

DECLARATION OF INTERVENTION OF KINGDOM OF SPAIN

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 Kingdom of Spain:

1. On behalf of the government of Kingdom of Spain, 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 merits phase of 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.*
3. 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 commence 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.
8. 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.
9. On 30 March 2022, as contemplated by Article 63, paragraph 1, of the Statute of the Court, the Registrar duly notified the Government of the Kingdom of Spain 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 this case”¹.
10. Between 21 July 2022 and 15 December 2022, 33 States filed declarations of intervention under Article 63, paragraph 2, of the Statute of the Court. By an Order dated 5 June 2023, the Court decided that the declarations of intervention under Article 63 of the Statute submitted by 32 States were admissible at the preliminary objections stage of the proceedings in so far as they concerned the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the jurisdiction of the Court.
11. In the Judgment rendered on 2 February 2024, the Court concluded that it has jurisdiction, on the basis of Article IX of the Genocide Convention, to entertain submission (b) in paragraph 178 of the Memorial of Ukraine, whereby Ukraine requests the Court to “[a]djudge and declare that there is no credible evidence that Ukraine is responsible for

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

committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine”, and that this submission is admissible.²³

12. It is the understanding of Kingdom of Spain that the Genocide Convention is of utmost importance to prevent and punish genocide. The prohibition against genocide is a *jus cogens* norm in international law³. The rights and obligations enshrined by the Convention are owed to the international community as a whole (rights and obligations *erga omnes partes*)⁴.
13. By this present Declaration, the Kingdom of Spain avails itself of the right to intervene in the merits phase conferred upon it by Article 63, paragraph 2, of the Statute. This Court has recognized that Article 63 confers a “right” of intervention⁵. 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 intervener, 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
14. Consistent with the restricted scope for interventions under Article 63 of the Statute, Kingdom of Spain will present its interpretation of the relevant Articles of the Genocide Convention in line with customary rules of interpretation as reflected in Articles 31-33 of the Vienna Convention on the Law of Treaties⁶.
15. In its intervention of 28 June 2023, Kingdom of Spain had focused solely on Article IX of the Convention relating to the jurisdiction of the Court. The present intervention will deal with Article I and Article II of the Convention for the merits of the case.

² *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*, Preliminary Objections, Judgment of 2 February 2024. ³ *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. ³ -162.

⁴ *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.

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.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 87: “*The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969*”; see also *Application of the International Convention On the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, p. 24, para. 75 with further references.

BASIS ON WHICH THE KINGDOM OF SPAIN IS PARTY TO THE
CONVENTION

16. The Kingdom of Spain acceded to the Convention and deposited its instrument of accession in accordance with Article XI, paragraph 4, of the Convention on 13 September 1968.

PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE:

MERITS

17. The Kingdom of Spain wishes to share with the Court its interpretation of Articles I and II of the Convention, which it considers relevant for the merits of the case.

18. 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.

19. According to Article I of the Genocide Convention, all States Parties are obliged to prevent and punish genocide. As the Court already emphasized, The Kingdom of Spain recalls that in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law⁷. Moreover, carrying out the duty 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”⁸. Good faith interpretation thus operates as a safeguard against misuse 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”¹⁰
20. In the Kingdom of Spain’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 I⁹. Such an assessment must be justified by substantial evidence “that is fully conclusive”¹⁰.

⁷ *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 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.

⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

¹⁰ *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

⁹ *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.

¹⁰ *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. ¹³ UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

21. 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”.¹³ It therefore constitutes good practice to rely on the results of independent investigations under UN auspices¹¹ before qualifying a situation as genocide.
22. The correct construction of Article I is hence 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.
23. 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 fact¹². 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 it is necessary to establish for the purposes of the decision of the case.¹³
24. In particular, the Court has recognized that there may be circumstances in which the Applicant cannot be required to prove a negative fact, which it is asserting.¹⁴
25. Against that background, The Kingdom of Spain wishes to explain 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.¹⁵ 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.¹⁶
26. Article II of the Convention reads:

¹¹ 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.

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), Judgment, p. 14, at p. 71, para. 162.

¹³ *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.

¹⁴ *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.

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. 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.

¹⁶ *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.

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.

27. Article II of the Convention deals with the definition of genocide. The Kingdom of Spain contends that the elements of genocide are already well-established in the case law of the Court and supports the current interpretation.
28. 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.¹⁷
29. The Genocide Convention is designed to prevent the physical or biological destruction of all or part of a protected group. When assessing the existence of genocide, the ICTY has considered the detrimental long-term consequences the actions in question have for the physical survival of the group, as well as the residual possibility that the group can reconstitute itself¹⁸, endorsing a quantitative and qualitative element for the *actus reus*.
30. 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 belongs. 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.¹⁹
31. 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.
32. Where direct evidence for 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”.²⁰

¹⁷ *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.

¹⁸ *Prosecutor v Radislav Krstic* (Judgement in Sentencing Appeals), IT-98-33-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 19 April 2004, paras. 24-31.

¹⁹ *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.

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v.*

33. 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.²¹

DOCUMENTS IN SUPPORT OF THE DECLARATION

34. The following is a list of the documents in support of this Declaration, which documents are attached hereto
- (a) Letter from the Registrar of the International Court of Justice to the Ambassador of the Kingdom of Spain to the Kingdom of the Netherlands (30 March 2022).
 - (b) Instrument of accession by the Government of the Kingdom of Spain to the Genocide Convention.

CONCLUSION

35. On the basis of the information set out above, the Kingdom of Spain avails itself on the right conferred upon it by Article 63 paragraph 2 of the Statute to intervene in the proceedings brought by Ukraine against the Russian Federation in this case.
36. The government of the Kingdom of Spain has appointed the undersigned as Agent, and Mrs María Consuelo Femenía Guardiola as Co-Agent, for the purposes with this Declaration. The Registrar of the Court may channel all communication through them at the following address:

Lange Voorhout 50 – 2514 EG, The Hague.

Respectfully,



(Signed, Santiago Ripol Carulla, Agent of the Government of the Kingdom of Spain)

Annex A: Letter from the Registrar of the International Court of Justice to the Ambassador of the Kingdom of Spain to the Kingdom of the Netherlands (30 March 2022);

Annex B: Instrument of ratification by the Government of the Kingdom of Spain of the Genocide Convention/ OR: Instrument of accession by the Government of the Kingdom of Spain to the Genocide Convention.

Serbia), Judgment, I.C.J. Reports 2015, p. 3, at p. 67, para. 148.

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 (I), p. 43, at p. 129, para. 209.