

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

16 September 2022

Adjusted 2 August 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)

DECLARATION OF INTERVENTION OF DENMARK

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

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

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

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

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

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

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

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

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

PRELIMINARY OBSERVATIONS

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

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

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

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

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

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

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

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

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

"Ukraine seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of [the Genocide Convention] will be in question in this case".¹

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 committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine", and that this submission is admissible.²

9. In Denmark's opinion, the Genocide Convention is of utmost importance to prevent and punish genocide. Any acts committed with an intent to destroy, in whole or in part, national, ethnical, racial

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

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, Judgement of 2 February 2024.

or religious groups constitute a crime under the Convention. The prohibition against genocide is a *jus cogens* norm in international law.³ The Court has recognized that the obligations in the Convention are owed by any State party to all the other States parties to the Convention in any given case (obligations *erga omnes partes*).⁴ By intervening in this case, Denmark wishes to reaffirm this collective commitment to upholding the rights and obligations contained in the Convention, including by supporting the crucial role of the Court and emphasising that international co-operation is required to prevent, adjudicate on and punish acts of genocide.⁵

10. By this present Declaration, Denmark avails itself of the right to intervene conferred upon it by Article 63, paragraph 2, of the Statute of the Court. This Court has recognized that Article 63 confers a “right” of intervention.⁶ 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”.⁷

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

12. Consistent with the restricted scope for interventions under Article 63 of the Statute, Denmark will present its interpretation of the relevant Articles of the Genocide Convention in line with customary rules of interpretation as reflected in Article 31 of the Vienna Convention on the Law of Treaties.⁸

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

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. 161-162.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.

⁵ Convention on the Prevention and Punishment of the Crime of Genocide of 1948, Preamble: “Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required.”

⁶ *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.

⁷ *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.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, p. 31, para. 87: “The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969”; see also *Application of the International Convention On the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, p. 24, para. 75 with further references.

States may offer their assistance to the Court in the construction of a particular Convention. Accordingly, interventions on both aspects are allowed.⁹

14. Denmark wishes to assure the Court that the intervention was filed “as soon as possible and not later than the date fixed for the filing of the last written pleading” as stipulated in Article 82 of the Rules of the Court. It requests to be provided with copies of all pleadings filed by Ukraine and the Russian Federation, as well as any annexed documents, in accordance with Article 85, paragraph 1, of the Rules of the Court. Denmark further informs the Court that it is willing to assist the Court in grouping its intervention together with similar interventions from other States for future stages of the proceedings, if the Court deems this useful in the interest of an expedient administration of justice.

BASIS ON WHICH DENMARK IS PARTY TO THE CONVENTION

15. Denmark signed the Genocide Convention on 28 September 1949 and deposited its instrument of ratification on 15 June 1951 in accordance with Article XI, paragraph 2, of the Convention.¹⁰

PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE:

16. In its intervention of 5 July 2023 Denmark had focused solely on Article IX of the Convention relating to the jurisdiction of the Court. At present, Denmark focuses on the construction of Articles I and II of the Convention that are relevant for the merits of the case.

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

MERITS

18. Denmark wishes to share with the Court its interpretation of some of the Articles of the Genocide Convention relevant for the merits of the case. Article I of the Genocide Convention concerns the duty of the Contracting Parties to prevent and to punish genocide, whether committed in time of peace or in time of war. As the Court has already emphasised, Denmark recalls that in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law.¹¹

⁹ 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.

¹⁰ United Nations Treaty Collection, Treaty Registration Number 1021, Volume 91:

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

¹¹ *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.

Moreover, carrying out the duty under Article I must be done in good faith in accordance with Article 26 of the Vienna Convention on the Law of Treaties. As the Court has observed, the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”.¹² Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Genocide Convention.

19. In Denmark’s view, the notion of “undertake to prevent” in Article I implies that each State Party must assess whether a genocide or a serious risk of genocide exists prior to qualifying a situation as genocide and (possibly) taking action pursuant to Article I.¹³ Such an assessment must be justified by substantial evidence “that is fully conclusive”.¹⁴

20. 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”.¹⁵ It therefore constitutes good practice to rely on the results of independent investigations under UN auspices before qualifying a situation as genocide.¹⁶

21. 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.¹⁷ 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.¹⁸

22. 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.¹⁹

23. Against that background, Denmark 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

¹² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

¹³ *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.

¹⁴ *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.

¹⁵ UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

¹⁶ 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.

¹⁷ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, I.C.J. Reports 2010 (I), Judgment, p. 14, at p. 71, para. 162.

¹⁸ *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.

¹⁹ *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.

justify its preventive action must provide conclusive evidence in support since this attempted justification involves charges of exceptional gravity.²⁰ 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.²¹

24. Article II of the Genocide Convention deals with the definition of genocide and Article III lists five modes of committing genocide, which shall be punishable. Denmark contends that the elements of genocide are already well-established in the Court's case law and supports the current interpretation. In particular, in order for genocide to occur, there is a requirement to establish both genocidal action and a (specific) genocidal intent next to the mental elements present in the acts listed in Article II.²² The occurrence of civilian casualties during the course of armed conflict is not evidence of genocidal action or genocidal intent, if it is not designed to destroy a group or part of a group.

25. 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 itself, endorsing a quantitative and qualitative element for the actus reus.²³

26. 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.²⁴

27. 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. 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".²⁵

²⁰ *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.

²¹ *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.

²² *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.

²³ *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.

²⁴ *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.

²⁵ *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.

28. 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.²⁶

DOCUMENTS IN SUPPORT OF THE DECLARATION

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

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

CONCLUSION

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

31. The government of Denmark has appointed the undersigned as Agent for the purposes with this Declaration. The Registrar of the Court may channel all communication through them at the following address:

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

Respectfully,

Vibeke Pasternak Jørgensen

Agent of the Government of Denmark

²⁶ *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.