

DECLARATION OF INTERVENTION
OF THE
GOVERNMENT OF AUSTRALIA



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

In the case of

*Allegations of Genocide under the Convention on the Prevention and Punishment of the
Crime of Genocide*

(Ukraine v. Russian Federation)

30 SEPTEMBER 2022



Note No. 48/2022

The Embassy of Australia in the Kingdom of the Netherlands presents its compliments to the Registrar of the International Court of Justice.

Australia has the honour to annex to this Note a Declaration by Australia of its intervention pursuant to Article 63, paragraph 2, of the Statute of the International Court of Justice in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* ('Australian Intervention').

Australia has the further honour to confirm that Australia has appointed Jesse Clarke, Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent, His Excellency Matthew Ernest Keith Neuhaus, Ambassador of Australia to the Kingdom of the Netherlands, as Co-Agent and Adam Justin McCarthy, Chief Legal Officer, Department of Foreign Affairs and Trade, as Co-Agent for Australia for the purposes of Australia's Intervention.

A copy of the instrument of appointment signed by the acting Minister for Foreign Affairs is annexed to this Note. The Embassy has the honour to confirm that the original instrument will be provided to the Court in due course.

Australia certifies that the signature on the Declaration is that of the appointed Co-Agent, His Excellency Matthew Ernest Keith Neuhaus.

Australia has the further honour to advise that the address for service to which all communications concerning these proceedings should be sent is that of this Embassy at the following address:

Australian Embassy The Hague
Carnegielaan 4
2517 KH Den Haag
Netherlands

The Embassy avails itself of this opportunity to renew to the Registrar of the International Court of Justice the assurances of its highest consideration.

THE HAGUE

30 September 2022

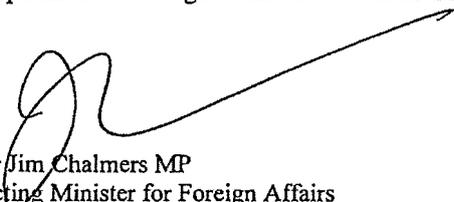




***Allegations of Genocide under the Convention on the Prevention and Punishment
of the Crime of Genocide (Ukraine v. Russian Federation)***

Appointment of Australia's Agent and Co-Agent

For the purposes of the conduct of the proceedings in the International Court of Justice concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, I hereby appoint Jesse Clarke, Assistant Secretary, Office of International Law, Attorney-General's Department, as Agent for Australia, His Excellency Matthew Ernest Keith Neuhaus, Ambassador of Australia to the Kingdom of the Netherlands, as Co-Agent for Australia and Adam Justin McCarthy, Chief Legal Officer, Department of Foreign Affairs and Trade as Co-Agent for Australia.



Dr Jim Chalmers MP
Acting Minister for Foreign Affairs

26 September 2022

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To the Registrar of the International Court of Justice, the undersigned being duly authorised by the Government of Australia:

1. On behalf of the Government of Australia, I have the honour to submit to the Court this Declaration of Intervention pursuant to Article 63(2) of the *Statute of the International Court of Justice* (the *Statute*) in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. By this Declaration, Australia seeks to avail itself of its right to intervene in the proceedings to provide the Court with its view as to the construction of the provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide* (the *Genocide Convention*, or the *Convention*)¹ that are at issue in the present case.

2. A State wishing to avail itself of its right to intervene under Article 63(2) must do so in accordance with Article 82 of the *Rules of Court* (the *Rules*), which relevantly states that:
 1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.
 2. The declaration shall state the name of an agent. It 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 the documents in support, which documents shall be attached.

¹ Genocide Convention, opened for signature 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).

3. This Declaration will address each of these requirements in turn, following some preliminary observations on the proceedings, as well as the admissibility and scope of the present Declaration.

I. PRELIMINARY OBSERVATIONS

4. Australia is profoundly concerned by the unilateral use of force by the Russian Federation in Ukraine and shares the sentiment and observations made by the Court in its Provisional Measures Order:

On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he had decided to conduct a “special military operation” against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage.

The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering. The Court is profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. [...] It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.²

Australia also shares the deep concerns expressed by the United Nations General Assembly in its resolutions titled the ‘Aggression against Ukraine’ (A/RES/ES-11/1)³ and the ‘Humanitarian consequences of the aggression against Ukraine’ (A/RES/ES-11/2).⁴

5. In this context, Australia stresses its continued commitment to the rules-based international order that is critical for maintaining international peace and security. It

² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures Order, 16 March 2022 (*Provisional Measures Order*), paras. 17-18.

³ GA Resolution A/RES/ES-11/1, 2 March 2022.

⁴ GA Resolution A/RES/ES-11/2, 24 March 2022.

recognises the vital role the Court plays in this regard, as the principal judicial organ of the United Nations, particularly in relation to the peaceful settlement of disputes.

6. Australia has a long history of supporting efforts to promote the Genocide Convention. It played an active role in negotiating the text of the Convention and supporting its adoption. In particular, Dr Herbert Vere Evatt, the President of the General Assembly at the time, and Australia's Minister for Foreign Affairs, played a key role with respect to Resolution 260(A)(III), by which the Convention was approved for signature and ratification.⁵
7. Australia was one of the first countries to ratify the Genocide Convention in 1949. Since then, Australia has been a steadfast supporter of the establishment and mandate of international courts and tribunals with jurisdiction over genocide and other serious international crimes.
8. Consistent with its ongoing support for the Genocide Convention, Australia now avails itself of its right under Article 63(2) of the Statute to intervene to assist the Court by providing its views on the construction of the provisions of the Convention at issue in the present proceedings. Reflecting the terms of the right conferred by Article 63(2), Australia's intervention will be limited to matters regarding the construction of the provisions of the Convention in question in this case. Australia recognises that, having availed itself of the right to intervene, the construction of the Convention given by the judgment of the Court will be binding upon it. Nevertheless, as has been acknowledged

⁵ See, e.g., 3 UN GAOR, 179th plenary meeting, at p. 852 (1948) (Mr Evatt).

by the Court, it does not thereby become a party to the dispute, and as such its intervention cannot affect the equality of the parties.⁶

9. Article 82(1) of the Rules provides that a declaration of a State desiring to avail itself of the right of intervention shall be filed “as soon as possible and not later than the date fixed for the opening of the oral proceedings”. This declaration complies with that requirement.
10. Australia does not consider there to be any limitation in Article 63 of the Statute that prevents it from intervening on the construction of provisions of the Convention that concern the Court’s jurisdiction.⁷ The terms of Article 63 are inconsistent with any such limitation, for it permits intervention by a party to the Convention “[w]hensoever” the construction of the Convention (plainly including Article IX) is in question.
11. Should the Court proceed to examine any questions of jurisdiction or admissibility in a separate phase of the proceedings in advance of the merits phase, then in each phase Australia would confine its observations on the construction of the Convention to the provisions that are relevant to that phase. By contrast, if questions of jurisdiction or admissibility are examined together with the merits, Australia would address issues of construction of the Convention relating to jurisdiction and merits together.
12. Australia reserves its right to respond to additional questions of construction of the Convention, by amending or supplementing its observations in the course of the proceedings, as those questions arise and Australia becomes aware of them.

⁶ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order, I.C.J. Reports 2013*, p. 10, para. 18.

⁷ See, e.g., Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume 1 (OUP, 2013), p. 1031; Alina Miron and Christine Chinkin, “Article 63”, in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1763.

II. PROCEDURAL BACKGROUND

13. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation by submitting an application concerning a dispute relating to the interpretation, application and fulfilment of the Genocide Convention. Ukraine's Application was submitted in accordance with Articles 36(1) and 40 of the Statute.⁸ Together with the Application, Ukraine submitted a request for the indication of provisional measures in accordance with Article 41 of the Statute.
14. On 7 March 2022, the Court held an oral hearing on Ukraine's request for provisional measures. Although the Russian Federation had informed the Court that it would not participate in the hearing, it delivered a document to the Registry of the Court on the same day. In its document, the Russian Federation set out its position regarding the "lack of jurisdiction" of the Court in this case and "request[ed] the Court to refrain from indicating provisional measures and to remove the case from its list".⁹
15. On 16 March 2022, the Court issued its order on provisional measures. The Court indicated that:
 1. The Russian Federation shall immediately suspend the military operations 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 persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point 1 above;
 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.¹⁰

⁸ Application instituting proceedings, filed in the Registry of the Court on 27 February 2022 (*Ukraine's Application*).

⁹ Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, filed in the Registry of the Court on 7 March 2022, para. 24.

¹⁰ Provisional Measures Order, para. 86.

16. On 23 March 2022, the Court issued an order fixing the time-limits for the filing of Ukraine's Memorial by 23 September 2022, and the Russian Federation's Counter-Memorial by 23 March 2022.¹¹
17. On 30 March 2022, pursuant to Article 63(1) of the Statute, the Registrar of the Court duly notified Australia of the proceedings as a party to the Genocide Convention.¹²

III. CASE AND CONVENTION TO WHICH THIS DECLARATION RELATES

18. Australia files this Declaration to intervene in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, initiated before the Court by Ukraine on 26 February 2022, which raises questions regarding the construction of the Convention.

IV. BASIS UPON WHICH AUSTRALIA IS A PARTY TO THE CONVENTION

19. Australia signed the Genocide Convention on 11 December 1948. On 8 July 1949, Australia deposited its instrument of ratification with the Secretary-General of the United Nations in accordance with the requirements set out at Article XI of the Convention.¹³
20. Australia has not filed any declarations or reservations to the Convention, and remains a Contracting Party.

¹¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 23 March 2022.

¹² Letter from the Registrar of the Court to the States parties to the Genocide Convention (except Russia and Ukraine), Reference 156413, 30 March 2022, **Annex A**.

¹³ United Nations Depository Notification confirming Australia's Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, Reference C.N.84.1949, 22 July 1949, **Annex B**.

V. PARTICULAR PROVISIONS OF THE CONVENTION IN QUESTION

21. The construction of several provisions of the Genocide Convention are at issue in this case. As noted by the Registrar in his letter to the States party to the Convention:

[T]he Applicant seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of this instrument will be in question in the case.¹⁴

22. In particular, it appears that the Court will be required to consider the proper interpretation of the following provisions of the Convention:

- (a) Article I, which 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.

- (b) Article II, which defines "genocide" as follows:

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.

- (c) Article IV, which 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.

¹⁴ Letter from the Registrar of the Court to the States parties to the Genocide Convention (except Russia and Ukraine), Reference 156413, 30 March 2022, **Annex A**.

(d) Article IX, which together with Article 36(1) of the Statute provides the Court with jurisdiction over disputes relating to its “interpretation, application or fulfilment”, stating:

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.

23. These Articles must be interpreted in their context, including that provided by other substantive provisions of the Convention, including Articles III, V, VI and VIII.

VI. STATEMENT OF CONSTRUCTION OF THESE PROVISIONS

24. When considering the proper construction of the Convention, Australia has applied the rules of treaty interpretation contained in the *Vienna Convention on the Law of Treaties* (the *Vienna Convention*),¹⁵ which are customary international law, and have been confirmed as such by the Court.¹⁶ Article 31(1) provides that:

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.

25. The interpretation of the Convention must also take account of any subsequent practice of the parties to the treaty establishing their agreement regarding its interpretation.¹⁷ Further, in certain circumstances recourse may be had to supplementary means of interpretation, including the *travaux préparatoires*.¹⁸

¹⁵ Vienna Convention, opened for signature 23 May 1969, 1155 U.N.T.S. 331 (entered into force 27 January 1980).

¹⁶ See, e.g., *Arbitral Award of 31 July 1989 (Guinea-Bissau v. Senegal), Merits, Judgment, I.C.J. Reports 1991*, pp. 69–70, para. 48.

¹⁷ Vienna Convention, Article 31(3)(b).

¹⁸ Vienna Convention, Article 32.

26. The Court has confirmed that the Convention imposes duties owed *erga omnes partes*.¹⁹

As such, the proper construction of the Convention is of great importance to all parties to the Convention. That Australia and all Contracting Parties have an interest in safeguarding the values underlying the Genocide Convention, and ensuring against its misuse, was confirmed by the Court shortly after the Convention was approved for signature and ratification. In its Advisory Opinion on *Reservations to the Genocide Convention*, the Court described the object and purpose of the Convention as follows:

It is indeed difficult to imagine a convention that might have this dual character [of having a purely humanitarian and civilising purpose] to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention.²⁰

27. As noted in paragraphs 10-11 above, Australia avails itself of its right to intervene to address the construction of provisions of the Genocide Convention which go both to the Court's jurisdiction and to the merits of the dispute. Australia commences with its statement of construction of those provisions relevant to the Court's jurisdiction (**subsection A**), before turning to the construction of the provisions relevant to the merits (**subsection B**).

¹⁹ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 47, para. 87; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 107-109.

²⁰ *Reservations to the Convention on Genocide, Advisory Opinion*, I.C.J. Reports 1951, p. 23.

A. Jurisdiction: Construction of Article IX

28. Through Article IX, the Contracting Parties have consented to the jurisdiction of the Court to hear “disputes” relating to the “interpretation, application or fulfilment” of the Genocide Convention.

i. The term “dispute” in Article IX should be interpreted consistently with the broad meaning that term has in international law

29. The existence of a “dispute” between the parties to the case is a precondition to the Court having jurisdiction under Article IX of the Genocide Convention.

30. The jurisprudence of the Court and its predecessor establishes that a “dispute” includes a “disagreement on a point of law or fact, a conflict of legal views or of interests”²¹ between the parties, where it can be demonstrated that “the claim of one party is positively opposed by the other”.²² Thus, a “dispute between States exists where the parties hold clearly opposing views concerning the question of the performance or non-performance of certain international obligations”.²³

31. The existence of a dispute is a matter of substance, not of form or procedure, and must be determined objectively by the Court in the particular case.²⁴ For that reason, one State’s unilateral denial that a dispute has arisen is not determinative of whether or not a

²¹ *The Mavrommatis Palestine Concessions (Greece v. United Kingdom)*, Jurisdiction, Judgment [1924] P.C.I.J. (ser A) No 2, 10, p. 11.

²² *South West Africa Cases (Ethiopia v. South Africa; Liberia v. South Africa) Preliminary Objections, Judgment of 21 December 1962*, I.C.J. Reports 1962, p. 328.

²³ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures Order, 7 December 2021, para. 19.

²⁴ *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, pp. 270-271, paras. 35-36.

dispute exists.²⁵ Further, the failure of a respondent State to participate in the proceedings does not preclude the Court from exercising its jurisdiction,²⁶ including deciding whether there is a dispute between the parties for the purposes of its jurisdiction.

32. To establish the existence and character of a “dispute” the Court may look to contemporaneous material existing prior to the application, including statements and documents exchanged by the parties in bilateral and multilateral settings.²⁷ The relevant exchanges need not make specific reference to the Convention itself, but must refer to the subject-matter of the Convention with sufficient clarity to identify that a dispute has arisen under it.²⁸
33. Australia contends that the term “dispute” in Article IX of the Convention is to be interpreted in accordance with the above jurisprudence. That is the way in which the Court has previously interpreted the term.²⁹ Most recently, in *The Gambia v. Myanmar*, the Court reaffirmed this approach and found no reason to depart from the above

²⁵ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016, p. 1159, para. 47. See also *Application of the International Convention on Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, p. 414, para. 18; *Obligations concerning Negotiations relating to Cessation of Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, pp. 849-851, paras. 37-43; and Provisional Measures Order, para. 28.

²⁶ Statute, Article 51; see also *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 2020, p. 464, para. 26; and *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, pp. 23-24, para. 27.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 64-77.

²⁸ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 72-77. See also *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, pp. 84-85, para. 30.

²⁹ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 63-64; and *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 614-615, para. 29.

principles when determining whether there is a dispute for the purposes of Article IX.³⁰

Australia submits that the Court should maintain this approach.

ii. Article IX confers jurisdiction to declare whether an applicant has complied with the Convention, if this is in dispute

34. In its Application, Ukraine noted that “[t]he Russian Federation claims that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and has undertaken military and other actions against Ukraine ... with the express purpose of preventing and punishing such alleged acts of genocide”.³¹ In those circumstances, Ukraine contends that the question whether it has committed genocide, such that the Russian Federation could take action with the purpose of preventing and/or punishing such genocide, is a dispute between the parties, and that this dispute concerns the interpretation, application or fulfilment of the Genocide Convention.³²
35. The Court has previously noted that Article IX contains an unusual feature, *vis-à-vis* other compromissory clauses.³³ That feature is that Article IX expressly indicates that disputes “relating to the responsibility of a State for genocide or any of the other acts enumerated in article III” may be referred to the Court, which indicates that such disputes “are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention”.³⁴ However, even in the context of disputes “relating to the responsibility of a State for genocide”, nothing in that language limits the jurisdiction

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 63-64.

³¹ Ukraine’s Application, para. 8.

³² Ukraine’s Application, para. 11.

³³ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 144, paras. 168-169.

³⁴ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 144, para. 169.

of the Court to cases where the applicant accuses the respondent of breaching the Convention. To the contrary, that language is ample to confer jurisdiction to declare that a party to the Convention has complied with its obligations (and thus is not responsible for genocide) if that is a matter in dispute.³⁵

36. That interpretation is confirmed by the fact that Article IX provides that a dispute may be submitted to the Court “at the request of any of the parties to the dispute”.³⁶ While that language conveys that only a party to the dispute may bring it before the Court,³⁷ it also conveys that any party to a dispute may do so (which must include the State that is accused of committing genocide).
37. The breadth of Article IX is further reinforced by the use of the phrase “interpretation, application or fulfilment” in Article IX, as those words together give the Court exhaustive jurisdiction over matters relating to “the life of the Convention”.³⁸
38. For the above reasons:
 - (a) A dispute as to whether a State has complied with the Convention, in particular by committing acts of genocide such that another State may take action under Article I of the Convention, is a dispute within the jurisdiction of the Court under Article IX.
 - (b) That dispute may be brought before the Court by either party to the dispute.

³⁵ Applicants have made similar requests in other cases, in which the Court found that it had jurisdiction. For example, see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 14, para. 14.

³⁶ Emphasis added.

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 111.

³⁸ Robert Kolb, “The Scope *Rationae Materiae* of the Compulsory Jurisdiction of the ICJ”, in Paolo Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP, 2009) 442, p. 453.

(c) The broad language used in Article IX, covering disputes relating to the “interpretation, application or fulfilment” of the Convention, confirms this construction and reinforces the conclusion that the Court has jurisdiction to declare whether an applicant State has complied with its obligations under the Convention in circumstances where this is in dispute between the parties.

iii. Article IX confers jurisdiction on the Court over disputes concerning the undertaking to prevent and punish genocide under Article I of the Convention

39. Article I of the Convention contains an undertaking “to prevent and punish” genocide. It follows that a dispute regarding the scope, content or exercise of the undertaking to prevent and punish genocide is within the Court’s jurisdiction under Article IX of the Convention, as it is a dispute about the “interpretation, application or fulfilment” of Article I.
40. Similarly, a dispute as to whether a party to the Convention has acted in good faith in taking action in purported compliance with its duty “to prevent and punish” genocide under Article I also falls within the scope *ratione materiae* of Article IX. Such a dispute necessarily concerns the “interpretation, application or fulfilment” of the Convention.
41. Article IX of the Convention confers jurisdiction on the Court to consider whether any conduct by a party is compatible, or incompatible, with its obligations under the Convention. This includes conduct which involves the threat or use of force. As noted by the Court in its judgment on preliminary objections in *Oil Platforms*, a “violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means.”³⁹ Further, to refuse to

³⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996, pp. 811-812, para. 21.*

exercise jurisdiction under Article IX in a case involving the use of force would be inconsistent with the express terms of the Convention, which confirm its applicability in “time of peace and time of war.”⁴⁰

42. This interpretation of Article IX is consistent with the Court’s previous decisions, including in the *Legality of Use of Force* cases.⁴¹ In those cases, the applicant alleged that the respondent States were committing genocide by their use of force, but in the absence of evidence of genocidal intent the Court held that it was not in a position to find that the acts in question were capable of coming within the provisions of the Genocide Convention.⁴² That is very different to a dispute as to whether the undertaking to “prevent and punish” genocide in Article I of the Convention is capable of providing a legal basis for the unilateral use of force. A dispute of this kind squarely involves the interpretation, application or fulfilment of the Genocide Convention, and thus falls within Article IX.
43. This conclusion is unaffected by whether or not the State party that claims to be entitled to use force asserts that entitlement under another treaty or under customary international law, because the Court has confirmed that the same acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty.⁴³

⁴⁰ Genocide Convention, Article I (emphasis added).

⁴¹ See, e.g., *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 137.

⁴² *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 138, para. 41.

⁴³ See, e.g., *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Relations (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 27, para. 56.

44. For the above reasons:

- (a) A dispute regarding the scope, content or exercise of the undertaking to prevent and punish genocide in Article I is a dispute within the Court's jurisdiction under Article IX of the Convention.
- (b) A dispute as to whether a State party to the Convention has acted in good faith in taking action against another State in purported compliance with its duty to prevent and punish genocide under Article I is likewise a dispute within the Court's jurisdiction under Article IX.
- (c) Article IX confers jurisdiction on the Court to consider whether any conduct by a State party is compatible or incompatible with that State party's obligations under the Convention, including conduct involving the threat or use of force.
- (d) The Court's jurisdiction under Article IX is unaffected by the fact that the conduct being considered may also fall within the ambit of another treaty or customary international law.

B. Merits

i. Construction of Article II

- 45. "Genocide" is defined in Article II of the Convention, in a way that incorporates detailed elements of both *action* and *intention*.
- 46. So far as concerns the element of *action*, subparagraphs (a)-(e) contain an exhaustive list of the acts that may constitute genocide. All of these acts are "by their very nature conscious, intentional or volitional acts."⁴⁴ Further, the relevant acts must be committed

⁴⁴ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 121, para. 186, citing International Law Commission (ILC), Commentary on Article 17 of the 1996 Draft Code of Crimes against the Peace and

against one or more persons by virtue of their membership of a “national, ethnical, racial or religious” group.⁴⁵

47. Regarding the element of *intention*, the perpetrator must act with both general intent to commit the act, and with specific intent (*dolus specialis*) “to destroy, in whole or in part, a national, ethnical, racial, or religious group, as such”.⁴⁶ The Court has emphasised that “[g]reat care must be taken in finding in the facts a sufficiently clear manifestation” of the requisite intent.⁴⁷

ii. *Construction of Article I*

48. Article I of the Convention states that genocide is a “crime under international law” which Contracting States “undertake to prevent and to punish”. The rights and obligations enshrined in the Convention, including the obligation in Article I to prevent and to punish genocide, are owed *erga omnes partes*.⁴⁸ As a consequence, any State party to the Convention has the right to invoke the responsibility of another State party for its

Security of Mankind, ILC Report 1996, *Yearbook of the International Law Commission, 1996*, Vol. II, Part Two, p. 44, para. 5.

⁴⁵ Genocide Convention, Article II.

⁴⁶ Genocide Convention, Article II. See also *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 121, para. 187 (“The additional intent must also be established, and is defined very precisely. It is often referred to as a special or specific intent or *dolus specialis*; ... 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 intent to destroy the group as such in whole or in part. The words “as such” emphasize that intent to destroy the protected group.”). See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 62, para. 132, noting that this element of intent “is the essential characteristic of genocide, which distinguishes it from other serious crimes.”

⁴⁷ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 122, para. 189.

⁴⁸ See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 107; *Application of the Convention of the Prevention and Punishment of the Crime of Genocide*, I.C.J. Reports 1996, p. 616, para. 31.

failure to comply with this obligation.⁴⁹ However, as the rights and obligations set out in the Convention must be interpreted and performed in good faith,⁵⁰ States must abstain from actions that frustrate its purpose or abuse its provisions.

(a) A State must conduct appropriate due diligence before acting in reliance on the undertaking to prevent genocide in Article I

49. In explaining the meaning of Article I, the Court has held that:

a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed.⁵¹

50. It is implicit in the linking of the "duty to act" under Article I to what the State knows ("learns of") or what it should know ("should normally have learned of") that, before taking any action in reliance on Article I, a State must carry out an assessment of the facts in order to determine whether genocide is occurring (or whether there is a serious risk of genocide occurring). That assessment must take account of both the action and intention elements of genocide, as discussed above in respect of Article II.⁵² Unless a State carries out such an assessment, it cannot know whether its "duty to prevent" genocide under Article I has been enlivened.

51. That is why, in respect of the duty to prevent genocide in Article I of the Convention, the notion of due diligence is of "critical importance".⁵³ Due diligence requires "an

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, paras. 107-111.

⁵⁰ Vienna Convention, Articles 26 and 31. See also Provisional Measures Order, para. 56.

⁵¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 221-222, para. 431; also 223, para. 432.

⁵² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 222, para. 431.

⁵³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 221, para. 430.

assessment *in concreto*⁵⁴ – that is, by reference to verifiable facts and evidence. Further, it must be carried out in good faith. In practice, this means that a State must have concluded in good faith that genocide has occurred, or that there is a serious risk that it will occur, on the basis of genuine and credible evidence, before taking action in accordance with Article I of the Convention to prevent genocide.

(b) Article I does not itself authorise the unilateral use of force

52. Australia submits that, properly interpreted, the “duty to prevent” genocide under Article I does not itself authorise or provide a legal basis for the use of force. Nor does Article I authorise a State to commit acts of aggression, war crimes or crimes against humanity. As the Court has specifically emphasised, in discharging its duty under Article I “every State may only act within the limits permitted by international law”.⁵⁵ Further, as the Court held in its Provisional Measures Order in this case, any action taken under Article I “must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.”⁵⁶
53. The above interpretation is reinforced by the context of Article I of the Genocide Convention, including the preamble, which emphasises the need for international cooperation; Article VIII, which emphasises multilateral cooperation; and Article IX, which provides that the Court is the appropriate forum for the settlement of disputes arising under the Convention. None of those articles are consistent with interpreting Article I as itself authorising or requiring States to engage in the unilateral use of force.

⁵⁴ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 221, para. 430.

⁵⁵ *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 221, para. 430. See also Provisional Measures Order, para. 57.

⁵⁶ Provisional Measures Order, para. 58.

(c) Duty to punish genocide refers to the criminal punishment of individuals

54. Finally, the “duty to punish” genocide under Article I is not concerned with the “punishment” of States. The ordinary meaning of the term “punish” connotes the exercise of penal power over individuals. Thus the “duty to punish” genocide under Article I should be interpreted as a duty to bring about the criminal investigation, prosecution, trial and punishment of individuals who commit genocide.
55. That submission is supported by the surrounding context, including Article IV of the Convention, which requires a party to ensure that “persons committing genocide” be punished. It is also supported by Article V of the Convention, which requires a party to undertake to enact the necessary legislation “to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III”. It follows that the “duty to punish” under Article I cannot support any unilateral use of force against another State.

VII. DOCUMENTS ATTACHED IN SUPPORT OF THIS DECLARATION

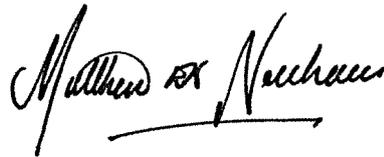
56. Australia submits the following documents in support of this Declaration of Intervention:

Annex A: Letter from the Registrar of the Court to the States parties to the Genocide Convention (except Russia and Ukraine), Reference 156413, 30 March 2022.

Annex B: United Nations Depository Notification confirming Australia’s Ratification of the Convention on the Prevention and Punishment of the Crime of Genocide, Reference C.N.84.1949, 22 July 1949.

VIII. CONCLUSION

57. On the basis of the information set out above, Australia avails itself of the right conferred upon it by Article 63(2) of the Statute to intervene as a non-party in the proceedings brought by Ukraine against the Russian Federation (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*).

A handwritten signature in black ink, reading "Matthew Ernest Keith Neuhaus". The signature is written in a cursive style with a horizontal line underneath the name.

His Excellency Matthew Ernest Keith Neuhaus
Ambassador of Australia to the Kingdom of the Netherlands
Co-Agent of the Government of Australia

Annex A:

Letter from the Registrar of the Court to the States parties to the Genocide Convention



156413

30 March 2022

Excellency,

I have the honour to refer to my letter (No. 156253) dated 2 March 2022 informing your Government that, on 26 February 2022, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Republic of the Russian Federation in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation). A copy of the Application was appended to that letter. The text of the Application is also available on the website of the Court (www.icj-cij.org).

Article 63, paragraph 1, of the Statute of the Court provides that:

[w]henever the construction of a convention to which States other than those concerned in the case are parties is in question, the Registrar shall notify all such States forthwith".

Further, under Article 43, paragraph 1, of the Rules of Court:

"Whenever the construction of a convention to which States other than those concerned in the case are parties may be in question within the meaning of Article 63, paragraph 1, of the Statute, the Court shall consider what directions shall be given to the Registrar in the matter."

On the instructions of the Court, given in accordance with the said provision of the Rules of Court, I have the honour to notify your Government of the following.

In the above-mentioned Application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention") is invoked both as a basis of the Court's jurisdiction and as a substantive basis of the Applicant's claims on the merits. In particular, the Applicant seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of this instrument will be in question in the case.

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

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2517 KJ La Haye - Pays-Bas
Téléphone : +31 (0) 70 302 23 23 - Facsimilé : +31 (0) 70 364 99 28
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Peace Palace, Carnegieplein 2
2517 KJ The Hague - Netherlands
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Website: www.icj-cij.org

Your country is included in the list of parties to the Genocide Convention. The present letter should accordingly be regarded as the notification contemplated by Article 63, paragraph 1, of the Statute. I would add that this notification in no way prejudices any question of the possible application of Article 63, paragraph 2, of the Statute, which the Court may later be called upon to determine in this case.

Accept, Excellency, the assurances of my highest consideration.

A handwritten signature in black ink, appearing to read 'Philippe Gautier', written in a cursive style.

Philippe Gautier
Registrar

Annex B:

United Nations Depository Notification confirming Australia's Ratification of the
Convention on the Prevention and Punishment of the Crime of Genocide

UNITED NATIONS  NATIONS UNIES
LAKE SUCCESS, NEW YORK

TELEPHONE: FIELDSTONE 7-1100

CABLE ADDRESS - UNATIONS NEWYORK - ADRESSE TELEGRAPHIQUE

REFERENCE:

C.N.84.1949.TREATIES

22 July 1949

CONVENTION OF 9 DECEMBER 1948 ON THE PREVENTION
AND PUNISHMENT OF THE CRIME OF GENOCIDE

RATIFICATION BY AUSTRALIA

Sir,

I have the honour to inform you that on
8 July 1949 the instrument of ratification by the
Government of Australia of the Convention of
9 December 1948 on the Prevention and Punishment
of the Crime of Genocide was deposited with the
Secretary-General of the United Nations, in
accordance with the provisions of Article XI.

On the same date the Government of Australia,
in accordance with Article XII of the Convention,

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notified the Secretary-General that it extends the application of the said Convention to all the territories for the conduct of whose foreign relations Australia is responsible.

The present notification is made in accordance with Article XVII (a) and (b) of the Convention.

I have the honour to be,

Sir,

Your obedient Servant,

For the Assistant Secretary-General
in charge of the Legal Department,

Director