

INTERNATIONAL COURT OF JUSTICE
DECLARATION OF INTERVENTION UNDER ARTICLE 63
OF DENMARK

16 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)

DECLARATION OF INTERVENTION OF DENMARK

DECLARATION OF INTERVENTION PURSUANT TO ARTICLE 63 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

To the Registrar, International Court of Justice, the undersigned being duly authorized by the Government of Denmark.

1. On behalf of the government of Denmark, I have the honour to submit to the Court a Declaration of Intervention pursuant to Article 63 paragraph 2 of the Statute of the Court in the Case concerning The Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).

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

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

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

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

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

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

PRELIMINARY OBSERVATIONS

4. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation in a dispute concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of Genocide (the "Genocide Convention").

5. In paras. 4-12 of its Application instituting proceedings, Ukraine contends that there is a dispute between Ukraine and the Russian Federation within the meaning of Article IX relating to the interpretation, application or fulfilment of the Genocide Convention.

6. On substance, Ukraine claims that the use of force by the Russian Federation in or against Ukraine since 24 February 2022 on the basis of alleged genocide, as well as the recognition that preceded the military operation, is incompatible with the Convention, quoting Articles I-III thereof (paras. 26-29 of the Application).

7. Following a request for provisional measures from Ukraine, the Court ordered on 16 March 2022 that:

(1) The Russian Federation shall immediately suspend the military operation 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 organizations and person which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in points (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.

As of the date of this Declaration, the Russian Federation has failed to comply with this Court's Order.

8. On 30 March 2022, as contemplated by Article 63, paragraph 1, of the Statute of the Court, the Registrar duly notified the Government of Denmark as a party to the Genocide Convention that by Ukraine's application the Genocide Convention "is invoked both as a basis for the Court's jurisdiction and the substantive basis of the Applicant's claims on the merits". The registrar also noted that:

"Ukraine 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 [the Genocide Convention] will be in question in this case".¹

9. In Denmark's opinion, the Genocide Convention is of utmost importance to prevent and punish genocide. Any acts committed with an intent to destroy, in whole or in part, national, ethnical, racial or religious groups constitute a crime under the Convention. The prohibition against genocide is a *jus cogens* norm in international law.² The Court has recognized that the obligations in the Convention are owed by any State party to all the other States parties to the Convention in any given case (obligations *erga omnes partes*).³ By intervening in this case, Denmark wishes to reaffirm this collective commitment to upholding the rights and obligations contained in the Convention, including by supporting the crucial role of the Court and emphasising that international co-operation is required to prevent, adjudicate on and punish acts of genocide.⁴

10. By this present Declaration, Denmark avails itself of the right to intervene conferred upon it by Article 63, paragraph 2, of the Statute. This Court has recognized that Article 63 confers a "right" of

¹ Letter from the Registrar of the Court of 30 March 2022 – see Annex A.

² 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.

³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.

⁴ Convention on the Prevention and Punishment of the Crime of Genocide of 1948, Preamble: "Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required."

intervention.⁵ The Court has also underlined that an intervention “is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and whereas such intervention cannot affect the equality of the Parties to the dispute”.⁶

11. Denmark does not seek to become a party to the Proceedings and accepts that the construction of the Genocide Convention given by the judgment will be equally binding upon it. Its intervention will not address issues of application of the Convention.

12. Consistent with the restricted scope for interventions under Article 63 of the Statute, Denmark will present its interpretation of the relevant Articles of the Genocide Convention in line with customary rules of interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties.⁷

13. Denmark notes that Article 63 of the Statute does not make a distinction between provisions in a Convention, which relate to jurisdictional issues and those, which contain substantive provisions. Both the wording in Article 63 of the Statute “Whenever the construction of a convention to which States other than those concerned in the case are parties is in question” and the wording in Article 82 of the Rules of the Court to file a declaration “as soon as possible” confirms that the filing of an Article 63 declaration is admissible at this stage of the proceedings. Indeed, in both situations, States may offer their assistance to the Court in the construction of a particular Convention. Accordingly, interventions on both aspects are allowed.⁸

14. Denmark wishes to assure the Court that the intervention was filed “as soon as possible and no later than the date fixed for the opening of the oral proceedings” as stipulated in Article 82 of the Rules of the Court. It requests to be provided with copies of all pleadings filed by Ukraine and the Russian Federation, as well as any annexed documents, in accordance with Article 85, paragraph 1, of the Rules of the Court. Denmark further informs the Court that it is willing to assist the Court in grouping its intervention together with similar interventions from other States for future stages of the proceedings, if the Court deems this useful in the interest of an expedient administration of justice.

⁵ *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 13, para. 21.

⁶ *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, para. 18.

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, 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.

⁸ MN Shaw (ed), *Rosenne's Law and Practice of the International Court 1920-2015* (5th ed, Vol III, Brill Nijhoff 2016), p. 1533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol I, OUP 2013), p. 1031; 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. 1741, at p. 1763, note 46.

BASIS ON WHICH DENMARK IS PARTY TO THE CONVENTION

15. Denmark signed the Convention on 28 September 1949 and deposited its instrument of ratification on 15 June 1951 in accordance with Article XI, paragraph 2, of the Convention.⁹

PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE:

16. At present, Denmark focuses on the construction of Article IX of the Convention on the jurisdiction of the Court and Articles I, II, III and VIII of the Convention that are relevant for the merits of the case.

17. If the Court proceeds to examine questions of jurisdiction together with questions of merits, Denmark will accordingly make observations in relation to the mentioned provisions together. Having complied with its procedural obligation under Article 82, paragraph 1, of the Rules of the Court to file this declaration “as soon as possible”, Denmark reserves its right to supplement the present declaration and the scope of its observations to the extent that additional matters of jurisdiction or on the merits arise as the case progresses, or as Denmark becomes aware of them upon receipt (in accordance with Article 86, paragraph 1, of the Rules) of the pleadings and documents annexed to them.

JURISDICTION

18. Article IX of the Genocide 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.”

19. Denmark contends that the notion of “dispute” is already well-established in the case law of the Court. The Court has described the meaning given to the word dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties.¹⁰ In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”.¹¹ The two sides must “hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”.¹² 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

⁹ United Nations Treaty Collection, Treaty Registration Number 1021, Volume 91:

https://treaties.un.org/Pages/showActionDetails.aspx?objid=080000028002840d&clang=_en

¹⁰ Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11

¹¹ 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.

¹² 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; ICJ, 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.

rejects those claims and that, therefore, a dispute exists”.¹³ It is also worth noting that the existence of a dispute cannot be determined by the Court based on one party’s unilateral denial of a dispute.¹⁴

20. On the interpretation of the other parts of Article IX, namely that the scope of such disputes must be “relating to the interpretation, application or fulfilment of the present Convention”, Denmark contends 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 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.”¹⁵

21. There can be a dispute about the interpretation, application or fulfilment of the Convention when one State alleges that another State has committed genocide.¹⁶ 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 being committed by the respondent State, it may decline its jurisdiction, also *prima facie*.¹⁷

22. 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 defendant was not only responsible for prohibited acts under Article III, but that it was also violating its obligations under the Convention by failing to prevent genocide in violation of Article I; and failing to punish genocide in violation of Articles I, IV and V.¹⁸ In that example, 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 also be disputes about “non-action” as a violation of the substantive obligations under Article I, IV and V.

23. The ordinary meaning of Article IX makes it clear that there is no need to establish genocidal acts as a basis for the Court’s jurisdiction. The Court has jurisdiction over the question whether

¹³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*), Preliminary Objections, Judgment of 22 July 2022, p. 27, para. 71.

¹⁴ 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, at pp. 849-851, paras. 37-43.

¹⁵ 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).

¹⁶ 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.

¹⁷ 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 ICJ declined its jurisdiction on the ground that Serbia and Montenegro did not have access to the Court, at the time of the institution of the proceedings, under Article 35 of the Statute (see e.g. ICJ, 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).

¹⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*The Gambia v. Myanmar*).

genocidal acts have been or are being committed or not.¹⁹ 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. In particular, the jurisdiction of the Court extends to disputes concerning the unilateral use of military force to fulfil the obligation of preventing and punishing alleged genocide.²⁰

24. The context of the phrase “including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III” further confirms this reading. In particular, the word “including” indicates a broader scope of Article IX of the Convention when compared to standard compromissory clause.²¹ Disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III are therefore 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.²²

25. Hence, the context of the phrase (“relating to”) in Article IX confirms that the Court’s jurisdiction goes beyond disputes between States about the responsibility for alleged genocidal acts, and also 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.

26. Moreover, a dispute relating to the interpretation, application or fulfilment of the Convention exists despite the absence of a “specific reference” to a Convention or its provisions in public statements by the parties, as long as those statements “refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter”.²³ Further, acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty.²⁴

27. In addition to that, Article IX expressly provides for the Court jurisdiction “at the request of *any of the parties* to the dispute” (emphasis added). This language suggests that a State accused of

¹⁹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order of 16 March 2022, p. 10, para. 43; 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.

²⁰ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order of 16 March 2022, p. 11, para. 45.

²¹ 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.

²² 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”).

²³ Application of the Convention on the Prevention and Punishment of the Crime a/Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 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.

²⁴ Alleged Violation of the 1955 treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. Unites States of America), Preliminary Objections, Judgment of 3 February 2021, para 56.

committing genocide has the same right to submit the dispute to the Court as the State making the accusation.

28. Finally, the object and purpose of the Convention gives further support to the wide interpretation of Article IX. The Court recently noted that “[a]ll the States parties to the Genocide Convention [thus] have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention”.²⁵ Famously, in its 1951 Advisory Opinion, the Court held:²⁶

“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.”

29. The Convention’s object to protect the most elementary principles of morality also prohibits any possibility of a State Party to abuse its provisions for other means. It would undermine the Convention’s credibility as a universal instrument to prohibit the most abhorrent crime of genocide if its authority could be abused by any State Party without a possibility of the victim of such abuse to turn to the Court. The purpose of the Convention speaks loudly in favour of a reading of Article IX, according to which disputes relating to the interpretation, application and 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.

30. In conclusion, the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the Convention show that a dispute regarding acts carried out by one State against another State based on false claims of genocide falls under the notion of “dispute between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention” in Article IX. Accordingly, the Court has jurisdiction to declare the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of the law.

MERITS

31. Denmark wishes to share with the Court its interpretation of some of the Articles of the Convention relevant for the merits of the case. Article I of the Convention concerns the duty of the Contracting Parties to prevent and to punish genocide, whether committed in time of peace or in time of war. As the Court has already emphasised, Denmark recalls that in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law.²⁷

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.

²⁶ Reservations to the Genocide Convention, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

²⁷ 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; Allegations of

Moreover, carrying out the duty under Article I must be done in good faith in accordance with Article 26 of the Vienna Convention on the Law of Treaties. As the Court has observed, the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”.²⁸ Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Convention.

32. In Denmark’s view, the notion of “undertake to prevent” in Article I implies that each State Party must assess whether a genocide or a serious risk of genocide exists prior to taking action pursuant to Article I.²⁹ The Court has previously seen this assessment “of critical importance”.³⁰

33. Importantly, the UN Human Rights Council 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”.³¹

34. The Court has observed that “Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble.”³² Under Article VIII of the Convention, States may call upon the competent organs of the UN 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” who may take collective action. Together with the right to seize the Court under Article IX and the final recital in the preamble of the Convention, which emphasizes the need for “international co-operation”, all this speaks in favour of a duty to employ multilateral and peaceful means to prevent genocide first before taking unilateral action as a matter of last resort.

35. This understanding corresponds with Chapter VI of the UN Charter, which contains a general obligation of States to settle disputes by peaceful means. Denmark emphasizes that all State Parties are engaged to suppress genocide worldwide for the benefit of mankind, and not in order to protect their own interests. Actions taken under Article I must be in conformity with the United Nations as set out in Article 1 of the United Nations Charter.³³

Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order of 16 March 2022, para. 57.

²⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

²⁹ *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.

³⁰ *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, para. 430.

³¹ UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

³² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 56.

³³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 58.

36. There is an obligation to carry out a good faith assessment of the existence of genocide or serious risk of genocide. 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 a lawful conduct that would otherwise be unlawful under international law, unless it has established that genocide is occurring or that there is a serious risk of genocide occurring, on an objective basis and pursuant to a good faith assessment of all relevant evidence from independent sources.

37. The purely “humanitarian and civilizing” purpose of the Convention compels an interpretation according to which a State may not act to another’s detriment on the purported basis of preventing or punishing an alleged genocide without having performed due diligence regarding the risk of such genocide.³⁴ Such an act would constitute an abuse of the law and a violation of the Genocide Convention.

38. Further, Article I must be construed in light of other international rules applicable between the Contracting Parties,³⁵ and cannot be construed as being capable of countenancing certain types of conduct, including violations of the prohibition of aggression, violation of international humanitarian law, and crimes against humanity. For the avoidance of doubt, Denmark is of the view that in construing the Genocide Convention the Court is not called upon to engage in any broader analysis of the international legality of uses of force in response to, for example, grave humanitarian crises, including under the doctrine of humanitarian intervention.

39. Turning to the undertaking “to punish” in Article I of the Convention, Denmark contends that the obligation is limited to punitive measures of a criminal law character directed against individuals. This is confirmed by Articles IV-VI of the Convention. It follows from this that a State should use its domestic criminal law or rely on international criminal investigations by cooperating with an international tribunal the jurisdiction of which it has accepted and which is competent to try the individuals, or by extraditing individuals accused of genocide for trial in another State in order to suppress genocide by individual perpetrators (“punishment”).³⁶ It is evident that Article I of the Convention cannot serve as a legal basis for military measures to “punish” a state or a people, which is a violation of the most fundamental norms of international law.

40. Article II of the Convention deals with the definition of genocide and Article III lists five modes of committing genocide, which shall be punishable. Denmark contends that the elements of genocide are already well-established in the Court’s case law. In particular, in order for genocide to occur, there is a requirement to establish both genocidal action and a (specific) genocidal intent next to the mental elements present in the acts listed in Article II.³⁷ The occurrence of civilian casualties

³⁴ Reservations to the Genocide Convention, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

³⁵ 1969 Vienna Convention on the Law of Treaties, Article 31(3)(c).

³⁶ Genocide Convention, Articles VI-VII; 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. 226-227, paras. 442-443.

³⁷ 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.

during the course of armed conflict is not evidence of genocidal action or genocidal intent, if it is not designed to destroy a group or part of a group.

41. As mentioned above, Article VIII of the Genocide 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” who may take collective action. Together with the right to seize the Court under Article IX of the Convention, the endowment to call upon the competent UN organs under Article VIII reflects the Convention’s design, which favours collective, institutional measures to prevent and to 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”.³⁸

42. Denmark recalls that the prevention and suppression of genocide is not only 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 as set out above. The object and purpose of Article VIII is to underline the preference for collective enforcement over unilateral enforcement. Hence, the legality of any extra-territorial unilateral preventive measure is contingent on the prior seising of competent United Nations organs pursuant to Article VIII and the failure of such organs to take action in accordance with the Charter. Any such unilateral preventive measure must comply with the requirements of Article I as set out above.

DOCUMENTS IN SUPPORT OF THE DECLARATION

43. Denmark submits the following document in support of this Declaration, which document is attached hereto:

Annex A: Letter from the Registrar of the International Court of Justice to the Ambassador of Denmark to the Kingdom of the Netherlands dated 30 March 2022.

CONCLUSION

44. On the basis of the information set out above, Denmark 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.

45. The government of Denmark has appointed the undersigned as Agent for the purposes with this Declaration together with Jarl Frijs-Madsen, Ambassador of Denmark to the Kingdom of the Netherlands, as Co-Agent. The Registrar of the Court may channel all communication through them at the following address:

The Embassy of Denmark in the Netherlands
Koninginnegracht 30
2514 AB Den Haag
Netherlands

Respectfully,

A handwritten signature in black ink, appearing to read 'Vibeke Pasternak Jørgensen', written over the printed name.

Vibeke Pasternak Jørgensen

Agent of the Government of Denmark



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.

/s/

H.E. the Ambassador
of the Kingdom of Denmark
to the Kingdom of the Netherlands
Embassy of the Kingdom of Denmark
The Hague

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 prejudices 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.

A handwritten signature in black ink, appearing to read 'P. Gautier', with a long horizontal stroke extending to the right.

Philippe Gautier
Registrar