

INTERNATIONAL COURT OF JUSTICE

**LETTER**

FROM THE GOVERNMENT OF SWEDEN

filed in the Registry of the Court

on 31 July 2024

in the case of

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

(UKRAINE v. RUSSIAN FEDERATION)

---

COUR INTERNATIONALE DE JUSTICE

**LETTRE**

DU GOUVERNEMENT DE SUEDE

enregistrée au Greffe de la Cour

le 31 juillet 2024

dans le cas de

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

(UKRAINE c. FÉDÉRATION DE RUSSIE)

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

The Hague, 12 July 2024

I have the honour to attach a letter from the Agent of the Government of the Kingdom of Sweden concerning the Government's intervention pursuant to Article 63, paragraph 2, of the Statute of the Court in the merits phase of the case concerning *Allegations of Genocide under the Convention of the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

I certify that the signature on the letter is that of the Agent, Ambassador Elinor Hammarskjöld, and kindly refer the Court to the instrument signed by the Minister for Foreign Affairs of Sweden, deposited with the written observations of the Government filed in the Registry of the Court on 13 February 2023, through which the present Agent was appointed.

Please be informed that the Government of Sweden is prepared to take a common approach with other intervening States, which have deposited an identical or essentially comparable Declaration of Intervention, for the next phases of the proceedings, should the Court deem such a common approach useful for the good and expedient administration of justice.

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

Yours sincerely,

(Signed)  
Johannes Oljelund  
Ambassador of the Kingdom of Sweden to the Kingdom of the Netherlands

## II. LETTER FROM THE AGENT OF THE GOVERNMENT OF THE KINGDOM OF SWEDEN

### I. INTRODUCTION

1. On behalf of the Government of Sweden and following the Registrar's letter n°162412 of 18 June 2024 addressed to me as Agent, I have the honour to inform the Court that the Government of Sweden maintains its intervention in the merits phase of the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. I also take note of the fact that the Registrar in his letter gives States the opportunity to adjust their Declarations of Intervention in light of the Court's Judgment of 2 February 2024, if they deem it necessary.

2. With reference to the Registrar's letter, The Government of Sweden wishes to make some adjustments in its previously submitted Declaration. The adjustments concern the construction of those provisions of the Convention on the Prevention and Punishment of the Crime of Genocide ("the Convention") for which Sweden contends, now in particular Articles I–III of the Convention, which are relevant for the Court's determination of the merits of the case.

### II. CONSTRUCTION OF THOSE PROVISIONS FOR WHICH SWEDEN CONTENDS

#### Section A – Jurisdiction

3. When it comes to the issue of jurisdiction, the Government of Sweden kindly refers the Court to what was stated in the corresponding Section<sup>1</sup> of the Declaration of Intervention filed in the Registry on 9 September 2022. Since the Court already has pronounced itself on this issue in its Judgment on 2 February 2024, Sweden sees no reason to adjust or append its Declaration in this regard.

#### Section B – Merits

4. When it comes to the merits of the present case, the Government would like to replace the text in the corresponding Section<sup>2</sup> of its previous Declaration of Intervention with the text submitted below.<sup>3</sup>

---

<sup>1</sup> See paras 22–40 in the Declaration of Intervention filed on 9 September 2022.

<sup>2</sup> See paras 41–54 in the Declaration of Intervention filed on 9 September 2022.

<sup>3</sup> Even if parts of the text on the following pages are identical with that of the Declaration, the whole Section is reproduced for reasons of clarity and readability.

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

5. 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.”

6. According to Article I of the Convention, all States Parties are obliged to prevent and punish genocide. As the Court already has emphasised, Sweden recalls that in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law.<sup>4</sup> Moreover, the duty under Article I must be performed in *good faith*, as provided by Article 26 of the Vienna Convention on the Law of Treaties, and consequently in accordance with the principle of *pacta sunt servanda*. As the Court has observed, the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”.<sup>5</sup> Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Convention. As “one of the basic principles governing the creation and performance of legal obligations”, good faith is also directly linked to the “trust and confidence [that] are inherent in international co-operation”.<sup>6</sup>

7. In Sweden’s view, the notion of “undertake to prevent” implies that each State Party must assess whether a genocide or a serious risk of genocide exists prior to qualifying a situation as genocide and (possibly) taking action pursuant to Article I.<sup>7</sup> Such an assessment must be justified by substantial evidence “that is fully conclusive”.<sup>8</sup>

8. 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”.<sup>9</sup> It therefore constitutes good practice to

---

<sup>4</sup> Order, para. 57, see also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430.

<sup>5</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

<sup>6</sup> *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

<sup>7</sup> *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.

<sup>8</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 90, para. 209.

<sup>9</sup> UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

rely on the results of independent investigations under UN auspices<sup>10</sup> before qualifying a situation as genocide.

9. The correct construction of Article I is that a State is under a due diligence obligation to gather such evidence from independent sources, where they exist, before alleging that another State Party of the Genocide Convention has committed genocide.

10. Concerning the burden of proof, it is for the Party which alleges a fact in support of its claims to prove the existence of that fact.<sup>11</sup> This principle is not an absolute one, however, since the determination of the burden of proof is in reality dependent on the subject-matter and the nature of the dispute brought before the Court; it varies according to the type of facts which are necessary to establish for the purposes of the decision in the case.<sup>12</sup>

11. In particular, the Court has recognised that there may be circumstances in which the Applicant cannot be required to prove a negative fact, which it is asserting.<sup>13</sup>

12. Against that background, Sweden wishes to state that it is for the State Party bringing a case against another State Party for a false allegation of genocide used as a basis to justify preventive action to provide *prima facie* evidence that its action did not fall under the definition of genocide as laid down in Article II. In turn, the Respondent State asserting that its allegation was well-founded to justify its preventive action must provide conclusive evidence in support, since this attempted justification involves charges of exceptional gravity.<sup>14</sup> After adversarial scrutiny, it would then be for the Court to evaluate all the evidence produced by the two Parties so as to reach its own conclusions.<sup>15</sup>

---

<sup>10</sup> 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.

<sup>11</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), Judgment, p. 14, at p. 71, para. 162.

<sup>12</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 639, at p. 660, para. 54.

<sup>13</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 639, at p. 660, para. 55.

<sup>14</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 90, para. 209. On the notion of "charges of exceptional gravity", see also G. M. Farnelli, Consistency in the ICJ's Approach to the Standard of Proof: An Appraisal of the Court's Flexibility, in: *The Law and Practice of International Courts and Tribunals*, 21:1(2022), pp. 98-121, at 107-111.

<sup>15</sup> *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 639, at p. 660, para. 56.

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

13. Article II of the Convention reads:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

14. Article III of the Convention reads:

“The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.”

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

16. In particular, in order for genocide to occur, there is a requirement to establish both genocidal action (*actus reus*) and a (specific) genocidal intent (*mens rea*), next to the mental elements present in the acts listed in Article II.<sup>16</sup>

---

<sup>16</sup> *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.

17. Genocidal intent, often referred to as specific intent, is considered the intention to destroy, in whole or in part, the group to which the victims belong. It is to be distinguished from other motives or reasons the perpetrator may have. It is not enough that the members of the group are targeted because they belong to that group, that is because the perpetrator has a discriminatory intent. Something more is required, and great care must be taken in finding in the facts a sufficiently clear manifestation of that intent.<sup>17</sup>

18. In turn, the fact that civilian casualties occurred during the course of armed conflict is not *per se* evidence of genocidal action or genocidal intent. Apart from the fact that at least one of the acts mentioned in Article II has to be committed by an alleged perpetrator, the “intent to destroy” must also be shown to exist with that perpetrator.

19. Where direct evidence for such specific intent is absent, the Court has determined that “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question”.<sup>18</sup>

20. Regarding the standard of proof the Court requires that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.<sup>19</sup>

### III. CONCLUSION

21. On the basis of the information set out above, and in its Declaration of Intervention filed in the Registry on 9 September 2022, Sweden avails itself on the right conferred upon it by Article 63, paragraph 2, of the Statute to intervene in the merits stage of the proceedings brought by Ukraine against the Russian Federation in this case.

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

- **I** – about the obligation to prevent and punish genocide; and
- **II–III** – about the elements of genocide.

---

<sup>17</sup> *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. 187, 189.

<sup>18</sup> *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. 67, para. 148.

<sup>19</sup> *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 p. 129, para. 209.

23. The Government of Sweden has appointed the undersigned as Agent for the purposes of these proceedings. The Registrar of the Court may channel all communication through me at the following address:

Embassy of Sweden  
Postbus 85601  
2508 CH Den Haag

Respectfully,

(Signed)  
Elinor Hammarskjöld  
Agent of the Swedish Government