

**Before the
INTERNATIONAL COURT OF JUSTICE**

**DECLARATION OF INTERVENTION OF THE REPUBLIC OF MALDIVES
Intervention pursuant to Article 63 of the Statute of the International Court of Justice**

**In the case of
APPLICATION OF THE CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE IN THE GAZA STRIP
(SOUTH AFRICA v. ISRAEL)**

1 October 2024

To the Registrar, International Court of Justice (the “Court”), the undersigned being duly authorised by the Government of the Republic of Maldives:

1. On behalf of the Government of the Republic of Maldives, I have the honour of submitting to the Court a declaration of intervention pursuant to Article 63(2) of the Statute of the Court in the case of the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*.
2. Article 82(5) 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(2) of the Statute of the Court 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 on the construction of those provisions for which it contends;
 - d. A list of the documents in support, which documents shall be attached.
3. This Declaration will address each of these requirements in turn.

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I. PRELIMINARY OBSERVATIONS

a. The Republic of Maldives' declaration of intervention

4. The Republic of South Africa (“South Africa”) has applied to institute proceedings against the State of Israel (“Israel”).¹ South Africa alleges that Israel’s acts against the Palestinian people in Gaza have violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the “Genocide Convention”).²
5. The prohibition of genocide is a *jus cogens* norm in international law³ and the Convention imposes *erga omnes partes* obligations “in the sense that each State party has an interest in compliance with them in any given case”.⁴
6. By filing this Declaration, the Republic of Maldives, as a party to the Genocide Convention, intervenes under Article 63(2) of the Statute of the Court. The Republic of Maldives recognises the need for international co-operation to prevent and punish genocide and supports the work of the Court in these proceedings.⁵
7. Article 82(1) of the Rules of the Court requires that declarations be filed “as soon as possible, and no later than the date fixed for the filing of the Counter-Memorial”. The Republic of Maldives confirms that it has filed this Declaration at the earliest reasonably available opportunity, and before the date fixed for the filing of Israel’s counter-memorial (28 July 2025).
8. The Republic of Maldives recognises that by intervening under Article 63(2) of the Statute of the Court, the construction of the Genocide Convention given by the judgment in this case will be equally binding upon it.

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, 29 December 2023.

² *ibid*, at p. 3, para. 4.

³ See *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. 110-111, paras. 161-162.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures Order, 26 January 2024, p. 12, para. 33.

⁵ See Genocide Convention, Preamble: “Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required”.

b. Procedural history

9. On 29 December 2023, South Africa instituted proceedings against Israel, alleging violations of the Genocide Convention.⁶ Together with its application to institute proceedings, South Africa submitted a request for the indication of provisional measures. The Court issued an order indicating provisional measures on 26 January 2024, including, among other provisional measures, that Israel take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in Gaza.⁷
10. Since 26 January 2024, South Africa has filed three further requests for the indication, or modification, of provisional measures, dated 12 February 2024, 6 March 2024 and 10 May 2024.⁸ The Court issued decisions in response to those further requests on 16 February 2024, 28 March 2024 and 24 May 2024 respectively.⁹ In the decision dated 24 May 2024, the Court noted that “the catastrophic humanitarian situation in the Gaza Strip which, as stated in its Order of 26 January 2024, was at serious risk of deteriorating, has deteriorated” and the humanitarian situation was “to be characterized as disastrous”.¹⁰ The Court considered that the “exceptionally grave” developments, particularly the military offensive in Rafah and large-scale displacement of the “already

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, 29 December 2023.

⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional measures order, 26 January 2024.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Request for additional measures under Article 75(1) of the Rules of Court submitted by South Africa, 12 February 2024; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Request by South Africa for the indication of provisional measures and modification of the Court’s prior provisional measures decisions, 6 March 2024; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Request by South Africa for the indication of provisional measures and modification of the Court’s previous provisional measures, 10 May 2024.

⁹ International Court of Justice, “*Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*”, Decision of the Court on South Africa’s request for additional provisional measures”, ICJ Press Release No. 2024/16 (16 February 2024); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 28 March 2024, General List No. 192; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures Order of 24 May 2024, General List No. 192.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures Order of 24 May 2024, General List No. 192, at p. 8, para. 28.

extremely vulnerable Palestinian population in the Gaza Strip”, justified the modification of earlier provisional measures.¹¹

11. On 5 April 2024, the Court fixed the timetable for the filing of memorials.¹² South Africa is to file its memorial by 28 October 2024 and Israel is to file its counter-memorial by 28 July 2025.

II. CASE AND CONVENTION TO WHICH THIS DECLARATION RELATES

12. The Republic of Maldives files this Declaration to intervene in the case concerning the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. The case raises questions of construction of the Genocide Convention. The Republic of Maldives, as a party to the Convention, has a direct interest in the Court’s construction of its provisions.

III. BASIS UPON WHICH THE REPUBLIC OF MALDIVES CONSIDERS ITSELF A PARTY TO THE GENOCIDE CONVENTION

13. On 24 April 1984, the Republic of Maldives 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, and its accession took effect on 23 July 1984.¹³ The Republic of Maldives has not filed any reservations, declarations, or objections to the Convention and remains a party to the Convention as of the date this Declaration was filed.

IV. PROVISIONS OF THE GENOCIDE CONVENTION THE CONSTRUCTION OF WHICH THE REPUBLIC OF MALDIVES CONSIDERS TO BE IN QUESTION

14. The Republic of Maldives focuses its intervention on the proper construction of the provisions concerning the incitement to commit genocide and the duty to punish the incitement of genocide in Articles I, III, IV and VI of the Genocide Convention. The

¹¹ *ibid.*, at p. 8, para. 29.

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Order of 5 April 2024, General List No. 192.

¹³ See Annex A to this Declaration (instrument of accession of the Republic of the Maldives, 12 April 1984); United Nations depositary confirmation of the Republic of the Maldives’ accession (deposited and registered on 24 April 1984, with effect from 23 July 1984) 1355 UNTS 322. See also Genocide Convention, Art. XIII.

Republic of Maldives also intervenes on the proper construction of Articles II and IX of the Genocide Convention.

15. South Africa's claims include assertions that Israel has violated the Genocide Convention by "fail[ing] to prosecute the direct and public incitement to genocide", not complying with the obligation to prevent and punish genocide "including the direct and public incitement to genocide", and by allowing statements by Israeli decision-makers and military officials constituting direct and public incitement to go "unchecked and unpunished", in violation of Articles I, III(c), IV and VI.¹⁴ The construction of Articles I, II, III, IV and VI is accordingly in question in this case, is the subject of a dispute between South Africa and Israel, and is the subject of this Declaration.
16. The Republic of Maldives reserves the right to supplement or amend this Declaration and the scope of its observations as the case progresses under Article 86(1) of the Rules of the Court.
17. The Genocide Convention should be interpreted in accordance with Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (the "Vienna Convention"). Article 31(1) provides:

"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."
18. Article 31(3) provides that, together with the context, the interpretation of a treaty must take account of the subsequent practice of the parties to the treaty to the extent that this establishes the agreement of the parties regarding the treaty's interpretation, as well as any relevant rules of international law applicable in the relations between the parties to the treaty. Under Article 32 of the Vienna Convention, recourse may also be had to supplementary means of interpretation, including the *travaux préparatoires* of the treaty, when the interpretation under Article 31 leaves the meaning ambiguous or obscure.

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, at paras. 4, 16, 103, 107, and 110.

19. The Republic of Maldives submits that, although the Genocide Convention predates the adoption of the Vienna Convention, the Vienna Convention nonetheless governs the interpretation of the Genocide Convention. The Court has on numerous occasions noted that the provisions on interpretation as set out in the Vienna Convention reflect customary international law,¹⁵ and has applied these provisions to treaties dating as far back as the 19th century.¹⁶
20. The Republic of Maldives will accordingly refer to other recognised sources of international law applicable between the Contracting Parties to the Genocide Convention, including relevant treaties and customary international law,¹⁷ to support the construction of the Genocide Convention for which it contends, and will refer to the Convention's *travaux préparatoires* where necessary to confirm the interpretation arising from the application of Article 31 of the Vienna Convention.¹⁸ Under Article 38(1)(d) of the Statute of the Court, the Republic of Maldives will also refer to "judicial decisions" of courts and tribunals and "the teachings of the most highly qualified publicists" as a subsidiary means for the determination of these rules.¹⁹

V. JURISDICTION: STATEMENT OF THE CONSTRUCTION OF ARTICLE IX OF THE GENOCIDE CONVENTION

21. Article IX of the Genocide Convention provides:

"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."

¹⁵ See, e.g., *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, I.C.J. Reports 1999, p. 1045, at p. 1059, para. 18; *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. 109-110, para. 160. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 6, at pp. 21-22, para. 41.

¹⁶ *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, I.C.J. Reports 2009, p. 213, at p. 237, para. 47, applying the rules reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties to a treaty concluded in 1858; *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, Judgment, I.C.J. Reports 2002, p. 625, at pp. 645-646, para. 37, confirming that the rules reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties applied to the interpretation of a treaty concluded in 1891.

¹⁷ Statute of the Court, Art. 38(1). Oliver Dörr and Kirsten Schmalenbach, "Article 31", in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (1st ed, Springer 2012), p. 561.

¹⁸ Report of the International Commission on the Work of the Second Part of the Seventeenth Session, Monaco, U.N. Doc. A/6309/Rev.1, 2 *Yearbook of the International Law Commission* (January 3-28 1966), p.169 at p. 354.

¹⁹ Statute of the Court, Art. 38(1)(d).

22. The Court has provisionally addressed the existence of jurisdiction in this case, finding in its Order on provisional measures (dated 26 January 2024) that:

“In light of the above, the Court considers that the Parties appear to hold clearly opposite views as to whether certain acts or omissions allegedly committed by Israel in Gaza amount to violations by the latter of its obligations under the Genocide Convention. The Court finds that the above-mentioned elements are sufficient at this stage to establish *prima facie* the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

As to whether the acts and omissions complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention (...) In the Court’s view, at least some of the acts and omissions alleged by South Africa to have been committed by Israel in Gaza appear to be capable of falling within the provisions of the Convention.

[...]

In light of the foregoing, the Court concludes that, *prima facie*, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case.”²⁰

23. The Republic of the Maldives interprets Article IX as imposing three requirements which must be met: (a) there must be a dispute between the parties; (b) that dispute must relate to the interpretation, application or fulfilment of the Genocide Convention; and (c) the dispute must be between Contracting Parties with standing before the Court.

a. The existence of a dispute on the date on which an application is submitted to the Court

24. The existence of a dispute between the parties is a requirement for the Court’s jurisdiction under Article IX of the Genocide Convention.²¹ A dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests between parties”²² and for a dispute to exist, “[i]t must be shown that the claim of one party is

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Provisional Measures, Order of 26 January 2024, General List No. 192, at pp. 11-12, paras. 28-29 and 31.

²¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 2 February 2024, General List No. 182, at p. 33, para. 44.

²² *ibid.*, at p. 33, para 44, citing *Mavrommatis Palestine Concessions*, Objection of the Jurisdiction of the Court, Judgment, 1924, P.C.I.J., Series A, No. 2, p. 11.

positively opposed by the other”.²³ Where a State alleges the violation of an obligation by another State, “the two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”.²⁴

25. For the Court to have jurisdiction, it must be demonstrated that, on the date on which an application is filed, the respondent was aware, or could not have been unaware, that its views were positively opposed by the applicant.²⁵ An applicant State need not refer expressly to a treaty in exchanges with a respondent State to later invoke that treaty before the Court,²⁶ nor is it always necessary for a respondent State to have expressly opposed the claims of an applicant State.²⁷ The silence of a respondent State may be sufficient in certain circumstances for the Court to infer the existence of a dispute.²⁸

26. Furthermore, in the context of the Genocide Convention, the Court has construed Article IX to mean that a dispute can exist between a non-injured State and the wrongdoing State:

“[t]he terms of Article IX providing that disputes are to be submitted to the Court ‘at the request of any of the parties to the dispute’, as opposed to any of the Contracting Parties, do not limit the category of Contracting Parties entitled to bring claims for alleged breaches of obligations *erga omnes partes* under the Convention. This phrase clarifies that only a party to the dispute may bring it before the Court, but it does not indicate that such a dispute may only arise

²³ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

²⁴ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 2 February 2024, General List No. 182, at p. 33, para. 44, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase*, Advisory Opinion, I.C.J. Reports 1950, p. 74.

²⁵ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I), p. 271, para. 38; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 100, para. 63; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, 2 February 2024, p. 33, para. 45.

²⁶ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011 (I), p. 85, para. 30.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at p. 505, para. 71.

²⁸ *ibid.*

between a State party allegedly violating the Convention and a State ‘specially affected’ by such an alleged violation.”²⁹

b. The dispute must relate to the Genocide Convention

27. For the Court to exercise jurisdiction, the dispute must relate to “the interpretation, application or fulfilment of the present Convention”. The Court “cannot limit itself to noting that one of the Parties maintains” that an application is within the Court’s jurisdiction under Article IX but must determine that the breaches alleged are capable of falling within the scope of Article IX.³⁰

28. Disputes concerning the conduct of parties to hostilities that do not engage Articles of the Genocide Convention fall outside Article IX, including alleged breaches of international humanitarian law or international human rights law that do not amount to genocide or any acts enumerated in Article III. The Court has previously held that where jurisdiction is founded on Article IX of the Genocide Convention, the Court’s jurisdiction is confined to violations of provisions of the Genocide Convention and cannot extend to other obligations under international law not amounting to genocide,³¹ though this does not affect the “existence and binding force” of the obligation in question.³²

29. In ten cases concerning the *Legality of Use of Force*, the Federal Republic of Yugoslavia challenged the NATO member States’ use of force in the Kosovo campaign in 1999.³³ The case was primarily concerned with challenging the use of force, though Serbia also alleged that the NATO States’ aerial bombardment was genocide, invoking

²⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at p. 517, para. 111.

³⁰ *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 124, paras. 38-40; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996-II, p. 803, at pp. 809-810, para. 16; See Christian J. Tams et al., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck / Hart Publishing/ Nomos 2014), p 305.

³¹ *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. 104, para. 147.

³² *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. 46, para. 86.

³³ The proceedings were filed against Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the United Kingdom, and the United States of America, but the Court merged aspects of the proceedings for efficiency.

Article IX. The Court dismissed the claim, holding at the provisional measures stage that bombardment could not be considered genocide.³⁴

30. The Court has also noted that it has “no power to rule on alleged breaches of other obligations, not amounting to genocide, particularly those protecting human rights in armed conflict”³⁵ and that this is the case even if “the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*.”³⁶ However, under Article IX, the Court is not prevented from taking into account alleged violations of international humanitarian law or human rights law to the extent those alleged violations are relevant to the Court’s determination of whether or not there has been a breach of the Genocide Convention.³⁷

c. The dispute must be between Contracting Parties

31. Proceedings before the Court must relate to disputes between Contracting Parties to the Genocide Convention that have accepted Article IX. Applicant States must also establish that they hold a legal interest in the subject-matter of the dispute.³⁸

32. As the Court has confirmed, where an obligation of a State is owed “towards the international community as a whole”, a non-injured State is entitled to invoke the responsibility of the wrongdoing State. Such obligations “[b]y their very nature [...] are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”³⁹

³⁴ *Case Concerning Legality of Use of Force (Yugoslavia v. Belgium)*, Order of 2 June 1999, I.C.J. Reports 1999, p. 124, at p. 138, paras. 40-41; The Court later held Serbia could not access the Court in 1999 having only been admitted as a UN member State in 2000, see *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, p. 279, at p. 327, para. 127.

³⁵ *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. 104, para. 147.

³⁶ *ibid*, at p. 104, para. 147.

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, General List No. 118, at pp. 45-46, para. 85.

³⁸ International Law Commission (“ILC”), *Articles on Responsibility of States for Internationally Wrongful Acts*, (YbILC 2001, vol II/2, 117), Art. 42.

³⁹ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3, at p. 32, para. 33.

33. Obligations *erga omnes partes* are those that protect norms of fundamental importance⁴⁰ and are “relevant”⁴¹ to attaining the treaty’s “common interest”.⁴² Such obligations derive, for example, in contemporary international law:

“from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23); others are conferred by international instruments of a universal or quasi-universal character.”⁴³

34. With regards to the Genocide Convention, the Court has previously held:

“The common interest in compliance with the relevant obligations under the Genocide Convention entails that any State party, without distinction, is entitled to invoke the responsibility of another State party for an alleged breach of its obligations *erga omnes partes*. Responsibility for an alleged breach of obligations *erga omnes partes* under the Genocide Convention may be invoked through the institution of proceedings before the Court, regardless of whether a special interest can be demonstrated. If a special interest were required for that purpose, in many situations no State would be in a position to make a claim.”⁴⁴

⁴⁰ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 449, para. 68; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2022, p. 487, at p. 527, para. 104; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at pp. 515-6, para. 107.

⁴¹ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Declaration of Judge Donoghue, I.C.J. Reports 2012, p. 584, at p. 587, para. 12; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Dissenting Opinion of Judge *ad hoc* Sur, I.C.J. Reports 2012, p. 605, at p. 614, para. 30; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at p. 516, para. 108; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Declaration of Judge *ad hoc* Kress, I.C.J. Reports 2022, p. 538, at p. 545, para. 16.

⁴² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at p. 449, para. 68; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at pp. 515-6, para. 106-7; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Declaration of Judge *ad hoc* Kress, I.C.J. Reports 2022, p. 538, at pp. 542, 544 paras. 10; 14-15; ILC, *Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries*, U.N. Doc. A/56/10 (10 August 2001), Article 48, p. 126, para. 7; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Rep. 1951, p. 15, at p. 23.

⁴³ *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment, I.C.J. Reports 1970, p. 3, at p. 32, para. 34.

⁴⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022-II, p. 477, at p. 516, para. 108.

35. Furthermore, a State does not need to demonstrate that any victims of an alleged breach of an *erga omnes partes* obligation under the Genocide Convention are its nationals.⁴⁵

VI. MERITS: STATEMENT OF THE CONSTRUCTION OF ARTICLES I, II, III, IV AND VI OF THE GENOCIDE CONVENTION

a. The construction of Article I: the duties to prevent and punish as independent obligations under the Genocide Convention

36. Article I of the Genocide Convention provides:

“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...”

37. Article I obliges Contracting Parties to not commit genocide. In the *Bosnian Genocide* case, the Court confirmed that although the obligation is not contained in the text the Article, “taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide”.⁴⁶ This reading followed from the fact that the Article categorised genocide as “a crime under international law” and the expressly stated obligation to prevent the commission of acts of genocide.⁴⁷ Acts of genocide can give rise to responsibility of individuals and the Contracting Party.⁴⁸

38. Article I additionally obliges Contracting Parties to prevent and punish genocide. The obligations to prevent and to punish genocide are “two distinct yet connected obligations.”⁴⁹ These obligations are owed *erga omnes* and are also contained in customary international law.⁵⁰

⁴⁵ *ibid*, at p. 516, para. 109.

⁴⁶ *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. 113, para. 166.

⁴⁷ *ibid*.

⁴⁸ *ibid*, at pp. 111-112, para. 163; p. 116, para. 173. See also Antonio Cassese, *International Criminal Law* (OUP, 2008), p. 129 *et seq*.

⁴⁹ *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. 219, para. 425.

⁵⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 595, at pp. 615-616, para. 31. See also *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15, at p. 23.

39. As with all obligations under the Genocide Convention, States must perform the duties to prevent and punish genocide in good faith.⁵¹ Breaches of the obligations to prevent and punish genocide are internationally wrongful acts, for which a State can be held responsible.⁵²
40. The scope of the obligation to punish genocide is informed in part by Articles IV, V and VI of the Convention. Regarding the obligation to prevent genocide, the Court has described the obligation as “to employ all means reasonably available to them” to prevent genocide “as far as possible”.⁵³ A State incurs responsibility for breaching the obligation to prevent genocide if the State “manifestly failed to take all measures to prevent genocide which were within its power, and which might have contributed to preventing the genocide”.⁵⁴
41. The parameters the Court has previously employed when determining whether a State has discharged the obligation to prevent genocide delineate the State’s capacity to influence effectively the action of persons likely to commit genocide and include: 1) the geographical distance of the State from the scene of the events; 2) the strength of the political links, as well as links of all other kinds, between the State authorities and the main actors in the events; 3) the State’s legal position vis-à-vis the situation and persons facing the danger or reality of genocide;⁵⁵ and 4) the State’s level of awareness that genocide was about to be committed or was underway.⁵⁶
42. As the *travaux* confirms, criminalising incitement to genocide in the Convention aligned with the Convention’s goal to prevent, and not just punish, genocide.⁵⁷ The Yugoslav delegate, when reiterating the need to criminalise incitement to genocide, explained “the first stage of those crimes [of genocide] had been the preparation and mobilization of the masses, by means of theories disseminated through propaganda”,

⁵¹ Vienna Convention on the Law of Treaties (1969) (“Vienna Convention”), Art. 26.

⁵² *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. 201, para. 383.

⁵³ *ibid.*, at p. 221, para. 430.

⁵⁴ *ibid.*

⁵⁵ *ibid.*

⁵⁶ *ibid.*, at p. 222, para. 432.

⁵⁷ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol II), p. 1519 (*Eighty-fourth meeting of the Drafting Committee*, UN Doc. A/C.6/SR.84 (26 October 1946)), (Mr. Lachs, Poland); (Mr. Pérez Perozo, Venezuela).

and concluded that, therefore, “[t]he first step in the campaign against genocide would be to prevent incitement to the crime”.⁵⁸

43. Taking into account the factors the Court has already employed when determining whether a State has discharged its duty to prevent genocide, the investigation, prosecution and punishment of individuals for direct and public incitement to genocide are actions a State has the capacity to influence. Prosecuting incitement to commit genocide would therefore go some way to illustrating a State is taking all measures reasonably available to them to prevent genocide.

b. The construction of Article II: the definition of genocide

44. Article II of the Genocide Convention provides:

“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.”

45. As this provision contains the definition of genocide, Article II is relevant for the application and interpretation of Articles I, III, IV, VI, and VII. Article II has been described as the “heart” of the Convention.⁵⁹ The definition of genocide in Article II has also been reproduced in a number of international instruments.⁶⁰

46. Article II contains two distinct elements: (a) the requisite intent, and (b) the individual act.⁶¹

47. First, regarding intent, the Court has confirmed that in satisfying Article II:

⁵⁸ *ibid.*

⁵⁹ Florian Jeßberger, “The Definition and the Elements of the Crime of Genocide” in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (OUP 2009), p. 88.

⁶⁰ Statute of the International Tribunal of the Former Yugoslavia (“ICTY Statute”), Art. 2; Statute of the International Criminal Tribunal for Rwanda (“ICTR Statute”), Art. 4; Rome Statute of the International Criminal Court, Art. 6.

⁶¹ *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. 121, para. 186.

“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. *The acts listed in Article II must be done with the intent to destroy the group as such in whole or in part.* The words ‘as such’ emphasize that intent to destroy the protected group.”⁶²

As the Court explained, and as detailed below, the requirement of a *dolus specialis* is separate from the need to establish that deliberate unlawful killings of members of the group have occurred.⁶³ This specific intent is to be distinguished from other reasons or motives the perpetrator may have and “[g]reat care” must be taken in finding in the facts a sufficiently clear manifestation of that intent.⁶⁴

48. The required intent to destroy the group is the distinguishing characteristic of the crime of genocide.⁶⁵ Intent can be inferred from established facts and circumstances though it must be the only reasonable inference that can be drawn.⁶⁶ The mental state required for the intent to destroy does not require that a protected group is actually destroyed.⁶⁷ Importantly, the proposition to include a list of motives in the Convention was rejected as it would enable defendants to claim that their actions had been propelled by motives other than those enumerated.⁶⁸

49. Mere knowledge on the part of the perpetrator that his or her acts contribute to the destruction of a protected group is insufficient.⁶⁹ Knowledge of a plan or policy to commit crimes would also not necessarily suffice to infer genocidal intent, though such

⁶² *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. 121, para. 187 (emphasis added).

⁶³ *ibid.*

⁶⁴ *ibid.*, at p. 122, para. 189.

⁶⁵ ILC, Report of the International Law Commission on the work of its forty-eighth session, 6 May - 26 July 1996, Official Records of the General Assembly, Fifty-first session, Supplement No. 10, A/51/10, Article 17, p. 44, para 5.

⁶⁶ *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. 198, para. 376; *Prosecutor v. Akayesu* (ICTR-96-4-TCh. 1), Judgment and Sentence, 2 September 1998, para. 523; *Prosecutor v. Tolimir* (IT-05-88/2-A), Judgment, 8 April 2015; paras 560-561; *Prosecutor v. Al Bashir* (ICC-02/05-01/09-3), Decision on the Prosecution’s Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, paras. 158-159.

⁶⁷ Guénaël Mettraux, *International Crimes: Law and Practice* (OUP 2019), pp 171-172; see *Prosecutor v. Blagojević and Jokić* (IT-02-60-T), Judgment, 17 January 2005, paras. 659, 666.

⁶⁸ See Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol II), pp. 1430-1443 (*Seventy-seventh of the Drafting Committee*, U.N. Doc. A/C.6/SR.77 (18 October 1948)).

⁶⁹ *Prosecutor v. Krstić* (IT-98-33-T), Judgment and Sentence, 2 August 2001, para. 561.

an awareness would be a relevant fact in assessing whether an inference of genocidal intent could be drawn.⁷⁰

50. Second, regarding the individual act, the exhaustive list of acts is contained in Article II(a)-(e) and includes acts against the physical or psychological integrity of members of the group or against the biological continuity of the group. The Republic of Maldives also observes that the acts described in Article II(e), forcibly transferring children of the group to another group, contains a form of prohibition on acts against the cultural existence of the group. Other acts, which are not included in the list, do not constitute genocide, even if the perpetrator acts with the intent to destroy a protected group.⁷¹ Ethnic cleansing may fall within Article II if it exhibits genocidal features such as evidence that the State is seeking to exterminate, rather than expel, a group.⁷² Acts that do not fall under the definition of the crime can nevertheless be evidence of genocidal intent.⁷³

51. Each of the individual acts falling within the definition of genocide requires the presence of intent to commit the acts, which must not be conflated with the specific intent to destroy defined in Article II.⁷⁴ The Court has confirmed that the acts listed in subparagraphs (a) to (e) “are by their very nature conscious, intentional, or volitional”.⁷⁵ The International Law Commission (“ILC”) has also pointed out:

“The prohibited acts enumerated in subparagraphs (a) to (e) are by their very nature conscious, intentional or volitional acts which an individual could not usually commit without knowing that certain consequences were likely to result. These are not the type of acts that would normally occur by accident or even as a result of mere negligence.”

However, the conduct may be committed by an act or omission⁷⁶ by any person, regardless of their position.⁷⁷

⁷⁰ *Prosecutor v Kayishema and Ruzindana* (ICTR-95-1-T), 21 May 1999, paras. 94, 276 and 528-545; *Prosecutor v. Krstić* (IT-98-33-T), Judgment and Sentence, 2 August 2001, para. 572 .

⁷¹ Guénaél Mettraux, *International Crimes: Law and Practice* (OUP 2019), pp. 286-7.

⁷² *ibid.*, p. 287; *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. 123-4, para. 190.

⁷³ *Prosecutor v. Karadžić and Mladić* (IT-95-5/18), Judgment and Sentence, 11 July 1996, para. 94.

⁷⁴ Guénaél Mettraux, *International Crimes: Law and Practice* (OUP 2019), p. 269.

⁷⁵ *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. 121, para. 186.

⁷⁶ *Prosecutor v. Bagilishema* (ICTR-95-O1A), Judgment and Sentence, 3 July 2002, para. 35.

⁷⁷ *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1), Judgment and Sentence, 1 June 2001, para. 170.

52. As has been noted regarding intent, a violation of Article II is not conditional upon the actual destruction of the group.⁷⁸ Article II does not require that the individual act be part of a genocidal campaign or a systemic attack on a protected group.⁷⁹ Nor does the definition require a genocidal policy or plan.⁸⁰ In confirming that genocide need not include a policy or collective action as an additional element, the ICTY Appeals Chamber has held that “[t]he existence of a plan or policy is not legal ingredient to the crime.”⁸¹

c. The construction of Article III(c): direct and public incitement to genocide

53. Article III of the Genocide Convention provides:

- “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.”

54. Article III makes it an international crime to “encourag[e] or persuad[e] another to commit” genocide.⁸² The recognition of the crime of incitement in international criminal law dates back to 1946.⁸³

55. The Republic of Maldives submits that Article III(c) engages State responsibility. In the *Bosnian Genocide* case, the Court declined to hold Serbia responsible for incitement, though this was due to insufficient evidence that the relevant organs or persons “directly and publicly incited the commission of acts of genocide anywhere else on the territory of Bosnia and Herzegovina”.⁸⁴ In cases where such evidence is

⁷⁸ Guénaél Mettraux, *International Crimes: Law and Practice* (OUP 2019), pp. 262-3; *Prosecutor v. Karadžić* (IT-95-5/12-T), Judgment and Sentence, 24 March 2016, para. 544.

⁷⁹ *Prosecutor v. Kayishema and Ruzindana* (ICTR-95-1), Judgment and Sentence, 1 June 2001, para. 163.

⁸⁰ William A Schabas, *Genocide in International Law: The Crime of Crimes* (CUP 2009), p. 287; *Prosecutor v. Krstić* (IT-98-33-T), Judgment and Sentence, 2 August 2001, para. 571.

⁸¹ *Prosecutor v. Jelisić* (IT-95-10-A), Judgment and Sentence, 5 July 2001, para. 48.

⁸² Andrew Ashworth, *Principles of Criminal Law* (Clarendon Press 1995), p. 462, cited in *Prosecutor v. Akayesu* (ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, at para. 555. See also Jens David Ohlin, “Incitement and Conspiracy to Commit Genocide” in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (OUP 2009), p. 207, citing Roger Gearty, *Essential Criminal Law* (2nd edn., London, Cavendish Publishing Ltd. 1998), p. 36.

⁸³ *Hans Fritzsche*, International Military Tribunal at Nuremberg, Judgment, 1 October 1946, available at <https://www.legal-tools.org/doc/45f18e/pdf/>.

⁸⁴ *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. 216, para. 417.

present, so long as it is “precise and incontrovertible”,⁸⁵ State responsibility for incitement to genocide is possible.

56. Incitement to commit genocide is an inchoate offence,⁸⁶ meaning that criminal liability for incitement does not require completion of the genocide. The *travaux préparatoires*, applied under the customary rule of treaty interpretation in Article 32 of the Vienna Convention, confirms that it is a crime to directly and publicly incite genocide, regardless of whether such incitement is successful. The Secretariat draft of the Genocide Convention explicitly included liability for “direct public incitement to any act of genocide whether the incitement be successful or not”.⁸⁷ This wording was retained in later stages of the drafting⁸⁸ but was eventually excluded due to: (a) long-term scholarly and judicial debate over the exact scope of incitement as a crime under international criminal law⁸⁹ (such as concerns about free speech limitations);⁹⁰ and (b) some delegates viewing the addition of the provision to be superfluous.⁹¹

57. The Genocide Convention must be interpreted and applied “within the framework of the entire legal system prevailing at the time of the interpretation.”⁹² Significantly, the Republic Maldives’ construction is also confirmed by other rules of international law applicable between the Contracting Parties to the Genocide Convention.⁹³ Under the Statutes of the International Tribunal of the Former Yugoslavia (“ICTY”) and the International Criminal Tribunal for Rwanda (“ICTR”) (adopted by resolutions of the UN Security Council),⁹⁴ which introduce the same wording as Article III(c) of the

⁸⁵ *ibid*, at p. 216, para. 417.

⁸⁶ See eg. *Prosecutor v. Nahimana* (ICTR-99-52-T.T.Ch.1), Judgment and Sentence, 3 December 2003, at para. 102.

⁸⁷ Committee on the Progressive Development of International Law and its Codification, Draft Convention for the Prevention and Punishment of Genocide (Prepared by the Secretariat), UN Doc. A/AC.10/42/Rev.1 (12 June 1947) Article 2(II)(2).

⁸⁸ U.N. Ad Hoc Committee on Genocide, *Draft Convention on the Prevention and Punishment of Genocide*, U.N. Doc. E/AC.25/12 (19 May 1948), Art. IV.

⁸⁹ Jens David Ohlin, “Incitement and Conspiracy to Commit Genocide” in Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary* (OUP 2009), p. 212.

⁹⁰ U.N. Ad Hoc Committee Meeting, *Summary Record of the Sixteenth Meeting*, U.N. Doc. E/AC.25/SR.16 (22 April 1948) (Mr. Maktos, United States of America). See also Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol II), p. 1536 (*Eighty-fifth meeting of the Drafting Committee*, U.N. Doc. A/C.6/SR.85 (27 October 1948)).

⁹¹ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol II), p. 1550 (*Eighty-fifth meeting of the Drafting Committee*, U.N. Doc. A/C.6/SR.85 (27 October 1948)).

⁹² *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276*, I.C.J. Reports 1971, p. 16, at pp. 31-32, para. 53.

⁹³ Vienna Convention, Art. 31(3)(c).

⁹⁴ UNSC Resolution 827 (25 May 1993) (U.N. Doc. S/Res/827); UNSC Resolution 995 (8 November 1994) (U.N. Doc. S/Res/995). See also Oliver Dörr and Kirsten Schmalenbach, “Article 31” in Oliver Dörr and Kirsten

Genocide Convention,⁹⁵ a conviction for incitement as a substantive offence may be obtained even if the incitement did not “substantially contribute” to the commission of genocide.⁹⁶ The ICTY and ICTR Statutes do not feature provisions on whether incitement can be penalised in cases without a completed genocide, though this absence can be traced back to the removal of this provision in the final text of the Genocide Convention, and the ICTR has concluded that “[n]evertheless, the Chamber is of the opinion that it cannot thereby be inferred that the intent of the drafters was not to punish unsuccessful acts of incitement. In light of the overall *travaux*, the Chamber holds the view that the drafters of the Convention simply decided not to specifically mention that such a form of incitement could be punished.”⁹⁷ The Trial Chamber held that a completed offence was not necessary for an incitement conviction: the crime incited does not have to be committed.⁹⁸

58. Therefore, the Republic of Maldives submits that, on a proper construction of the Genocide Convention, liability for the crimes listed in Article III(c) does not require proof of “success”, nor a direct link between the incitement and the genocide itself.

59. The criminalisation of incitement to commit genocide is a mandatory restriction on freedom of speech. However, the criminalisation of hate speech is distinguished from incitement to commit genocide through the more stringent requirements that apply to the latter, discussed below.⁹⁹ Genocide offences also have a high bar and the Court has held that any crime under Article III, including incitement, must be proven by evidence that is “fully conclusive”.¹⁰⁰

Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (1st ed, Springer 2012), at p. 563. The European Court of Human Rights has referred to UN Security Council Resolutions relating to the situation in Northern Cyprus when it interpreted the European Convention on Human Rights with regard to the taking of property there. See *Rantsev v. Cyprus and Russia* (App. No. 25965/04, ECtHR), 7 January 2010, paras. 273-282.

⁹⁵ ICTY Statute, Art. 4(3)(c): “The following acts shall be punishable [...] (c) Direct and public incitement to commit genocide”; ICTR Statute, Art. 2(3)(c): “The following acts shall be punishable [...] (c) Direct and public incitement to commit genocide”.

⁹⁶ *Prosecutor v. Nahimana*, (Case No. ICTR-99-52-T, T.Ch.1), Judgment and Sentence, 28 November 2007, paras. 514, 594, 934, 943, 946, 997, 1002.

⁹⁷ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, para. 561.

⁹⁸ *ibid*, para. 561.

⁹⁹ Amal Clooney and Alice Gardoll, “Hate Speech” in Amal Clooney and David Neuberger (eds), *Freedom of Speech in International Law* (OUP 2024), pp. 179-180, citing *Prosecutor v. Nahimana* (ICTR-99-52-A), Judgment, 28 November 2007, at para. 692 – “[d]irect incitement to commit genocide...has to be more than mere vague or indirect suggestion” and “cannot be held accountable for hate speech that does not directly call for the commission of genocide”.

¹⁰⁰ *ibid*, p. 179, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, 3 February 2015, p. 3, at p. 74, para. 178; see also p. 119, para. 407 (when direct

60. To establish liability for the crime of incitement, two requirements must be met. First, the incitement must be “direct”.¹⁰¹ The ICTR has held that this requires that the incitement “specifically provoke another to engage in a criminal act, and that more than mere vague or indirect suggestion goes to constitute direct incitement.”¹⁰² However, the crime of incitement requires no causal link between the incitement and the genocide.¹⁰³ In making this assessment, directness of an incitement “should be viewed in the light of its cultural and linguistic content” and “a particular speech may also be perceived as direct in one country, and not so in another, depending on the audience.”¹⁰⁴ As confirmed by the *travaux préparatoires* of the Genocide Convention, incitement may be both direct and implicit at the same time—the Polish delegate observed in the 87th meeting of the drafting Committee that “it was sufficient to play skilfully on mob psychology by casting suspicion on certain groups, by insinuating that they were responsible for economic or other difficulties in order to create an atmosphere favourable to the perpetration of the crime.”¹⁰⁵ But the incitement must be to genocide specifically, distinct from incitement to racial, national and religious hatred.¹⁰⁶
61. Second, the incitement must also be “public”.¹⁰⁷ Publicity is established by looking to “the place where the incitement occurred and whether or not assistance was selective or limited”. As confirmed by the ILC, “public incitement is characterised by a call for criminal action to a number of individuals in a public place or to members of the general public at large by such means as the mass media, for example, radio or television.”¹⁰⁸ The *travaux préparatoires* confirm that “public” incitement can be done “by means of

evidence of specific intent is absent, the Court requires that “the only reasonable conclusion to be drawn [from conduct] is an intent” to “destroy that substantial part of the group”).

¹⁰¹ Genocide Convention, Art. III(c); ICTY Statute, Art. 4(3)(c); ICTR Statute, Art. 2(3)(c); Rome Statute of the International Criminal Court, Art. 25(3)(e).

¹⁰² *Prosecutor v. Akayesu* (ICTR-96-4-TCh. 1), Judgment and Sentence, 2 September 1998, para. 557. See also *Prosecutor v. Nahimana*, (Case No. ICTR-99-52-T, T.Ch.1), Judgment and Sentence, 28 November 2007, para. 692.

¹⁰³ *Prosecutor v. Nahimana* (Case No. ICTR-99-52-T, T.Ch.1), Judgment and Sentence, 3 January 2003, para. 1015.

¹⁰⁴ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-TCh 1), Judgment and Sentence, 2 September 1998, para. 557.

¹⁰⁵ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol II), p. 1576 (*Eighty-seventh meeting of the Drafting Committee*, U.N. Doc. A/C.6/SR.87 (29 October 1948)) (Mr. Lachs, Poland),.

¹⁰⁶ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol I), p. 1066 (U.N. Ad Hoc Committee on Genocide, *Meeting held on 30 April 1948: Portions of Report Adopted in First Reading*, U.N. Doc E/AC.25/W.4 (30 April 1948)).

¹⁰⁷ Genocide Convention, Art. III(c); ICTY Statute, Art. 4(3)(c); ICTR Statute, Art. 2(3)(c); Rome Statute of the International Criminal Court, Art. 25(3)(e).

¹⁰⁸ ILC, *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. Doc. A/51/10 (5 July 1996), Art. 2(3)(f); *Prosecutor v. Akayesu* (ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, para. 556.

speeches, radio or press, inciting it to genocide”.¹⁰⁹ The negotiating history of the Genocide Convention also confirms that:

“Such appeals may be part of an agreed plan but they may simply reflect a purely personal initiative on the part of the speaker. Even in the latter case, public incitement should be punished. It may well happen that the lightly or imprudently spoken word of a journalist or speaker himself incapable of doing what he advises will be taken seriously by some of his audience who will regard it as their duty to act on his recommendation. Judges will have to weigh the circumstances and show greater or lesser severity according to the position of the criminal and his authority, according to whether his incitement is premeditated or merely represents thoughtless words”.¹¹⁰

This criteria has resulted in, *inter alia*, officials at a radio network being convicted of participating in a genocide for allowing broadcasts that specifically targeted a group.¹¹¹

62. For direct and public incitement to be found, it must be shown is that “the persons for whom the message was intended immediately grasped the implication thereof.”¹¹² Consequently, the required intent is that the perpetrator desired to “create by his actions a particular state of mind necessary to commit such a crime in the minds of person(s) he is so engaging.”¹¹³ Therefore, the defendant “must have himself the specific intent to commit genocide, namely, to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.”¹¹⁴

63. The Republic of Maldives also submits an observation on the relationship between Article III(a) and Article III(b)-(e). In the *Bosnian Genocide* case, the Court held that once State responsibility for genocide is established, it would be unnecessary to determine whether it may have also incurred responsibility under Article III(b)-(e):

“Thus, if and to the extent that consideration of the first issue were to lead to the conclusion that some acts of genocide are attributable to the Respondent, it would be unnecessary to determine whether it may also have incurred responsibility under Article III, paragraphs (b) to (e), of the Convention for the same acts. Even though it is theoretically possible for the same acts to result in

¹⁰⁹ Hiram Abtahi and Philippa Webb, *The Genocide Convention: The Travaux Préparatoires* (Martinus Nijhoff 2008, vol I), p. 238 (*Draft Convention for the Prevention and Punishment of Genocide (Prepared by the Secretariat)*, U.N. Doc. E/447 (28 March 1947)).

¹¹⁰ *ibid.*, p. 238 (*Draft Convention for the Prevention and Punishment of Genocide (Prepared by the Secretariat)*, U.N. Doc. E/447 (28 March 1947)).

¹¹¹ *Prosecutor v. Nahimana* (ICTR-99-52-T, T.Ch.1), Judgment and Sentence, 28 November 2007.

¹¹² *Prosecutor v. Akayesu* (ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, para. 558.

¹¹³ *ibid.*, para. 560.

¹¹⁴ *Prosecutor v. Akayesu* (Case No. ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, para. 560. See also Jens David Ohlin, “Incitement and Conspiracy to Commit Genocide” in Paola Gaeta, *The UN Genocide Convention: A Commentary* (OUP 2009), at p. 216.

the attribution to a State of acts of genocide (contemplated by Art. III, para. (a)), conspiracy to commit genocide (Art. III, para. (b)), and direct and public incitement to commit genocide (Art. III, para. (c)), there would be little point, where the requirements for attribution are fulfilled under (a), in making a judicial finding that they are also satisfied under (b) and (c), since responsibility under (a) absorbs that under the other two. The idea of holding the same State responsible by attributing to it acts of ‘genocide’ (Art. III, para. (a)), “attempt to commit genocide” (Art. III, para. (d)), and ‘complicity in genocide’ (Art. III, para. (e)), in relation to the same actions, must be rejected as untenable both logically and legally.”¹¹⁵

However, the Republic of Maldives is of the view that the Court’s finding allows for the conclusion that a State may be simultaneously responsible under Article III(a) for some acts, and responsible under Article III(b)-(e) for different actions. Furthermore, from a different perspective, the Court has confirmed that a finding that a State is not responsible for genocide under Articles II and II(a) of the Genocide Convention does not avail a Court from considering its responsibility under Article III(b)-(e).¹¹⁶

d. The construction of Article IV: perpetrators of incitement to commit genocide must be punished regardless of their official capacity

64. Article IV of the Convention provides:

“Persons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.”

65. Article IV provides that States have a duty to punish persons who commit any of the acts in Article III, which includes direct and public incitement to genocide, regardless of title or rank. The phrase “shall be punished” under Article IV makes clear that States must punish those convicted.¹¹⁷

66. As the Court has previously held, 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.”¹¹⁸ It would be inconsistent with for the principle of good faith for a State to

¹¹⁵ *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. 200, para. 380.

¹¹⁶ *ibid*, at p. 200, at para. 381.

¹¹⁷ See Christian J. Tams et al., *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (C.H. Beck / Hart Publishing / Nomos 2014), pp. 194, 197.

¹¹⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

investigate and, upon conviction, punish only low-ranking perpetrators, with a resulting impunity for public officials or high-ranking leaders.¹¹⁹

67. Though the Court upheld the immunity of a Foreign Minister accused of inciting “racial hatred” by allegedly inciting a population to attack Tutsis in Rwanda, the Court emphasised that the Minister’s immunity from the criminal jurisdiction of another State did not mean that such officials “enjoyed impunity in respect of any crimes they might have committed, irrespective of their gravity. Immunity from criminal jurisdiction and individual criminal responsibility are quite separate concepts. While jurisdictional immunity is procedural in nature, criminal responsibility is a question of substantive law.”¹²⁰ The Court outlined scenarios in which the immunities of the Foreign Minister did not represent a bar to prosecution, including prosecution in their own State and proceedings before certain international criminal courts with jurisdiction.¹²¹

68. Regarding incitement in particular, the Republic of Maldives considers the rank or position held by a public official may indeed be relevant to the determination of whether incitement to commit genocide has taken place. As stated above, for direct and public incitement, it must be shown that “the persons for whom the message was intended immediately grasped the implication.”¹²² The utterances by a public official or ruler may be more likely to in fact incite genocidal acts than utterances by individuals who do not command the same authority.¹²³ As a result, an individual’s rank or title may be relevant when determining part of the *mens rea* of incitement; that the individual intended for the audience to construe their remarks as a call to genocide.¹²⁴

¹¹⁹ See also Vienna Convention, Art. 27 – a State may not invoke internal legal provisions, such as domestic laws concerning immunity, to explain a failure to perform obligations under the Genocide Convention.

¹²⁰ *Case concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, p. 3, at p. 25, para. 60.

¹²¹ *ibid.*, at p. 25, para. 61.

¹²² *Prosecutor v. Akayesu* (Case No. ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, paras. 558-560.

¹²³ See Susan Benesch, “The Ghost of Causation in International Speech Crime Cases”, in Predrag Dojcinovic (ed.), *Propaganda, War Crimes Trials and International Law* (Routledge 2012), pp. 262-264.

¹²⁴ See, for example, *Prosecutor v. Akayesu* (Case No. ICTR-96-4-TCh.1), Judgment and Sentence, 2 September 1998, paras. 51, 54 – Mr. Akayesu was a “well known and popular figure in the local community” and was “the leader of the commune and commonly treated with great respect and deference”.

e. The construction of Article VI: the duty to try perpetrators of the direct and public incitement to genocide

69. Article VI of the Genocide Convention provides:

“Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.”

70. States, when aided by the legislation and effective penalties required under Article V, can undertake measures to represses and punish acts of genocide even in their initial stages by trying individuals on their territory responsible for direct and public incitement to genocide.

71. The Court has confirmed that Article VI “obliges the Contracting Parties to institute and exercise territorial criminal jurisdictional” in their national courts.¹²⁵ The present proceedings concern the obligations of Israel, the State within which alleged direct and public incitement to genocide was committed.¹²⁶ The Republic of Maldives accordingly does not intend to address the construction of Article VI insofar as other States’ obligations are concerned. However, it reserves the right to do so should that become an issue in the case.

72. To fulfil obligations under Article VI, States must first investigate instances of genocide or other suspected Article III acts. A duty to investigate accordingly arises from Article VI. Instituting criminal jurisdiction necessitates an investigation of suspected Article III acts and, if appropriate, the filing of criminal charges.¹²⁷

¹²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 226-227, para. 442.

¹²⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, at pp. 59-65, paras. 101-102.

¹²⁷ The Court has considered the duty to investigate alleged crimes under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and noted a State must “exercise its jurisdiction...starting by establishing the facts...as soon as the suspect is identified in [its] territory”. *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 422, at pp. 453-454, paras. 85-86. See also, in relation to the Geneva Conventions, Claus Kreß “Reflection on the Iudicare Limb of the Grave Breaches Regime” (2009) 7 *Journal of International Criminal Justice* 789 – the grave breaches regime entails a duty to investigate and, where so warranted, to prosecute and convict.

73. The timing of a State’s investigation and subsequent trying of allegations of incitement must be informed by the principle of good faith.¹²⁸ For the criminalisation of incitement to meaningfully fulfil the Convention’s object of preventing genocide, the Maldives submits territorial States must investigate and (depending on the outcome of an investigation) charge and try perpetrators of incitement to commit genocide without delay.¹²⁹ Territorial States should not unnecessarily stretch the length of time during which it claims to investigate the crimes listed in Article III of the Genocide Convention to avoid fulfilling obligations to try and punish those crimes, particularly if there is credible and publicly available evidence available to investigating authorities.
74. Article VI requires that individuals charged with Article III acts should “be tried by a competent tribunal” of the territorial State or by an “international penal tribunal” with jurisdiction.
75. Interpreting Article VI consistently with other rules of international law applicable between the Contracting Parties to the Genocide Convention, including relevant treaties and customary international law, requires that domestic trials for Article III crimes be held in accordance with internationally recognised fair trial standards.¹³⁰
76. Article VI accordingly requires that territorial States conduct a competent, independent and impartial trial of those charged with incitement to genocide in line with international fair trial standards,¹³¹ or otherwise must ensure a trial by an international penal tribunal.

VII. DOCUMENTS ATTACHED IN SUPPORT OF THIS DECLARATION

77. The Republic of Maldives submits the following documents in support of this Declaration:

¹²⁸ Genocide Convention, Preamble.

¹²⁹ International courts have held that investigations and prosecutions of international crimes must be carried out promptly. See e.g., Rome Statute, Art. 17(2)(b) (providing that States should be deemed unwilling to carry out proceedings if there was “an unjustified delay in the proceedings...inconsistent with an intent to bring the person concerned to justice”), Art. 67(1)(c) (providing a defendant has the right to be tried without undue delay).

¹³⁰ See *Prosecutor v. Aleksovski* (IT-95-14/1-A), Judgment 24 March 2000, para. 104 (“The right to a fair trial is, of course, a requirement of customary international law.”). See further Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2020), pp. 13-25.

¹³¹ See Amal Clooney and Philippa Webb, *The Right to a Fair Trial in International Law* (OUP 2020), pp. 66-133.

- a. Annex A: instrument of accession of the Republic of Maldives to the Genocide Convention.
- b. Annex B: letter from the Registrar sent pursuant to Article 63(1) of the Statute of the Court.
- c. Annex C: confirmation of signature from the Ministry of Foreign Affairs of the Republic of Maldives.

VIII. CONCLUSION

78. For the reasons set out in this Declaration, the Republic of Maldives avails itself of its right under Article 63(2) of the Statute of the Court to intervene in these proceedings and respectfully requests that the Court recognise the admissibility of this Declaration.
79. The Republic of Maldives has appointed the undersigned as Agent for the purposes of the present Declaration.

The address for service to which all communications concerning this case should be sent is:

H.E. the Ambassador of the Republic of Maldives to the Kingdom of Belgium
and to the European Union

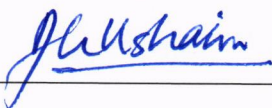
Embassy of the Republic of Maldives to the Kingdom of Belgium, Netherlands
& Luxembourg

Mission of the Republic of Maldives to the European Union

Rue des Colonies 56

1000 Bruxelles

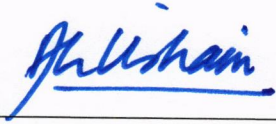
Belgium



Attorney General Ahmed Usham (Agent)

CERTIFICATION

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



Attorney General Ahmed Usham (Agent)

24/IV/84



THE MINISTER OF FOREIGN AFFAIRS
MALE,
REPUBLIC OF MALDIVES.

(IV-2)

WHEREAS the Convention on the Prevention and Punishment of the Crime of Genocide was adopted by the General Assembly of the United Nations on 9 December, 1948; and;

WHEREAS Article XI of the said Convention provides that any State which has not signed the Convention may accede to it;

NOW, THEREFORE, BE IT KNOWN, that the Government of the Republic of Maldives, having seen and considered the said Convention do hereby accede to the same.

IN WITNESS WHEREOF, I FATHULLA JAMEEL, Minister of Foreign Affairs of the Republic of Maldives, have hereunto set my hand and affixed my seal.

DATED this Twelfth day of April, 1984.




FATHULLA JAMEEL

Secretary-General,
United Nations,
New York.



By email only

161308

6 February 2024

Excellency,

I have the honour to refer to my letter (No. 161010) dated 3 January 2024 informing your Government that, on 29 December 2023, South Africa filed in the Registry of the Court an Application instituting proceedings against the State of Israel in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*. 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.

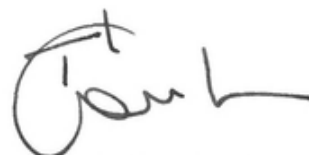
In the above-mentioned Application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”) is invoked both as a basis of the Court’s jurisdiction and as a substantive basis of the Applicant’s claims on the merits. In particular, the Applicant seeks to found the Court’s jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention and alleges violations of Articles I, III, IV, V and VI of the Convention. It therefore appears that the construction of this instrument will be in question in the case.

J.

[Letter to the States parties to the Genocide Convention
(except South Africa and Israel)]

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 'Gautier', with a stylized flourish at the end.

Philippe Gautier
Registrar