

INTERNATIONAL COURT OF JUSTICE

DECLARATION OF INTERVENTION UNDER ARTICLE 63
OF THE REPUBLIC OF ESTONIA

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 UNDER ARTICLE 63 OF THE
STATUTE OF THE COURT
OF THE REPUBLIC OF ESTONIA

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Government of the Republic of Estonia:

1. On behalf of the Government of the Republic of Estonia, 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 *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.*"
3. Those matters are addressed in sequence below, following some preliminary observations.

I. PRELIMINARY OBSERVATIONS

4. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation in a dispute concerning the interpretation, application and fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention").¹
5. Ukraine explains in its Application that "*the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide*

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application instituting proceedings of 26 February 2022.

have no basis”.² In its Application Ukraine “*emphatically denies that any such genocide has occurred*” in Ukraine and that “*Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide*”.³

6. In 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.⁴
7. 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.⁵ Together with the Application, Ukraine submitted a Request for the indication of provisional measures.⁶
8. A hearing was held on 7 March 2022. The Russian Federation did not participate in the oral proceedings and communicated to the Court a document, which contended that the Court lacked the jurisdiction in this case.⁷ The Russian Federation asserts in its document that the Genocide Convention does not regulate the use of force between States and that “[t]he special military operation conducted by Russia in the territory of Ukraine is based on the United Nations Charter, its Article 51 and customary international law”.⁸ Therefore, “*the Application and Request manifestly fall beyond the scope of the Convention and thus the jurisdiction of the Court*”.⁹
9. Following the Request for provisional measures from Ukraine¹⁰, the Court by finding that it had *prima facie* jurisdiction, ordered on 16 March 2022:

(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*

² Ibid. para. 2.

³ Ibid. para. 3.

⁴ Ibid, paras 4-12.

⁵ Ibid. paras 26-29.

⁶ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures of 26 February 2022.

⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Document (with annexes) from the Russian Federation setting out its position regarding the alleged “lack of jurisdiction” of the Court in the case.

⁸ Ibid. para. 15.

⁹ Ibid. para. 23.

¹⁰ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Request for the indication of provisional measures of 26 February 2022.

(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.*¹¹

10. As of date of this Declaration, Russia 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.
11. On 30 March 2022, pursuant to Article 63, paragraph 1, of the Statute of the Court, the Registrar of the Court duly notified the Government of the Republic of Estonia 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 [Ukraine'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 the case".¹²
12. By this present Declaration, the Republic of Estonia 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 intervention¹³. 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*".¹⁴
13. In the view of the Republic of Estonia this case raises important issues concerning the Genocide Convention. Preamble of the Genocide Convention referring to the United Nations General Assembly resolution 96 (I) of 1946 states that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world. Therefore, the Republic of Estonia considers that the legal issues raised by this case touch on some of the most fundamental principles and obligations of international law. It is the understanding of the Republic of Estonia that 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 group constitutes a crime under international law. As the Court has acknowledged, the

¹¹ *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.

¹² Letter from the Registrar of the Court of 30 March 2022 – see Annex (a).

¹³ *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.

¹⁴ *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.

prohibition of genocide is a *jus cogens* norm in international law¹⁵ and the rights and obligations enshrined in the Convention are owed to the international community as a whole (rights and obligations *erga omnes partes*)¹⁶.

14. In such a situation, when the treaty embodies matters of collective interest, the Judge Cançado Trindade called upon all State Parties to contribute to the proper interpretation of the treaty as sort of a “*collective guarantee of the observance of the obligations contracted by the State parties*”.¹⁷
15. Consistent with the restricted scope for interventions under Article 63 of the Statute, the Republic of Estonia 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.¹⁸ It 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 relate to substantive provisions. 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*”.¹⁹ 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 allowed²⁰, and the wording in Article 82 of the Rules 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.
16. As a Contracting Party to the Genocide Convention, the Republic of Estonia has a direct interest in the construction that might be placed upon provisions of the Convention by the Court in these proceedings. For that reason, the Republic of Estonia is exercising its

¹⁵ *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.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, at p. 47, para. 87; *Case Concerning Armed Activities on the Territory of the Congo (New Application; 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 6, at p. 31, para. 64; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3 with further references; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 36, para. 107.

¹⁷ 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.

¹⁸ *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: “[t]he 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. 28, para. 75 with further references.

¹⁹ See Opinion of Judge Schwebel in *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.

²⁰ 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.

right to intervene conferred by Article 63 of the Statute and its intervention is accordingly directed to the questions of construction of the Convention arising in this case.

17. At present, the Republic of Estonia focuses on the construction of Article IX of the Convention on the jurisdiction of the Court and Articles I, II-IV, VIII of the Convention that are relevant for the merits of the case.
18. The Republic of Estonia does not seek to become a party to the proceedings and accepts that the Genocide Convention's construction given by the judgment will be equally binding upon it. Its intervention will not address issues of application of the Convention.
19. The Republic of Estonia also 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.
20. Should the Court accept the right to intervene of the Republic of Estonia, it requests to be provided with copies of all pleadings filed by Ukraine and Russia, as well as any annexed documents, in line with Article 85, paragraph 1, of the Rules of the Court.
21. It further informs the Court that it is willing to assist the Court in grouping its intervention together with similar interventions from other States, in particular EU Member States, for future stages of the proceedings, if the Court deems such a move useful in the interest of an expedient administration of justice.
22. The Republic of Estonia reserves the right to supplement the present Declaration and the scope of its observations to the extent that additional matters of jurisdiction or the merits arise as the case progresses, or as the Republic of Estonia becomes aware of them upon receipt (in accordance with Article 86, paragraph I, of the Rules) of the pleadings and documents annexed to them.

II. THE CASE AND CONVENTION TO WHICH THE DECLARATION RELATES

23. This declaration of intervention relates to the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. Proceedings were instituted by Ukraine against the

Russian Federation on 26 February 2022. The case raises questions concerning the construction of the Genocide Convention.

III. BASIS ON WHICH THE REPUBLIC OF ESTONIA IS PARTY TO THE CONVENTION

24. On 21 October 1991, the Republic Estonia deposited its instrument of accession to the Genocide Convention with the Secretary-General of the United Nations in accordance with Article XI of the Convention. Upon that instrument becoming effective on 19 January 1992, Estonia became a Contracting Party of the Genocide Convention in accordance with Article XIII of the Convention. Estonia has not filed any reservations to the Convention.

IV. CONSTRUCTION OF THE PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE:

JURISDICTION

25. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. 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.”

26. The Republic of Estonia contends that the notion of “dispute” is already well-established in the case law of the Court and supports the current interpretation. Accordingly, it concurs with 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.²¹ In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”.²² The two sides must “*hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations*”.²³ Moreover, “in

²¹ *The Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

²² *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.

²³ *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.

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"²⁴.

27. The Republic of Estonia hence concentrates 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*". It 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. As Judge Oda 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*"²⁵.
28. The ordinary meaning of the phrase "*relating to the interpretation, application or fulfilment of the Convention*" may be divided in two sub-categories.
29. The first point ("relating to") establishes a link between the dispute and the Convention.
30. The second point ("interpretation, application or fulfilment of the Convention") encompasses many different scenarios. 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*"²⁶.
31. There can be a dispute about the interpretation, application or fulfilment of the Convention when one State alleges that another State has committed genocide²⁷. 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*²⁸.
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 defendant was not only responsible for prohibited acts

²⁴ *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.

²⁵ *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, p. 627, para. 5.

²⁶ R. Kolb, "The Compromissory Clause of the Convention", in: Paola Gaeta (ed), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 420.

²⁷ *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.

²⁸ *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. *Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004, p. 595).

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 V²⁹. 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. Therefore, there can also be disputes about “non-action” as a violation of the substantive obligations under Article I, IV and V.

33. Therefore, the ordinary meaning of Article IX 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 whether genocidal acts have been or are being committed or not.³⁰ 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 for the stated purpose of preventing and punishing alleged genocide³¹.

34. The context of the phrase (“relating to ...”) further confirms this reading. In particular, the unusual feature of the words “including” in the intermediate sentence indicates a broader scope of Article IX of the Convention when compared to standard compromissory clause³². 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 Convention³³. Moreover, Article IX expressly provides for ICJ jurisdiction “at the request of *any of the parties* to the dispute” (emphasis added). This language 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. In particular, such a State may seek a “negative” declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual foundation. Thus, where there is a dispute concerning whether a State has engaged in conduct contrary to the Convention, the State accused of such conduct has the same right to submit the dispute to the Court as

²⁹ *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).

³⁰ *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)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 14, para. 30.

³¹ *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.

³² *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.

³³ See also the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 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”).

the State that has made the accusation, and the Court will have jurisdiction over that dispute.

35. 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, but 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.
36. Finally, the object and purpose give further support to the wide interpretation of Article IX. The Court 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”³⁴. Already in its 1951 Advisory Opinion, the Court held³⁵:

“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. 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.”

37. 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 outlaw 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 hence 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.
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 false claims of genocide falls under the notion of “dispute between Contracting Parties relating to the interpretation, application

³⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 36, para. 107.

³⁵ *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

or fulfilment of the present Convention”. 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. In particular, 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.

V. CONSTRUCTION OF THE PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE:

MERITS

39. In addition, the Republic of Estonia wishes to make some preliminary comments on the merits concerning the interpretation of Articles I, II-IV and VIII of the Convention as being relevant also at this stage of proceedings.
40. Article I of the Convention reads:
- “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.”*
41. According to Article I of the Genocide Convention, all States Parties are obliged to prevent and punish genocide. As the Court already emphasised, the Contracting Parties in fulfilling their duty to prevent genocide, must act within the limits permitted by international law³⁶. Moreover, the duty carried out under Article I must be done in good faith (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”*³⁷. Furthermore, the Court has stated: *“[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation.”*³⁸ Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Convention.
42. In the view of the Republic of Estonia, the notion of “undertake to prevent” in Article I of the Genocide Convention implies that each State Party must assess whether a genocide

³⁶ *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 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.

³⁷ *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

³⁸ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 7, at p. 268, para 46.

or a serious risk of genocide exists prior to taking action pursuant to Article I³⁹. Such an assessment must be justified by substantial evidence “*that is fully conclusive*”⁴⁰.

43. Importantly, the United Nations 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*”.⁴¹ It therefore constitutes good practice to rely on the results of independent investigations under United Nations auspices⁴² before qualifying a situation as genocide and taking any further action pursuant to the Convention.
44. The correct construction of Article I is hence that a State purporting to act is under a due diligence obligation to gather evidence from independent sources before taking any further action in fulfilment of Article I.
45. The scope of the “undertake to prevent” is further coloured by the final recital in the preamble of the Genocide Convention, which emphasizes the need for “international co-operation”. Moreover, under Article VIII of the Convention States may call upon the competent organs of the United Nations to take action, and Article IX provides for judicial settlement. 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. Such reading also coincides with Chapter VI of the United Nations Charter, which contains a general obligation of States to settle disputes by peaceful means. The Republic of Estonia 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.
46. 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.

³⁹ *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.

⁴⁰ *Ibid.* at p. 129, para. 209.

⁴¹ UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

⁴² See for example 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.

47. Turning to the undertaking “to punish” in Article I of the Convention, the Republic of Estonia 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. In other words, a State should use its domestic criminal law or rely on international criminal investigations before the ICC to suppress genocide by individual perpetrators (“punishment”) and not engage in any other type of measures, in particular forcible or military measures to “punish” a State or a people.
48. Article II of the Convention deals with the definition of genocide and Article III lists five modes of committing genocide, which shall be punishable. The Republic of Estonia contends that the elements of genocide are already well-established in the case law of the Court and supports the current interpretation.
49. 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 II⁴³. In turn, the fact that the occurrence of civilian casualties during the course of armed conflict is not evidence of genocidal action or genocidal intent, as it cannot be qualified as an extreme form and most inhuman form of persecution designed to destroy a group or part of a group.
50. 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 (either by a non-binding 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 competent United Nations organs under Article VIII reflects the Convention’s design, which favours collective, institutional measures to prevent and to suppress acts of genocide. The Court 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*”⁴⁴.
51. The Republic of Estonia 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 preference of collective enforcement over unilateral enforcement. Hence, the legality of any extra-territorial unilateral preventive measure is contingent on the prior seizing of competent United Nations organs pursuant to Article VIII and the failure of such organs

⁴³ *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. 121-122, paras. 186-189.

⁴⁴ *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 *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. 109, para. 159).

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.

VI. DOCUMENTS IN SUPPORT OF THE DECLARATION

52. The following is a list of the documents in support of this Declaration, which are attached hereto
- (a) Letter from the Registrar of the International Court of Justice to the Ambassador of the Republic of Estonia to the Kingdom of the Netherlands, dated 30 March 2022;
 - (b) Instrument of accession by the Government of the Republic of Estonia to the Genocide Convention;
 - (c) Depository notification on the accession of Estonia to the Genocide Convention.

VII. CONCLUSION

53. On the basis of the information set out above, the Republic of Estonia 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 and respectfully requests the Court to recognise the admissibility of this Declaration.
54. The Republic of Estonia reserves the right to amend or supplement this Declaration in the course of written and oral observations and by filing a further declaration with the Court.
55. The Republic of Estonia has appointed the undersigned as Agent for the purposes of the present Declaration, together with H.E. Lauri Kuusing, Ambassador of Estonia to the Kingdom of the Netherlands, as Co-Agent. It is requested that all communications in this case be sent to the following address: Embassy of the Republic of Estonia, Zeestraat 94, 2518 AD, The Hague, The Netherlands.

Respectfully,



Kerli Veski

Agent of the Republic of Estonia



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.

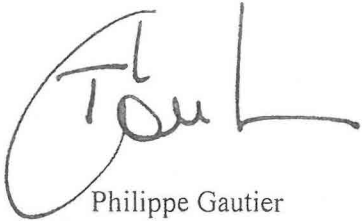
In the above-mentioned Application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”) is invoked both as a basis of the Court’s jurisdiction and as a substantive basis of the Applicant’s claims on the merits. In particular, the Applicant 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.

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[Letter to the States parties to the Genocide Convention
(except Ukraine and the Russian Federation)]

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 'Philippe Gautier', written in a cursive style.

Philippe Gautier
Registrar



EESTI VABARIIGI
ÜLEMNÕUKOGU
ESIMEES

His Excellency,
Mr. Pérez de Cuellar
Secretary General of the United Nations

I, Arnold RÜütel, Chairman of the Supreme Council of the Republic of Estonia, by signing this letter of accession based on the Resolution of September 26, 1991 of the Supreme Council of the Republic of Estonia do hereby inform You as the Depositary that the Republic of Estonia has decided to accede by the following 28 Conventions, Covenants and Optional Protocols:

1. Revised General Act for the Pacific Settlement of International Disputes.

Adopted on 28 April 1949.

2. Convention on the Privileges and Immunities of the United Nations.

Adopted on 13 February 1946.

3. Convention on the Privileges and Immunities of the Specialized Agencies.

Adopted on 21 November 1947.

4. Convention on Diplomatic Relations.

Adopted on 18 April 1961.

5. Optional Protocol to the Convention on Diplomatic Relations Concerning Acquisition of Nationality.

Adopted on 18 April 1961.

6. Optional Protocol to the Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes.

Adopted on 18 April 1961.

7. Convention on Consular Relations.

Adopted on 24 April 1963.

8. Optional Protocol to the Convention on Consular Relations Concerning Acquisition of Nationality.

Adopted on 24 April 1936.

9. Optional Protocol to the Convention on Consular Relations

Concerning the Compulsory Settlement of Disputes.

Adopted on 24 April 1936.

10. Convention on Special Missions.

Adopted on 8 December 1969.

11. Optional Protocol to the Convention of Special Missions
Concerning the Compulsory Settlement of Disputes.

Adopted on 8 December 1969.

12. Convention on the Prevention and Punishment of Crimes
against Internationally Protected Persons including Diplomatic
Agents.

Adopted on 14 December 1973.

13. Convention on the Representation of States in their
Relations with International Organizations of a Universal
Character.

Adopted on 14 March 1975.

14. Convention on Succession of States in respect of State
Property, Archives and Debts.

Adopted on 08 April 1983.

15. Convention on the Prevention and Punishment of the Crime
of Genocide. Adopted 09 December 1948, with the following
objection:

With regard to reservation (2) made by the United States of
America:

The Estonian Government objects to this reservation on the
grounds that it creates uncertainty, as to the extent of the
obligations the Government of the United States of America is
prepared to assume with regard to the Convention. According to
Article 27 of the Vienna Convention on the Law of Treaties, no
party may invoke the provisions of its domestic law as
justification for failure to perform a treaty. .

16. International Convention on the Elimination of All Forms
of Racial Discrimination.

Adopted on 07 March 1966.

17. International Covenant on Economic, Social and Cultural
Rights.

Adopted on 16 December 1966

18. International Covenant on Civil and Political Rights.

Adopted on 16 December 1966.

19. Optional Protocol to the Covenant on Civil and Political Rights.

Adopted on 16 December 1966

20. Convention on the Non-Applicability of Statutory Limitations to War Crimes Against Humanity.

Adopted on 26 November 1968.

21. International Convention on the Suppression and Punishment of the Crime of Apartheid.

Adopted on 30 November 1937.

22. Convention on the Elimination of All Forms of Discrimination against Women.

Adopted on 18 December 1979.

23. Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

Adopted on 10 December 1984.

24. International Convention against Apartheid in Sports.

Adopted on 10 December 1985.

25. Convention on the Rights of the Child.

Adopted on 20 November 1989.

26. Convention on the Law of Treaties.

Adopted on 23 May 1969.

27. Convention on Succession of States in respect of Treaties.

Adopted on 23 August 1978.

28. Convention on the Law of Treaties between States and International Organizations or between International Organizations.

Adopted on 21 March 1986.

In Conclusion, I, on behalf of the Republic of Estonia, do solemnly affirm that the Republic of Estonia will faithfully abide by all rules and obligations in the aforementioned Conventions, Covenants and optional Protocols.

Signed in Tallinn

on September 26, 1991



A. Rüütel

UNITED NATIONS  NATIONS UNIES

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

REFERENCE: LA 41 TR/221/1 (2-1)
(3-1)
(3-2)/PEND, etc.

The Secretary-General of the United Nations presents his compliments to the Permanent Representative of the Republic of Estonia to the United Nations and has the honour to confirm the deposit, on 21 October 1991, of the instruments of accession by the Government of Estonia to the following twenty-eight treaties:

- (i) Revised General Act for the Pacific Settlement of International Disputes, adopted by the General Assembly of the United Nations on 28 April 1949

In the absence of provisions in the instrument of accession to the contrary, it has been assumed that the accession extends to all the provisions of the Act (chapters I, II, III and IV), as provided for in article 38 A. A confirmation to that effect would however be required at the Permanent Representative's earliest convenience.

In accordance with paragraph 2 of its article 44, the Revised General Act will enter into force for Estonia on the ninetieth day following the date of deposit of the instrument, i.e. on 19 January 1992;

- (ii) Convention on the Privileges and Immunities of the United Nations, adopted by the General Assembly of the United Nations on 13 February 1946

In accordance with its section 32, the Convention entered into force for Estonia on the date of deposit of the instrument, i.e. on 21 October 1991;



- 2 -

- (iii) Convention on the Privileges and Immunities of the Specialized Agencies, approved by the General Assembly of the United Nations on 21 November 1947

The deposit of the instrument of accession to the above-mentioned Convention has been deferred pending receipt of the notification in respect of the specialized agencies to which the Government of Estonia will undertake to apply the Convention as required by Section 43, article XI, thereof. The deposit of the instrument of accession will be effected as soon as the notification is received by the Secretary-General;

- (iv) Vienna Convention on Diplomatic Relations, Optional Protocol to the Vienna Convention on Diplomatic Relations concerning Acquisition of Nationality and Optional Protocol to the Vienna Convention on Diplomatic Relations concerning the Compulsory Settlement of Disputes, done at Vienna on 18 April 1961

In accordance with paragraph 2 of their respective articles 51, VI and VIII, the Convention and the two Protocols entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (v) Vienna Convention on Consular Relations, Optional Protocol to the Vienna Convention on Consular Relations concerning Acquisition of Nationality and Optional Protocol to the Vienna Convention on Consular Relations concerning the Compulsory Settlement of Disputes, done at Vienna on 24 April 1963

In accordance with paragraph 2 of their respective articles 77, VI and VIII, the Convention and the two Protocols entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;



- (vi) Convention on Special Missions, and Optional Protocol to the Convention on Special Missions concerning the Compulsory Settlement of Disputes, adopted by the General Assembly of the United Nations on 8 December 1969

In accordance with paragraph 2 of their respective articles 53 and VII, the Convention and the Optional Protocol entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (vii) Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the General Assembly of the United Nations on 14 December 1973

In accordance with its article 17 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (viii) Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, concluded at Vienna on 14 March 1975

The said Convention has not as yet entered into force. In accordance with its article 89 (1), the Convention will enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession, the instrument of accession by the Government of Estonia being the twenty-fifth instrument so deposited;



- (ix) Vienna Convention on Succession of States in respect of State Property, Archives and Debts, concluded at Vienna on 8 April 1983

The above-mentioned Convention has not as yet entered into force. In accordance with its article 50 (1), the Convention will enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession, the instrument of accession by the Government of Estonia being the first instrument so deposited;

- (x) Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948

In accordance with its article XIII, the Convention will enter into force for Estonia on the ninetieth day following the date of deposit of the instrument, i.e. on 19 January 1992.

Due note has also been taken of the objection contained in the instrument of accession by the Government of Estonia to a reservation made by the United States of America upon ratification of the Convention;

- (xi) International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature at New York on 7 March 1966

In accordance with its article 19 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xii) International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights, adopted by the General Assembly of the United Nations on 16 December 1966

In accordance with their respective articles 27 (2), 49 (2) and 9 (2), the two Covenants and the Optional Protocol will enter into force for Estonia three months after the date of deposit of the instrument, i.e. on 21 January 1992;

- (xiii) Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the General Assembly of the United Nations on 26 November 1968

In accordance with its article VIII (2), the Convention will enter into force for Estonia on the ninetieth day after the date of deposit of the instrument, i.e. on 19 January 1992;

- (xiv) International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the General Assembly of the United Nations on 30 November 1973

In accordance with its article XV (2), the Convention will enter into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xv) Convention on the Elimination of All Forms of Discrimination against Women, adopted by the General Assembly of the United Nations on 18 December 1979

In accordance with its article 27 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xvi) Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the General Assembly of the United Nations on 10 December 1984

In accordance with its article 27 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xvii) International Convention against Apartheid in Sports, adopted by the General Assembly of the United Nations on 10 December 1985

In accordance with its article 18 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xviii) Convention on the Rights of the Child, adopted by the General Assembly of the United Nations on 20 November 1989

In accordance with its article 49 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;

- (xix) Vienna Convention on the Law of Treaties, concluded at Vienna on 23 May 1969

In accordance with its article 84 (2), the Convention entered into force for Estonia on the thirtieth day after the date of deposit of the instrument, i.e. on 20 November 1991;


- (xx) Vienna Convention on Succession of States in respect of Treaties, concluded at Vienna on 23 August 1978

The said Convention has not as yet entered into force. In accordance with its article 49 (1), the Convention shall enter into force on the thirtieth day following the date of deposit of the fifteenth instrument of ratification or accession, the instrument of accession by the Government of Estonia being the ninth instrument so deposited;

- (xxi) Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations, concluded at Vienna on 21 March 1986

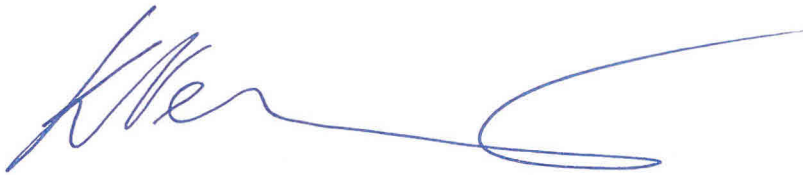
The said Convention has not as yet entered into force. In accordance with its article 85 (1), the Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession, the instrument of accession by the Government of Estonia being the fifteenth instrument so deposited.

All States concerned are being informed of the above.

2 December 1991 

CERTIFICATION

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

A handwritten signature in blue ink, consisting of a stylized 'K' followed by 'erli' and a long horizontal stroke ending in a loop.

Kerli Veski

Agent of the Republic of Estonia