to the Convention".[53]

iii. The elements of genocide according to Article II and III of the Convention

51. Article II of the Convention deals with the definition of genocide and Article III lists five modes of committing genocide, which shall be punishable. Sweden contends that the elements of genocide are already well-established in the case law of the Court and supports the current interpretation.

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[51] Order, para. 58.

[52] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires* (Martinus Nijhoff, 2008), Vol. I, p. 1 230 (Mr Katz-Suchy, Poland).

[53] Hirad Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Preparatoires* (Martinus Nijhoff, 2008), Vol. II, p. 1 800 (Mr Maktos, United States of America), and p. 1 577 (Mr Fitzmaurice, United Kingdom, noting the USSR's proposed amendment, if adopted with the proposal to expand protection to political groups, "might become a pretext for serious abuses").

52. In particular, in order for genocide to occur, there is a requirement to establish both genocidal action and a (specific) genocidal intent – or *dolus specialis* – next to the mental elements present in the acts listed in Article II.[54] The occurrence, even on a large scale, of civilian casualties during the course of armed conflict is not therefore sufficient to show either genocidal action or genocidal intent, as it cannot in itself be qualified as evidence of the extreme and most inhuman form of persecution that is designed to destroy a group or part of a group, whether national, ethnical, racial or religious. Apart from the fact that at least one of the acts mentioned in Article II has to be committed by an alleged perpetrator, the "intent to destroy" must also be shown to exist with that perpetrator.

iv. The possibility under Article VIII to call upon the UN to take action

53. Article VIII of the Convention provides that States Parties may call upon "competent organs" of the United Nations to take action under the Charter for the prevention and suppression of acts of genocide. Both the Security Council and the General Assembly are "competent organs" that may take collective action (either by a General Assembly resolution or by Security Council enforcement action under Chapter VII). Together with the right to seize the Court under Article IX of the Convention, the endowment to call upon the UN-organs under Article VIII reflects the Convention's design, favouring collective, institutional measures to prevent and suppress acts of genocide. The Court has held that "Article VIII may be seen as addressing the prevention and suppression of genocide at the political level rather than as a matter of legal responsibility".[55]

54. Sweden again recalls that the prevention and suppression of genocide is not a domestic matter but concerns the international community as a whole. It contends that the proper construction of Article VIII requires the said provision to be read in its context, in particular together with Article I. The object and purpose of Article VIII is to underline the preferability of collective over unilateral measures. Any unilateral preventive or suppressive measures taken must comply with the requirements of Article I as set out above, including the prohibition of aggression.

VIII. DOCUMENTS IN SUPPORT OF THE DECLARATION

55. The following is a list of the documents 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 Sweden to the Kingdom of the Netherlands dated 30 March 2022,[56] and

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[54] *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007 (I), p. 43, at pp. 121–122, paras. 186–189.

[55] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 88 (citing *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide [Bosnia and Herzegovina v. Serbia and Montenegro]*, Judgment, I.C.J. Reports 2007 (I), p. 109, para. 159).

[56] Annex A.

(b) Instrument of ratification by the Government of Sweden of the Genocide Convention dated 27 May 1952.[57]

IX. CONCLUSION

56. On the basis of the information set out above, Sweden avails itself on the right conferred upon it by Article 63, paragraph 2, of the Statute to intervene as a non-party in the Proceedings brought by Ukraine against the Russian Federation in this case.

57. If its intervention is admitted by the Court, Sweden will in the forthcoming stages of the Proceedings address issues concerning the construction of the following Articles of the Convention:

- **I** – about the obligation to prevent and punish genocide;
- **II–III** – about the elements of genocide;
- **VIII** – about the possibility to call upon the UN to take action; and
- **IX** – about the Court's jurisdiction.

58. The Government of Sweden has appointed the undersigned as Agents for the purposes of this Declaration. The Registrar of the Court may channel all communication through us at the following address:

Embassy of Sweden
Postbus 85601
2508 CH Den Haag

Respectfully,

Carl Magnus Nesser
Agent of the Swedish Government

Daniel Gillgren
Co-Agent of the Swedish Government

[57] Annex B.

ANNEX A

LETTER FROM THE REGISTRAR OF THE INTERNATIONAL COURT OF JUSTICE TO THE STATES PARTIES TO THE GENOCIDE CONVENTION

COUR INTERNATIONALE DE JUSTICE — INTERNATIONAL COURT OF JUSTICE

156413 — 30 March 2022

Excellency,

I have the honour to refer to my letter (No. 156253) dated 2 March 2022 informing your Government that, on 26 February 2022, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Republic of the Russian Federation in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). 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, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I 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 Ukraine and the Russian Federation)]

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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

INSTRUMENT OF RATIFICATION BY THE GOVERNMENT OF SWEDEN OF THE GENOCIDE CONVENTION

s a v o i r f a i s o n s: que, ayant jugé bon et utile d'entrer en négociations avec plusieurs Gouvernements étrangers en vue de la conclusion d'une Convention pour la prévention et la répression du crime de génocide et NOTRE Plénipotentiaire, dûment autorisé à cet effet, ayant conclu, arrêté et signé une Convention portant mot pour mot ce qui suit:

(inseratur)

A ces causes et fins NOUS avons voulu ratifier, approuver et accept ladite Convention avec tous ses articles, points et clauses comme aussi par les présentes NOUS l'acceptons, approuvons et ratifions de la manièr la plus efficace que faire se peut: voulons et promettons d'observer et de remplir sincèrement et loyalement tout ce contient ladite Convention avec tous ses articles, points et clauses. En foi de quoi NOUS avons signé la présente de NOTRE propre main et y avons fait apposer NOTRE Sceau Royal. Fait au Château de Stockholm, le 9 mai 1952.

GUSTAF ADOLF
(L.S.)

/Östen Undén

Alltså hava VI denna Konvention med alla dess artiklar, punkter och klausuler velat ratificera, gilla och antaga, såsom VI densamma härmed och i kraft av detta på det allra eftertryckligaste, som ske kan, antaga, gilla och ratificera, så att VI vad förestående Konvention med alla dess artiklar, punkter och klausuler innehåller och förmår, uppriktigt, troligen och redligen vilja och skola hålla och uppfylla. Till yttermera visso hava VI detta med egen hand underskrivit och med VÅRT Kungliga sigill bekräfta låtit, som skedde å Stockholms Slott den 9 maj 1952.