Kingdom of the Netherlands

Date
13 January 2023

The Permanent Mission of the Kingdom of the Netherlands to the United Nations presents its compliments to the Office of Legal Affairs of the United Nations and, with reference to the latter's Note Verbale of 11 August 2022 with no. LA/COD/40, has the honour to inform the Office of Legal Affairs as follows.

The Kingdom of the Netherlands would like to provide the International Law Commission with a selection of judgments of its national courts in which subsidiary means for the determination of rules of international law in the sense of Article 38 1(d) of the ICJ Statute are used and a selection of pleadings before international courts and tribunals and statements in which the Netherlands refers to these subsidiary means (see Annex I and appendices I and II).

Please duly note that the application of the Kingdom of the Netherlands submitted to the European Court of Human Rights on 10 July 2020 and the additional memorials of March and May 2021 as included in Annex I can be shared with the ILC upon request but are not intended for publication on the UN website.

The Permanent Mission of the Kingdom of the Netherlands to the United Nations avails itself of this opportunity to renew to the Office of Legal Affairs of the United Nations the assurances of its highest consideration.

Annex I: Subsidiary means for the determination of rules of international law

a) Decisions of national courts

[information on] *decisions of national courts, legislation and any other relevant practice at the domestic level that draw upon judicial decisions and the teachings of the most highly qualified publicists of the various nations in the process of determination of rules of international law, namely: international conventions, whether general or particular; international custom, as evidence of a general practice accepted as law; and the general principles of law recognized by the community of nations.*

Case / document	**Subsidiary means used**	**Paragraph(s) / page**	**Citation from the judgment / document (in English where available)**	**English translation of Dutch citations (non-official)**	**Source (in Dutch unless indicated otherwise)**
Court of Appeals, The Hague, 7 December 2021, ECLI:NL:GHDHA:2021:2374, applicant v. defendants.	Case law	3.3 3.4 3.8	Uitgangspunt voor het hof is het arrest van het Internationale Gerechtshof (IGH) van 3 februari 2012 inzake Jurisdictional Immunities of the State. […] In de Jurisdictional Immunities-zaak ging het om een civiele vordering tegen een vreemde Staat. Het oordeel van het IGH maakt duidelijk dat zelfs als vaststaat dat oorlogsmisdaden zijn gepleegd, er geen uitzondering geldt op de immuniteit van jurisdictie van de aangesproken Staat, en dat dit niet anders wordt door een beroep op jus cogens of op het ontbreken van een alternatieve rechtsgang. De vraag is of de in dit arrest gegeven regels ook van toepassing zijn op een civiele vordering tegen functionarissen van de vreemde Staat, zoals [geïntimeerde 1] en [geïntimeerde 2]. […] Nationale en internationale rechtspraak ondersteunt ook niet de stelling dat in civiele zaken op de immuniteit van jurisdictie van (voormalige) overheidsfunctionarissen een uitzondering moet worden gemaakt voor oorlogsmisdaden of misdrijven tegen de menselijkheid.	Starting point for the court is the International Court of Justice's (ICJ) judgment of 3 February 2012 concerning Jurisdictional Immunities of the State. […] The Jurisdictional Immunities case involved a civil action against a foreign State. The ICJ judgment makes clear that even if it is established that war crimes have been committed, there is no exception to the immunity from jurisdiction of the State sued, this does not change by invoking jus cogens or the absence of an alternative remedy. The question is whether the rules given in this judgment also apply to a civil action against officials of the foreign State, as [respondent 1] and [respondent 2]. […] National and international case law does not support the proposition that an exception to the immunity from	ECLI:NL:GHDHA:2021:2374, Gerechtshof Den Haag, 200.278.760/01 (rechtspraak.nl)

				jurisdiction of (former) government officials in civil cases should be made for war crimes or crimes against humanity.	
Court of Appeals, The Hague, 8 June 2022, ECLI:NL:GHDHA:2022:973		11.1 13.5.1 13.6.2	De rechter dient zich voor de invulling van de bestanddelen van artikel 8 (oud) van de WOS te oriënteren op het internationale recht en de internationale rechtspraak. De elementen van het misdrijf marteling zijn ontwikkeld en uitgekristalliseerd in de rechtspraak van het ICC en het ICTY en in Rule 90 van de Customary International Humanitarian Law Database van het ICRC. Voor wat betreft de onder 1, 2 en 4 cumulatief/alternatief ten laste gelegde aansprakelijkheid van de meerdere in de zin van artikel 9 (oud) van de WOS zij daarbij vooropgesteld dat het hof bij de beoordeling hiervan aansluiting heeft gezocht bij het internationale recht, inclusief de doctrine van 'command responsibility', zoals terug te vinden de Statuten van verschillende tribunalen228, en de daarop betrekking hebbende rechtspraak	The court should turn to international law and international case law for the interpretation of the components of Article 8 (old) of the WOS [criminal law applicable to armed conflict]. The elements of the crime torture have been developed and crystallized in the case law of the ICC and ICTY and in Rule 90 of the ICRC's Customary International Humanitarian Law Database. With respect to the liability of the superior within the meaning of article 9 (old) of the WOS as charged under 1, 2 and 4 cumulatively/alternatively, it should be noted that in assessing this, the court of appeal has sought a connection with international law, including the doctrine of 'command responsibility', as found in the Statutes of various tribunals, and the case law related thereto	ECLI:NL:GHDHA:2022:973, Gerechtshof Den Haag, 2200550317 (rechtspraak.nl)
District Court of Overijssel, 17 December 2019, ECLI:NL:RBOVE:2019:4966	Literature and case law	5.11	In artikel 3 HKBV ‘61 is bepaald dat een gezagsverhouding die van rechtswege voortvloeit uit de interne wet van de Staat waarvan de minderjarige onderdaan is, in alle Verdragsstaten wordt erkend. De tekst van dit artikel geeft geen uitsluitsel voor het geval een kind een meervoudige nationaliteit heeft. Zowel de literatuur als de rechtspraak is verdeeld over de uitleg van artikel 3 HKBV ’61.	In Article 3 of the Hague Convention on the Protection of Children and co-operation in respect of intercountry adoptions (Hague Convention) determined that a relationship of subordination which is encompassed in the internal laws of a State of which the minor is a national, is recognized by all State Parties. The text of the Article is not	ECLI:NL:RBOVE:2019:4966, Rechtbank Overijssel, C/08/228956 / FA RK 19-401 (rechtspraak.nl)

				clear when it comes to a minor with multiple nationalities. Literature as well as case law is divided on the interpretation of Article 3 of the Hague Convention.	

b) Policy statements

[information on] *statements made in international organizations, international conferences and other forums, including pleadings before international courts and tribunals, concerning subsidiary means for the determination of rules of international law.*

Document	**Subsidiary means**	**Page(s)**	**Citation from the document (in English where available)**	**English translation of Dutch citations (non-official)**	**Source (in Dutch unless indicated otherwise)**
Report of the International Law Commission, Cluster 3, statement made by The Netherlands, 5 November 2019.		Page 3	The Netherlands is of the opinion that general principles of law are not to be considered as a subsidiary source of international law but rather have a supplementary function. This would suggest that States can be responsible for an internationally wrongful act when acting contrary to an obligation arising from a general principle. However, a further inquiry would be appreciated into the question whether general principles of law can be violated. We are of the opinion that a general principle of law may be violated if, due to its wide recognition in State practice and case law of international courts, it serves as a source of rights and obligations for states, if this question is to be answered affirmatively in line with our position, it should nevertheless be made dear whether this depends on the qualification of the violated principle as both a general principle of law and customary international law and/or a rule contained in a treaty.		Netherlands statement (Cluster III) -- Report of the ILC on the work of its seventy-first session -- Sixth Committee (Legal) — 74th session (un.org)

Reaction of the Dutch Cabinet to the external advice of the CAVV on peremptory norms of general international law, 23 October 2020.		Page 3	Vervolgens constateert de CAVV dat de toelichtingen bij de ontwerpconclusies zwaar leunen op rechterlijke uitspraken en doctrine, welke een secundaire bron van internationaal recht zijn. De CAVV concludeert dat dit, gekoppeld aan het gebrek aan een kritische reflectie op het materiaal, ervoor zorgt dat het succes van dit ILC project allesbehalve zeker is. Deze stellingen van de CAVV zijn volgens het kabinet terecht en vinden hun weerklank in eerdere bijdragen van Nederland op dit onderwerp in de AVVN.	Next, the CAVV notes that the explanatory notes to the draft conclusions rely heavily on court decisions and doctrine, which are a secondary source of international law. The CAVV concludes that this, coupled with the lack of critical reflection on the material, ensures that the success of this ILC project is anything but certain. These contentions of the CAVV, in the view of the Cabinet, are justified and resonate with previous contributions by the Netherlands on this subject in the UNGA.	
Reaction of the Government to the joint advice of the CAVV and EVA on the scope for and the significance and desirability of the use of the term 'genocide' by politicians, 22 December 2017.		Page 3	Dat alleen een rechter een oordeel zou kunnen geven over genocide wordt door CAVV en EVA genuanceerd; in beginsel is het aan staten om een oordeel te vellen over volkenrechtelijk relevante handelingen van andere staten of personen. Ook parlementen zouden niet belemmerd hoeven te worden door de afwezigheid van een rechterlijke uitspraak. Wel wijzen CAVV en EVA, volgens het Kabinet terecht, op het verschil in juridische betekenis tussen parlementaire vaststellingen en handelingen van de regering. Hoewel ook het parlement een zelfstandig standpunt kan innemen, of de regering kan uitnodigen om hierover een standpunt in te nemen, kan aan standpunten van een parlement volkenrechtelijk geen bijzonder gewicht worden toegekend. CAVV en EVA zien derhalve geen volkenrechtelijke belemmeringen voor het gebruik van de termen genocide of misdrijven tegen de menselijkheid door de regering of het parlement. […] In het Regeerakkoord staat dat uitspraken van internationale gerechts- en strafhoven, eenduidige conclusies volgend uit wetenschappelijk onderzoek en vaststellingen door de Verenigde Naties (VN) leidend zijn	The fact that only a judge could pass judgment on genocide is nuanced by CAVV and EVA; in principle, it is up to states to pass judgment on acts of other states or persons that are relevant under international law. Parliaments should also not be hampered by the absence of a court ruling. CAVV and EVA do, however, rightly point out the difference in legal significance between parliamentary determinations and government actions, according to the Cabinet. Although parliament can also take an independent position, or can invite the government to take a position on this, no special weight can be attached to the positions of a parliament under international law. CAVV and EVA therefore see no obstacles under international law to the use of the terms genocide or crimes against humanity by the government or parliament. […] The Coalition Agreement states that rulings by international courts and criminal courts,	

			bij de erkenning van genocides voor de Nederlandse regering. Op basis hiervan ligt in de rede om tot erkenning over te gaan wanneer de Veiligheidsraad van de VN in een bindende resolutie heeft vastgesteld dat sprake is van genocide, dan wel wanneer er een uitspraak is van een internationaal gerechts- of strafhof (dat geschiedde bijvoorbeeld ten aanzien van de genocides in Rwanda en Srebrenica). Wanneer het louter om historisch onderzoek dan wel een uitspraak van een individuele VN-rapporteur gaat, ligt erkenning niet in de rede. Een tweede relevante overweging is dat internationale vaststellingen de voorkeur hebben, hoewel een nationale vaststelling volgens de CAVV en EVA niet om deze reden zou hoeven worden uitgesteld. De regering beschouwt deze overwegingen in het licht van het Regeerakkoord.	unequivocal conclusions resulting from scientific research and findings by the United Nations (UN) are leading in the recognition of genocides for the Dutch government. On this basis, it is reasonable to proceed to recognition when the Security Council of the UN has determined in a binding resolution that there is a question of genocide, or when there is a ruling by an international court or criminal court (that was done, for example, at regarding the genocides in Rwanda and Srebrenica). When it concerns purely historical research or a statement by an individual UN rapporteur, recognition is not reasonable. A second relevant consideration is that international determinations are preferable, although according to the CAVV and EVA a national determination should not be postponed for this reason. The government considers these considerations in the light of the Coalition Agreement.	

Application of the Government of the Kingdom of the Netherlands within the meaning of Article 33 of the Convention against the Russian Federation, 10 July 2020	Case law				
Memorial on admissibility of 12 March 2021 (The Netherlands v Russia)	Case law				
Additional Memorial of the Government of the Kingdom of the Netherlands on the admissibility of 14 May 2021 (The Netherlands v Russia)	Case law				

Joint declaration of intervention pursuant to Article 63 of the Statute of the Court by the Governments of Canada and Kingdom of the Netherlands in the case of Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) 7 December 2022 (Appendice 1)	Case law				
Respondent's counter-memorial in the matter of RWE AG, RWE Eemshaven Holding II B.V. against the Kingdom of the Netherlands, 5 September 2022	Case law			Microsoft Word - tmp66D1 (worldbank.org)	

Letter of 17 June 2022 presenting the government's response to AIV advisory report no. 119, CAVV Advisory Report 38, 'Autonomous Weapon Systems: The Importance of Regulation and Investment' (Appendice 2)	Doctrine				

Before the

International Court of Justice

Joint Declaration of Intervention

Pursuant to Article 63 of the Statute of the Court

By the Governments of Canada and the Kingdom of the Netherlands

Filed in the Registry of the Court

In the case of

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

JOINT DECLARATION OF INTERVENTION UNDER ARTICLE 63 OF THE STATUTE OF THE COURT

OF THE GOVERNMENTS OF CANADA AND THE KINGDOM OF THE NETHERLANDS

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Governments of Canada and the Kingdom of the Netherlands:

1. On behalf of the Governments of Canada and the Kingdom of the Netherlands, we have the honour to submit to the Court a Joint Declaration of Intervention pursuant to the right to intervene set out in Article 63, paragraph 2, of the Statute of the Court, in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

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

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

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

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

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

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

Preliminary observations

4. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation ("Russia") concerning a dispute relating to the interpretation, application and fulfilment of the *Convention on the Prevention and Punishment of the Crime of Genocide*[1] (hereinafter: Genocide Convention).[2] The Application instituting proceedings was accompanied by a request to the Court for the indication of provisional measures. The Court issued an Order indicating provisional measures on 16 March 2022.

5. According to its application instituting proceedings, Ukraine contends that:

> [The] Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called "Donetsk People's Republic" and "Luhansk People's Republic," and then declared and implemented a "special military operation" against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. On the basis of this false

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[1] Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, United Nations, *Treaty Series*, vol. 78, p. 277. Entry into force on 12 January 1951.

[2] Application instituting proceedings, filed in the Registry of the Court on February 26, 2022, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

allegation, Russia is now engaged in a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people.[3]

6. Ukraine therefore brought its Application "to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide."[4] Ukraine contends that "Russia's actions erode the core obligation of Article I of the Convention, undermine its object and purpose, and diminish the solemn nature of the Contracting Parties' pledge to prevent and punish genocide".[5]

7. On March 30, 2022, pursuant to Article 63, paragraph 1, of the Statute of the Court, the Registrar notified Canada and the Kingdom of the Netherlands, as Contracting Parties to the Genocide Convention, that by Ukraine's application the Genocide Convention "is invoked both as a basis for the Court's jurisdiction and as a substantive basis of [Ukraine's] claims on the merits"[6]. Specifically, the Registrar noted that Ukraine "seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Article 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."[7]

8. On October 31, 2022, the Registrar informed the Contracting Parties to the Convention that "taking into account the number of declarations pursuant to Article 63 of the Statute of the Court that have been filed in this case, the Court considers that the interest of the sound administration of justice and procedural efficiency would be advanced if any State that intends to avail itself of the right of intervention conferred on it by Article 63 would file its declaration not later than Thursday 15 December 2022."[8]

9. By this Joint Declaration, Canada and the Netherlands accordingly avail themselves of the right to intervene in the dispute between Ukraine and Russia under Article 63, paragraph 2, of the Statute of the Court, as Contracting Parties to the Genocide Convention, addressing relevant preliminary and substantive elements at the same time.

10. The Court has recognized that Article 63 confers a right of intervention,[9] where the State seeking to intervene confines its intervention to "the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case".[10] The Court has also held that

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[3] *Ibid*, para 2.
[4] *Ibid*, para 3.
[5] *Ibid*, para 28.
[6] Letters of 30 March 2022 from the Registrar of the Court to the Ambassador of Canada to the Netherlands and to the Minister of Foreign Affairs of the Kingdom of the Netherlands respectively.
[7] *Ibid*.
[8] Letter of 31 October 2022 from the Registrar of the Court to the Contracting Parties of the Genocide Convention.
[9] *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1981, p. 13, para 21; *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, para 7.
[10] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1981, p. 15, para. 26.

"in accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention."[11]

11. Furthermore, bearing in mind the *jus cogens* character of the prohibition of genocide, and the *erga omnes partes* nature of the obligations under the Genocide Convention, all Contracting Parties have a common interest in the accomplishment of the high purposes of the Genocide Convention. In its Order on provisional measures in *The Gambia v. Myanmar* case, the Court made the following statement relative to the interests of all parties to the Genocide Convention:

> The Court recalls that in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, it observed that '[i]n 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.' . . . In view of their shared values, all the States parties to the Genocide Convention have a common interest to ensure that acts of genocide are prevented and that, if they occur, their authors do not enjoy impunity. That common interest implies that the obligations in question are owed by any State party to all the other States parties to the Convention.[12]

12. It is in this limited context, as Contracting Parties to the Genocide Convention, that Canada and the Netherlands put forward a Joint Declaration of Intervention. Given their common interest in the accomplishment of the high purposes of the Convention, as well as their consequent interest in its construction, Canada and the Netherlands have decided to intervene in this case in order to place their interpretation of the relevant provisions of the Convention before the Court.

13. Canada and the Netherlands do not seek to become a party to the proceedings and accept that, by availing themselves of the right to intervene under Article 63 of the Statute, the construction given to the Genocide Convention by the judgment in this case will be equally binding upon them as it is to the parties to the proceedings.

14. Canada and the Netherlands wish to intervene and present their interpretation of Articles IX and I of the Genocide Convention. With respect to the jurisdiction of the Court, in their view, Article IX grants jurisdiction to the Court to make a declaration of a Contracting Party's compliance with its obligations under the Genocide Convention, irrespective of whether it is the applicant State or the respondent State, provided that this is a matter in dispute between the parties to the case. With respect to the construction of Article I, the intervention will argue that the duty to prevent genocide entails a due diligence obligation to assess whether there is a genocide or a serious risk of genocide before taking further action in fulfilment of Article I. The duty to prevent should be interpreted in light of the definition of genocide in Article II, as well as Article VIII, which encourages Contracting Parties to act collectively to prevent genocide. As for the duty to punish outlined in Article I, it must be read together with Articles IV to VII of the Genocide Convention, and thus be interpreted as an

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[11] *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, para 7.

[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures,* Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para 41.

obligation to prosecute individuals. Article I does not allow a Contracting Party to punish another Contracting Party for a genocide or an alleged genocide.

I. The Case and Convention to which this Declaration Relates

15. This Joint Declaration relates to the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide*, instituted by Ukraine on February 26, 2022 against Russia. That case concerns the interpretation, application and fulfilment of the Genocide Convention.

16. As Contracting Parties to the Genocide Convention, Canada and the Netherlands have an interest in the construction of this Convention resulting from the case brought by Ukraine. Canada and the Netherlands are accordingly exercising their right to intervene in these proceedings pursuant to Article 63 of the Statute. The intervention is directed to the question of construction of the Genocide Convention arising in this case.

II. The Basis on which Canada and the Netherlands are Contracting Parties to the Genocide Convention

17. Canada and the Netherlands are Contracting Parties to this Convention. In accordance with Article XI of the Genocide Convention, Canada signed this Convention on 28 November 1949 and deposited its instrument of ratification on 3 September 1952. The Netherlands deposited its instrument of accession to the Genocide Convention in accordance with Article XI of the Convention on 20 June 1966. The Genocide Convention entered into force for Canada and the Netherlands on the 90th day following the deposit of their instruments of ratification and accession. Based on this, Canada and the Netherlands were Contracting Parties to this Convention at the time the present proceedings were instituted.

III. The Provisions of the Genocide Convention in Question in the Present Dispute

18. Ukraine seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. Specifically, Ukraine contends that a dispute exists between it and Russia relating to the interpretation, application or fulfilment of the Genocide Convention.

19. The proper construction of Article IX of the Genocide Convention is therefore in question in the case and is directly relevant to the resolution of the dispute placed before the Court by Ukraine's Application. Article IX 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.

20. There is no limitation in Article 63 of the Statute of the Court or Article 82 of the Rules of the Court that would prevent Canada and the Netherlands from exercising their right to intervene on the construction of provisions of the Genocide Convention pertaining to issues of jurisdiction in addition to issues pertaining to the merits.

21. In its Application, Ukraine contends that "the duty to prevent and punish genocide enshrined in Article I of the Convention necessarily implies that this duty must be performed in good faith and not abused, and that one Contracting Party may not subject another Contracting Party to unlawful action, including armed attack, especially when it is based on a wholly unsubstantiated claim of preventing and punishing genocide."[13] Ukraine thus argues that "Russia's actions erode the core obligation of Article I of the Convention, undermine its object and purpose, and diminish the solemn nature of the Contracting Parties' pledge to prevent and punish genocide".[14]

22. In light of the above, the proper construction of Article I of the Genocide Convention is also in question in the case and is directly relevant to the resolution of the dispute placed before the Court by Ukraine's Application. Article I 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.

23. As further detailed below, the duty to prevent and punish genocide, as outlined in Article I, must be interpreted in light of Articles II and IV-VIII of the Genocide Convention.

IV. Construction of the Provisions for which Canada and the Netherlands contend

24. Canada and the Netherlands have based their interpretation of the Genocide Convention on the general rules of interpretation, as reflected in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (hereinafter: VCLT).[15] Article 31(1) of the VCLT provides as the basic rule of interpretation 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". Pursuant to Article 31(3) of the VCLT, such interpretation must take account of the subsequent practice of the parties to the treaty, and pursuant to Article 32 of the VCLT, may also be confirmed by reference to supplementary means of interpretation.

25. In accordance with Article 31(3) of the VCLT, Canada and the Netherlands will support their interpretation by other relevant rules of international law applicable between the parties to the dispute. Canada and the Netherlands will rely on customary international law, the Charter of the United Nations[16] (hereinafter: the UN Charter), the Rome Statute of the International Criminal Court[17] and the Draft Articles on the Responsibility of States for Internationally Wrongful Acts[18] in the context of the interpretation of the Genocide Convention. Canada and the Netherlands will also refer to the case law of international courts and tribunals as subsidiary means in the interpretation of the Genocide Convention, pursuant to Article 38(1)(d) of the Statute of the Court.

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[13] Application instituting proceedings, filed in the Registry of the Court on February 26, 2022, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, para 27.
[14] *Ibid*, para 28.
[15] Vienna Convention on the Law of Treaties (Vienna, 1969), UNTS v. 1155, p. 331.
[16] Charter of the United Nations, (San Francisco, 1945), 1 UNTS XVI.
[17] Rome Statute of the International Criminal Court (Rome, 1998) UNTS 2187.
[18] Draft Articles on the Responsibility of States for Internationally Wrongful Acts, 2001, Yearbook of the ILC 2001, Vol. II Part Two.

ARTICLE IX OF THE GENOCIDE CONVENTION

26. Article IX confers jurisdiction to the Court over "disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention". There is nothing in Article IX that limits the Court's jurisdiction to cases where it is the applicant State accusing the respondent State of breaching its obligations under the Genocide Convention.

27. First, the term "dispute" is sufficiently broad to encompass a disagreement over the lawfulness of the conduct of an applicant State; it is not limited to the conduct of the respondent State. The term "dispute" as used in Article IX should be interpreted consistently with the wide meaning given to that term generally in international law.[19] It is well established that a dispute exists when there is "a disagreement on a point of law or fact, a conflict of legal views or interests"[20] between parties, provided that they hold views which are opposed to each other. It is not necessary that a respondent State has expressly opposed the claims of the applicant State.[21] Furthermore, a dispute under the Genocide Convention may exist despite the absence of a specific reference to the Genocide Convention in public statements by the parties, provided that those statements "refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter."[22]

28. Second, Article IX of the Genocide Convention expressly states that disputes shall be referred to the Court "at the request *of any of the parties* to the dispute" (emphasis added). This confirms that, where there is a dispute concerning whether a State has engaged in conduct contrary to the Genocide Convention, the State accused of such conduct has the same right to submit the dispute to the Court as the State that has made the accusation, and the Court has jurisdiction over that dispute. In particular, such a State may seek a "negative" declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual foundation.

29. Finally, the inclusion of the word "fulfilment" in Article IX, in addition to the more common formulation of "interpretation and application" usually found in compromissory clauses, supports a broad interpretation of this provision. Specifically, Article IX confers jurisdiction over a dispute as to whether a Contracting Party's conduct can properly be said to be in "fulfilment" of the Genocide Convention. It encompasses disputes about the scope and content of the provisions of the Genocide Convention and actions taken (or not taken) by the Contracting Parties in respect to those obligations, including the duty to prevent and punish genocide outlined in Article I.

30. In light of the above, Article IX grants jurisdiction to the Court to make a declaration of a Contracting Party's compliance with its obligations under the Genocide Convention, irrespective of whether it is the applicant State or the respondent State, provided that this is a matter in dispute between the parties to the case.

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[19] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures,* Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para 63.
[20] *Mavrommatis Palestine Concessions*, Judgment No 2, 1924, P.C.I.J., Series A, No. 2, p. 11.
[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures,* Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para 71.
[22] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures,* Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para 72.

ARTICLE I OF THE GENOCIDE CONVENTION

31. An essential first step before taking action in fulfilment of Article I is the assessment of whether there is a genocide or a serious risk of genocide. The notion of due diligence articulated by the Court in relation to a State's obligation to take measures to prevent genocide applies equally when assessing whether there is a genocide or a serious risk thereof. This assessment should be based on all available information, in particular from independent and credible sources, and should be guided by the definition of genocide, as outlined in Article II of the Genocide Convention. Indeed, any Contracting Party that purports to prevent genocide must establish an objective basis for its assessment that genocide has occurred or is about to occur. Whether acts amount to genocide or a serious risk thereof so as to trigger the application of Article I, is not simply a matter of a State's subjective interpretation; the acts at issue must fit within the definition of genocide in Article II.

32. Pursuant to Article II of the Genocide Convention, the commission of genocide relies on both genocidal action and genocidal intent.[23] Specifically, Article II provides that genocide may only occur if the genocidal act is committed "with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". This genocidal intent is "the essential characteristic of genocide, which distinguishes it from other serious crimes."[24] As for what constitutes a genocidal act, Article II provides the following list: (i) killing members of the group; (ii) causing serious bodily or mental harm to members of the group; (iii) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (iv) imposing measures intended to prevent births within the group; and (v) forcibly transferring children of the group to another group.

Duty to Prevent

33. Under Article I, Contracting Parties have confirmed that genocide is a crime under international law "which they undertake to prevent and to punish". While Article I does not specify what kind of measures a Contracting Party may take to fulfil this obligation, it is well established that in discharging its obligations under a treaty, a Contracting Party must act in good faith.[25] In discharging its duty to prevent genocide under the Genocide Convention, a Contracting Party must also take into account other parts of the Convention,[26] and act within the limits permitted by international law.[27]

34. In *Bosnia v. Serbia*, this Court considered the meaning and scope of some of the substantive obligations stipulated by the Genocide Convention, including the duty to prevent genocide set forth in Article I. The Court stated that "the obligation [to prevent] is one of conduct and not result, in the sense that a State cannot be under an obligation to succeed, whatever the circumstances, in preventing the commission of genocide: the obligation of State parties is rather to employ all means

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[23] *Ibid.*, para 186-187.

[24] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgement, ICJ Reports 2015, p. 3, para 132.

[25] Article 26 of the VCLT provides that "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

[26] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of the Court of 16 March 2022 on the Request for the Indication of Provisional Measures, para 56.

[27] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbian and Montenegro)*, Judgement, ICJ Reports 2007, p. 43, para 430.

reasonably available to them so as to prevent genocide as far as possible."[28] The Court added that "the notion of 'due diligence', which calls for an assessment *in concreto*, is of critical importance"[29] and emphasized 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."[30] As mentioned above, this notion of due diligence equally applies to the assessment of whether there is a genocide or a serious risk thereof.

35. Furthermore, Article I should be interpreted in light of Article VIII, which provides that a State "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide". While Article VIII does not exhaust a Contracting Party's duty to prevent genocide,[31] it encourages Contracting Parties to act collectively to prevent and suppress genocide through the mechanisms of the United Nations. The preamble of the Genocide Convention further emphasizes multilateral cooperation by stressing that international cooperation is required "in order to liberate mankind from [the] odious scourge" of genocide. Contracting Parties may also submit a dispute relating to the interpretation, application or fulfilment of the Convention to the Court, pursuant to Article IX of the Convention.

36. Article VIII thus supports an interpretation that a Contracting Party should act, where appropriate, through recourse to multilateral mechanisms, when taking action to prevent genocide, including when carrying out an assessment of whether genocide is occurring or at serious risk of occurring. This could include, for example, relying on independent investigations conducted under UN auspices.

37. Article VIII is also relevant to the analysis of what conduct may or may not be justified by the duty to prevent genocide. This analysis should be guided by the spirit and aims of the United Nations, as set out in Article 1 of the UN Charter,[32] which states that the purposes of the United Nations are, *inter alia*:

> [t]o maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

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[28] *Ibid.*, para 430.
[29] *Ibid.*, para 430.
[30] *Ibid.*, para 431.
[31] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbian and Montenegro)*, Judgement, ICJ Reports 2007, p. 43, para 427.
[32] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of the Court of 16 March 2022 on the Request for the Indication of Provisional Measures, para 58. Furthermore, Article 103 of the UN Charter provides that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail."

The analysis of what conduct may or may not be justified by the duty to prevent genocide should also be guided by a consideration of what conduct is legally permissible under general international law and the UN Charter, whether acting alone or collectively.

38. In light of the above, the duty to prevent genocide entails a due diligence obligation to assess whether there is a genocide or a serious risk of genocide before taking further action in fulfilment of Article I. This assessment should be based on all available information, in particular from independent and credible sources, and guided by the definition of genocide in Article II of the Genocide Convention. Contracting Parties are encouraged to act collectively to prevent genocide, in accordance with the spirit and aims of the United Nations. They must also ensure that any actions taken to prevent genocide are in compliance with the UN Charter and other international legal obligations.

Duty to Punish

39. The duty to punish outlined in Article I must be read with Articles IV to VII of the Genocide Convention, and thus interpreted as an obligation to investigate and prosecute persons accused of genocide, and to punish persons found to be guilty of genocide. Specifically, Articles IV to VII state:

> Article IV
>
> 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.
>
> Article V
>
> The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article III.
>
> Article VI
>
> 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.
>
> Article VII
>
> Genocide and the other acts enumerated in article III shall not be considered as political crimes for the purpose of extradition.
>
> The Contracting Parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

40. Pursuant to these provisions, a Contracting Party discharges its obligation to punish genocide by prosecuting persons subject to criminal jurisdiction within its own criminal courts; by cooperating with competent international tribunals when it has accepted their jurisdiction; and by extraditing persons accused of genocide for trial in other States, as relevant.

41. In light of the above, the duty to punish outlined in Article I relates to punitive measures of a criminal law character directed against persons capable of being found criminally responsible; it cannot serve as justification for actions aimed at punishing another Contracting Party for a genocide or alleged genocide. In this regard, Article IX of the Genocide Convention outlines a system of dispute resolution between Contracting Parties by providing that disputes relating to the interpretation, application or fulfillment of the Convention shall be submitted to the Court.

V. Documents in Support of the Joint Declaration

42. The following is a list of the documents in support of this Joint Declaration, which documents are attached hereto:

(a) Letter of 30 March 2022 from the Registrar of the International Court of Justice to the Ambassador of Canada to the Kingdom of the Netherlands;
(b) Letter of 30 March 2022 from the Registrar of the International Court of Justice to the Minister of Foreign Affairs of the Kingdom of the Netherlands;
(c) Instrument of ratification by the Government of Canada of the Genocide Convention;
(d) Instrument of ratification by the Government of the Kingdom of the Netherlands to the Genocide Convention.

VI. Conclusion

43. On the basis of the information set out above, Canada and the Netherlands avail themselves of the right conferred upon them by Article 63, paragraph 2, of the Statute to intervene as non-parties in the proceedings brought by Ukraine against Russia in this case. Canada and the Netherlands reserve their rights to supplement or amend this Joint Declaration, and any associated Written Observations submitted with respect to it, as they consider necessary in response to any developments in the proceedings.

44. The Government of Canada has appointed the undersigned as Agent for the purposes of the present Joint Declaration. Ms. Carolyn Knobel, Director General and Deputy Legal Adviser, Global Affairs Canada, is Deputy Agent. It is requested that all communications in this case be sent to the following address:

Embassy of Canada
Sophialaan 7, The Hague
The Netherlands

45. The Government of the Kingdom of the Netherlands has appointed the undersigned as Agent for the purposes of the present Joint Declaration. Ms. Mireille Hector, Deputy Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands, is Co-Agent. It is requested that all communications in this case be sent to the following address:

Ministry of Foreign Affairs of the Kingdom of the Netherlands
International Law Division
Rijnstraat 8
2515XP The Hague
The Netherlands

Respectfully,

Alan H. Kessel
Assistant Deputy Minister and Legal Adviser,
Agent of the Government of Canada
Global Affairs Canada

René J.M. Lefeber
Legal Adviser
Agent of the Government of the Kingdom of the Netherlands

ANNEX A: Letter of 30 March 2022 from the Registrar of the International Court of Justice to the Ambassador of Canada to the Kingdom of the Netherlands

ANNEX B: Letter of 30 March 2022 from the Registrar of the International Court of Justice to the Minister of Foreign Affairs of the Kingdom of the Netherlands

ANNEX C: Instrument of ratification by the Government of Canada of the Genocide Convention

ANNEX D: Instrument of ratification by the Government of the Netherlands of the Genocide Convention

CERTIFICATION

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

_____

Alan H. Kessel
Agent of the Government of Canada

_____

René J.M. Lefeber
Agent of the Government of the Kingdom of the Netherlands

C UR INTERNATIONALE
DE JUSTICE

INTERNAT AL OURT
OF JU ICE

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 tho e concerned in the case are parties is in question, the Registrar shall notify all uch 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.

H.E. the Ambassador of Canada
to the Kingdom of the Netherlands
Embas y of Canada
The Ha ue

Your country is included in the li t of partie to the Genocide Convention The present letter should accordingly be regarded as the notification ontemplated by Article 63, paragraph 1, of the Statute. I would add that this notification in no way pre udges 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 highe t consideration

Philippe Gautier
Registrar

COUR INTERNATIONALE DE JUSTICE — INTERNATIONAL COURT OF JUSTICE

Le 30 mars 2022

Excellence,

J'ai l'honneur de me référer à ma lettre (n° 156253) en date du 2 mars 2022, par laquelle j'ai porté à la connaissance de votre Gouvernement que l'Ukraine a, le 26 février 2022, déposé au Greffe de la Cour internationale de Justice une requête introduisant une instance contre la Fédération de Russie en l'affaire relative à des Allégations de génocide au titre de la Convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie). Une copie de la requête était jointe à cette lettre. Le texte de ladite requête est également disponible sur le site Internet de la Cour (www.icj-cij.org).

Le paragraphe 1 de l'article 63 du Statut de la Cour dispose que

> «[l]orsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffier les avertit sans délai».

Le paragraphe 1 de l'article 43 du Règlement de la Cour précise en outre que

> «[l]orsque l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige peut être en cause au sens de l'article 63, paragraphe 1, du Statut, la Cour examine quelles instructions donner au Greffier en la matière».

Sur les instructions de la Cour, qui m'ont été données conformément à cette dernière disposition, j'ai l'honneur de notifier à votre Gouvernement ce qui suit.

Dans la requête susmentionnée, la convention de 1948 pour la prévention et la répression du crime de génocide (ci-après la «convention sur le génocide») est invoquée à la fois comme base de compétence de la Cour et à l'appui des demandes de l'Ukraine au fond. Plus précisément, celle-ci entend fonder la compétence de la Cour sur la clause compromissoire figurant à l'article IX de la convention, prie la Cour de déclarer qu'elle ne commet pas de génocide tel que défini aux articles II et III de la convention, et soulève des questions sur la portée de l'obligation de prévenir et de punir le génocide consacrée à l'article premier de la convention. Il semble, dès lors que l'interprétation de cette convention pourrait être en cause en l'affaire.

./.

Son Excellence l'Ambassadeur du Canada
auprès du Royaume des Pays-Bas
Ambassade du Canada
La Haye

Votre pays figure sur la liste des parties à la convention sur le génocide. Aussi la présente lettre doit-elle être regardée comme constituant la notification prévue au paragraphe 1 de l'article 63 du Statut. J'ajoute que cette notification ne préjuge aucune que tion concernant l application éventuelle du paragraphe 2 de l'article 63 du Statut sur laquelle la Cour pourrait par la suite être appelée à se prononcer en l'espèce.

Veuillez agréer, Excellence, les assurances de ma très haute considération.

Le Greffier de la Cour,

COUR INTERNATIONALE DE JUSTICE | INTERNATIONAL COURT OF JUSTICE

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.

./.

H.E. the Minister for Foreign Affairs
of the Kingdom of the Netherlands
Ministry of Foreign Affairs of the Netherlands
The Hague

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 prejudges 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.

Philippe Gautier
Registrar

COUR INTERNATIONALE DE JUSTICE

INTERNATIONAL COURT OF JUSTICE

Le 30 mars 2022

Excellence,

J'ai l'honneur de me référer à ma lettre (n° 156253) en date du 2 mars 2022, par laquelle j'ai porté à la connaissance de votre Gouvernement que l'Ukraine a, le 26 février 2022, déposé au Greffe de la Cour internationale de Justice une requête introduisant une instance contre la Fédération de Russie en l'affaire relative à des Allégations de génocide au titre de la convention pour la prévention et la répression du crime de génocide (Ukraine c. Fédération de Russie). Une copie de la requête était jointe à cette lettre. Le texte de ladite requête est également disponible sur le site Internet de la Cour (www.icj-cij.org).

Le paragraphe 1 de l'article 63 du Statut de la Cour dispose que

«[l]orsqu'il s'agit de l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige, le Greffier les avertit sans délai».

Le paragraphe 1 de l'article 43 du Règlement de la Cour précise en outre que

«[l]orsque l'interprétation d'une convention à laquelle ont participé d'autres Etats que les parties en litige peut être en cause au sens de l'article 63, paragraphe 1, du Statut, la Cour examine quelles instructions donner au Greffier en la matière».

Sur les instructions de la Cour, qui m'ont été données conformément à cette dernière disposition, j'ai l'honneur de notifier à votre Gouvernement ce qui suit.

Dans la requête susmentionnée, la convention de 1948 pour la prévention et la répression du crime de génocide (ci-après la «convention sur le génocide») est invoquée à la fois comme base de compétence de la Cour et à l'appui des demandes de l'Ukraine au fond. Plus précisément, celle-ci entend fonder la compétence de la Cour sur la clause compromissoire figurant à l'article IX de la convention, prie la Cour de déclarer qu'elle ne commet pas de génocide, tel que défini aux articles II et III de la convention, et soulève des questions sur la portée de l'obligation de prévenir et de punir le génocide consacrée à l'article premier de la convention. Il semble, dès lors, que l'interprétation de cette convention pourrait être en cause en l'affaire.

./.

Son Excellence
Monsieur le Ministre des affaires étrangères des Pays-Bas
Ministère des affaires étrangères des Pays-Bas
La Haye

Votre pays figure sur la liste des parties à la convention sur le génocide. Aussi la présente lettre doit-elle être regardée comme constituant la notification prévue au paragraphe 1 de l'article 63 du Statut. J'ajoute que cette notification ne préjuge aucune question concernant l'application éventuelle du paragraphe 2 de l'article 63 du Statut sur laquelle la Cour pourrait par la suite être appelée à se prononcer en l'espèce.

Veuillez agréer, Excellence, les assurances de ma très haute considération.

Le Greffier de la Cour,

DEPARTMENT OF

EXTERNAL AFFA
CANADA

, LESTER BOWLES PEARSON

cretary of State for Ext al ffairs in

the Government of Canada do hereby certify

t the Government of Canad ratifi the

conv ntion on the Prevention nd Punishment

of the Crime of Genocide, which Convention

was open for signature on December 9, 1948,

and hich was signed by duly authorized

representatives of the Government of

Canada on November 28, 1949.

IN WITNESS WHEREOF

I have signed and sealed this Instrument

of Ratification.

DONE at Ottawa

day of August, 1952.

Secretary of State
for External Affairs.

Nous JULIANA, par la grâce de Dieu, Reine des Pays-Bas, Princesse d'Orange-Nassau, etc., etc., etc.

À tous ceux qui les présentes verront, Salut!

Ayant vu et examiné la Convention pour la prévention et la répression du crime de génocide, Convention ouverte à la signature le 9 décembre 1948 et dont les textes anglais et français suivent:

Approuvons par les présentes, pour le Royaume en Europe, le Surinam et les Antilles Néerlandaises, dans toutes les dispositions qui y sont contenues, la Convention reproduite ci-dessus, éclarons y adhérer et Promettons qu'elle sera inviolablement observée.

En foi de quoi, ous avons donné les présentes, signées de Notre main et avons ordonné qu'elles fussent revêtues de Notre sceau oyal.

onné à Soestdijk, le treizième jour du mois de mai de l'an de grâce mil neuf cent soixante six.

Letter of 17 June 2022 to the House of Representatives from the Minister of Foreign Affairs, Wopke Hoekstra, and the Minister of Defence, Kajsa Ollongren, presenting the government's response to AIV advisory report no. 119, CAVV Advisory Report 38, 'Autonomous Weapon Systems: The Importance of Regulation and Investment'

On behalf of the government, the Minister of Foreign Affairs and the Minister of Defence would like to thank the joint committee of the Advisory Council on International Affairs (AIV) and the Advisory Committee on Issues of Public International Law (CAVV) for their advisory report *'Autonomous Weapon Systems: The Importance of Regulation and Investment'*,[1] which updates their 2015 advisory report *'Autonomous Weapons Systems: The Need for Meaningful Human Control'*.

In their new advisory report, the AIV and the CAVV examine technological developments in the fields of artificial intelligence, robotics and quantum technology as they relate to the development and deployment of autonomous weapon systems in the geopolitical context. Several major powers are investing heavily in the development of new technologies and autonomous weapon systems. The AIV and the CAVV recognise that, for reasons of security and in order to ensure that the armed forces are adequately equipped, the Netherlands must have partially autonomous weapon systems at its disposal. Such weapon systems offer relevant military benefits: they are generally more precise, faster and safer than weapon systems without autonomous features. An example of a situation in which autonomous weapon systems offer advantages is the threat of hypersonic missiles, because human reaction speed is too low to respond to them in time. Besides the benefits, the AIV and the CAVV also emphasize the risks associated with autonomous weapon systems, including the potential for abuse by certain states and non-state actors and the expectation that the use of autonomous weapon systems could lower the threshold for the use of force. In addition, the AIV and the CAVV point to the increasing pace of technological innovation and the leading role played by industry in this regard. The AIV and the CAVV therefore believe that further regulation is necessary and present various options for achieving this. They also consider the political and social debate and the legal and ethical aspects of the issue, taking the advantages and disadvantages of the use of autonomous weapon systems into account. In their report, the AIV and the CAVV emphasize the importance of both regulation and investment and present the government with ten recommendations. In the present

[1] AIV advisory report no. 97 / CAVV advisory report no. 26: *'Autonomous Weapons Systems: The Need for Meaningful Human Control'*, October 2015

response, the government will evaluate the recommendations one by one and explain its recalibrated national position on this issue.

International context: the GGE LAWS and the CCW

Before discussing the ten recommendations, the government will first assess the discussions and conclusions of the Group of Governmental Experts on Lethal Autonomous Weapon Systems (GGE LAWS) and the Convention on Certain Conventional Weapons (CCW). The GGE LAWS, which meets under the mandate of the high contracting parties to the CCW, is the forum for international consultations and negotiations on autonomous weapon systems. These meetings take place under the auspices of the CCW (since 2014) and in the GGE LAWS (since 2017). The GGE meets several times a year.

Roughly speaking, the countries that participate in the international debate on autonomous weapon systems can be divided into four groups:

1. Countries that believe that existing international law is adequate and do not favour further measures.
2. Countries that argue that the existing international legal framework needs to be clarified and are not (yet) willing to embrace a potential ban or any positive obligations or to speak out on such matters. For a long time, the Netherlands belonged to this group.
3. Countries that advocate introducing negative obligations, for example in the form of a ban on fully autonomous weapon systems, and positive obligations for autonomous weapon systems that are permissible.
4. Countries that are in favour of a new international ban on a large number of autonomous weapon systems and far-reaching obligations with regard to autonomous weapon systems that are permissible.

At present, there is no international consensus on the definition of an 'autonomous weapon system' or the distinction between full and partial autonomy.[2] There is also no consensus on the use and meaning of the term 'meaningful human control', which is a core concept in the advisory report. Other terms that have been used in this context include sufficient human control, appropriate human control, human judgment and responsible governance. Furthermore, there is no consensus on the need for a ban on

[2] Contrary to what the AIV and CAVV state in their advisory report, the term 'lethal autonomous weapon system' does not necessarily refer to a lethal and fully autonomous weapon system in the international discourse on this issue.

(fully) autonomous weapon systems. The idea of drafting a political declaration or a code of conduct instead of adding a new protocol to the CCW has been suggested on several occasions. At the moment, it is not yet clear which direction the process will take.

Due to the complexity of the consensus-based decision-making process within the CCW, a number of states and civil society organisations are increasingly advocating a shift to a different forum, as happened in the case of the regulation of anti-personnel mines and cluster munitions. Given the strategic importance of autonomous weapon systems, many CCW member states, including major military powers, currently have little interest to initiate such a process. Without these countries, it is highly doubtful that a new protocol or treaty on autonomous weapon systems could be effective.

The government remains committed to making progress within the CCW framework because all relevant actors in the field of autonomous weapon systems are represented there and because recent years have shown that progress is possible despite the complicated dynamics within the GGE. The most tangible results of the GGE LAWS are the 11 Guiding Principles endorsed by the high contracting parties to the CCW in 2019.[3] On the basis of these principles, further work has been done in subsequent years to clarify the existing operational and normative frameworks for the use and development of autonomous weapon systems. Agreement has also been reached on the specific need to preserve human judgment in the deployment of autonomous weapon systems, and progress has been made on how this can be operationalised.

At the Sixth CCW Review Conference in December 2021, the high contracting parties to the CCW decided to continue meeting in the framework of the GGE in 2022. In this context, the government will use the new AIV/CAVV advisory report and its response to the report as a starting point for the further development of Dutch policy on autonomous weapon systems.

Recommendation 1: '*Pay more attention to developments in autonomous weapon systems.'*

The government is devoting attention to new technologies and their relationship to national and international security policy. In order to maintain and strengthen the knowledge base in this area, the Defence organisation, along with its security partners, is investing in long-running research programmes and experiments to test the functioning of autonomous weapon systems within legal and ethical frameworks. Among various other initiatives, the Defence organisation also funds research facilities operated

[3] UN Doc. CCW/MSP/2019/9, Annex III.

by strategic partners and actively focuses on international cooperation (see also the responses to recommendations 6 and 9). In the interests of national security, it is imperative to continue monitoring all developments in the field of autonomous weapon systems at both civil and military level, to experiment with new military means and methods in a timely manner, and to remain involved in international discussions.

The government adopts recommendation 1 and will continue to pay close and continuous attention to political, diplomatic, technical and financial developments in the field of autonomous weapon systems and, where possible and appropriate, advocate for further regulation. The government's specific efforts will be discussed in greater detail in its responses to the other recommendations.

Recommendation 2: *'Actively pursue a ban on fully autonomous weapon systems.'*

In their advisory report, the AIV and the CAVV make a distinction between fully autonomous weapon systems, which they believe should be explicitly banned, and partially autonomous weapon systems, which are permissible provided they are under meaningful human control. According to the AIV and the CAVV, there are various options for achieving further regulation for both fully autonomous and partially autonomous weapon systems, such as a new protocol to the CCW. This is not so much about developing new legal rules, but primarily about further specifying existing legal rules.

The government adopts recommendation 2 in full and will contribute to international efforts in support of a ban on fully autonomous weapon systems and the further specification of the rules that apply to the deployment of autonomous weapon systems, for example in a protocol to the CCW. In this context, it is important to take the complexities of international relations and diplomacy into account. The definition and delineation of such a ban require a very precise formulation. For the government, the main objective of the ban is to preserve human judgment in the deployment of autonomous weapon systems. It is therefore important to draw a general distinction between autonomous weapon systems that can be developed and deployed in accordance with existing international law and those that cannot. An overly broad definition must be avoided, to ensure that existing systems that are vital to our national security, such as the Goalkeeper and the Patriot, are not included in the ban. At the same time, an excessively narrow definition could result in a ban without any practical effect. In terms of the feasibility and effectiveness of the ban, moreover, it is important to ensure that all states that are actively involved in the development of autonomous weapon systems join such a ban. In addition, together with allies, the Defence

organisation must be able to conduct research into fully autonomous weapon systems that could be – or may already have been – deployed by potential adversaries. This is because the Defence organisation must be familiar with the weapon systems of potential adversaries, even if these are fully autonomous weapon systems that are incompatible with international law.

Recommendation 3: *'Take a more active role in the development of international regulation for the development, procurement and deployment of partially autonomous weapon systems.'*

For the evaluation of this recommendation, the government refers to its response to recommendation 5. The two recommendations are closely related, since recommendation 5 identifies the concept of meaningful human control as the starting point for the further regulation advocated for in recommendation 3.

Recommendation 4: *'Call on states to implement or include in their national legislation the obligation to conduct weapon reviews arising from article 36 of Additional Protocol I to the Geneva Conventions.'*

The AIV and the CAVV conclude that states are under the obligation to determine whether a weapon system can be deployed in accordance with international law. They advise the government to encourage states to adopt national legislation for this purpose and to push for the mandatory disclosure of the results of such weapon reviews. The government partially adopts this recommendation.

As the government has previously noted,[4] the Netherlands already calls on states to introduce procedures for the purpose of implementing article 36 of Additional Protocol I to the Geneva Conventions (API), similar to the Netherlands' Advisory Committee on International Law and the Use of Conventional Weapons (AIRCW). The Netherlands has shared its knowledge in this area within the EU and the UN, and will continue to do so. It calls on countries to establish and implement their weapon review processes in a transparent manner and share the results of their reviews internationally where possible. For reasons of state security and commercial confidentiality, the government believes that mandatory full disclosure is not advisable. Furthermore, in order to avoid creating other unnecessary obstacles for countries setting up article 36 procedures, the government believes that states should be allowed to determine for themselves how

[4] Government response of July 2021 to a private member's policy proposal submitted by MP Salima Belhaj, see Parliamentary Paper 35 848, no. 3.

they wish to comply with the obligation arising from article 36 of the Additional Protocol: by incorporating it into national legislation or by other means.

In the Netherlands, the AIRCW examines new means and methods of warfare for compatibility with international law. Based on its advice, the Minister of Defence decides whether or not to approve the use of a particular means or method by the armed forces. The AIRCW publishes its advisory reports online, subject to commercial confidentiality and operational considerations. The government will explore the possibility of providing a legal basis for the AIRCW in a newly adopted law. In the government's view, the call of the AIV and the CAVV to strengthen the AIRCW's role by making it responsible for coordinating consultations between the government, businesses and knowledge institutions would obscure its true task. The AIRCW is primarily charged with conducting legal reviews, while the coordination of consultations with stakeholders is more of a policy task.

Recommendation 5: '*Continue to advocate for the concept of meaningful human control (MHC) as a basis for the regulation of partially autonomous weapon systems.'*

In recommendation 3, the AIV and the CAVV advise the government to take a more active role in the development of international regulation for the development, procurement and deployment of partially autonomous weapon systems. Recommendation 5 adds to this that the concept of meaningful human control should be the starting point for the regulation of such systems.

The AIV and the CAVV present various proposals on how meaningful human control can be assigned and defined. The government agrees with the AIV and the CAVV that, in practice, meaningful human control relates to 'the role of human judgment in the deployment of weapon systems'. Human judgment is particularly important because international humanitarian law attributes the obligations with regard to distinction, precautions and proportionality to the individual planning, authorising or executing an attack. The government believes that human control is needed to retain human judgment in the use of weapon systems with autonomous features with a view to ensuring that such systems can be used in accordance with international law, for example by determining whether a person or object is entitled to special protection under international humanitarian law.

The government regards the criteria drawn up by the AIV and the CAVV for exercising human control, such as the nature of the intended target, the duration of the use of the

autonomous weapon, the geographical scope of the operation, the circumstances and the requirements for effective human-machine interaction, as a good basis for regulation. The required degree of human control and the criteria that should be applied depend primarily on the operational context.[5] For example, a defensive situation involving an incoming missile on the open sea requires different restrictions and a different degree of human control than a chaotic combat situation in a densely populated area. The required degree of human control will therefore differ from situation to situation. At the present time, the government accordingly does not endorse a specific definition of meaningful human control, as this would fail to do justice to the complexity of the debate for the same reasons as mentioned under recommendation 2.

In the introduction to this letter, the government already noted that autonomous weapon systems are necessary for ensuring that the armed forces are adequately equipped. In order to engage with these systems in a responsible manner, the relevant political, operational, legal and moral issues need to be considered in advance. This applies not only to such matters as the development, procurement and testing of autonomous weapon systems but also to the education and training of personnel.

Human control can thus be incorporated into various stages of a weapon's life cycle. This may also involve various actors, such as businesses and knowledge institutions during the development stage. The Ministry of Foreign Affairs and the Ministry of Defence regularly consult with civil society organisations and research institutes to discuss their views on the question of meaningful human control, and take their advice into account in decision-making where possible. The government has also funded several studies on autonomous weapon systems and meaningful human control.[6]

The government adopts recommendations 3 and 5 and will contribute to discussions at the international level to further develop and secure the preservation of human judgment in the deployment of autonomous weapon systems.

Human rights

[5] 'ICRC Position on Autonomous Weapon Systems', ICRC, 12 May 2021; 'Limits on Autonomy in Weapon Systems', ICRC/SIPRI, 2020.
[6] Ibid. 'Autonomous Weapon Systems and International Humanitarian Law: Identifying Limits and the Required Type and Degree of Human–Machine Interaction', SIPRI, June 2021; M. Ekelhof, 'The Distributed Conduct of War: Reframing Debates on Autonomous Weapons, Human Control and Legal Compliance in Targeting', PhD Dissertation, Vrije Universiteit Amsterdam, 2019; various UNIDIR studies, see: https://www.unidir.org/projects/artificial-intelligence-and-weaponization-increasingly-autonomous-technologies.

The advisory report also examines the use of partially autonomous weapon systems in peacetime and the human rights provisions that apply in this context. The government agrees with the analysis of the AIV and the CAVV that the legal regime of human rights applies to the use of deadly force outside situations of armed conflict. In the GGE LAWS, the Netherlands highlighted the importance of human rights as a relevant legal regime for the potential deployment of weapon systems with autonomous features. The government agrees that the legal regime of human rights imposes stricter requirements on the use of deadly force for law enforcement purposes than the legal regime of international humanitarian law does for combat operations.

As regards the right to privacy, the AIV and the CAVV highlight the importance of proper data governance when using big data in systems that operate on the basis of artificial intelligence. The AIV and the CAVV advise the government to improve the supervision on data and invest more – both financially and in terms of capacity – in the development of artificial intelligence, robotics, quantum computing and responsible data use. The government recognises the importance of good data governance, including within the armed forces. The Defence organisation sees data as a strategic asset. A coherent data governance policy and clear frameworks and guidelines for data management are therefore crucial.

Responsibility and accountability

Along with the AIV and the CAVV, the government underlines the importance of allocating responsibility in a clear manner when it comes to the development and deployment of autonomous weapon systems. In the context of state responsibility, states can be held responsible on the basis of international law for the unlawful actions of weapon systems with autonomous features that they use. Given the relatively risky nature of the use of such weapon systems in conflict situations, the AIV and the CAVV advise the government to consider the introduction of a form of strict state responsibility. The government acknowledges that this strict responsibility is currently not part of existing international law on state responsibility in this context. The Stockholm International Peace Research Institute (SIPRI) is currently conducting a study on the subject of responsibility and accountability, which is being co-financed by the Netherlands. The government will further explore the options relating to state responsibility and include them in the Dutch contribution to the debate on this issue.

Further to the advisory report's observations concerning individual accountability, the government notes that the responsibility for prosecuting international crimes falls primarily to the national legal system, with prosecution by the International Criminal

Court acting as a backstop. Where appropriate, individuals or legal entities that have played a role in the life cycle of an autonomous weapon system may be subject to civil liability in accordance with national law or criminal prosecution.

Recommendation 6: '*Work with EU partners, the United States, the United Kingdom and other NATO allies to achieve joint development and production of partially autonomous weapon systems (in which meaningful human control is assigned appropriately), export control and investment screening for dual-use technologies.'*

Joint development and innovation

NATO is committed to maintaining the Alliance's technological edge. In the interests of (national) security, the Netherlands endorses this commitment, which is widely shared within the Alliance and is linked to a high level of ambition. Within NATO, the Netherlands intends to actively support the implementation of the organisation's Emerging and Disruptive Technologies (EDT) Roadmap, which was approved in 2019. This roadmap encourages NATO countries to place a stronger emphasis on the research and development of emerging and disruptive technologies in their joint and national research programmes. Among other measures, the Netherlands will start contributing in a targeted manner to the joint work programme of the NATO Science and Technology Organization (STO), for example in the fields of artificial intelligence and autonomous weapon systems.

Within the EU, the European Defence Fund (EDF) is an increasingly important instrument for joint defence research and capability development for member states. The Netherlands is therefore committed to further developing the EDF and using it for the benefit of the Defence organisation, knowledge institutions and defence companies. The Netherlands believes it can contribute to the development of autonomous systems and reiterates the importance of meaningful human control in the decision-making process. The European Commission oversees the ethical evaluation of the project proposals. The EDF does not provide financial support to projects involving products or technologies whose use, development or production is prohibited under international law. Projects focusing on the development of lethal autonomous weapons that do not provide scope for meaningful human control over decisions relating to their selection and deployment in attacks targeting humans are likewise not eligible for support from the Fund. Generally speaking, in addition to the EDF, the Netherlands is involved in bilateral innovation and development partnerships with several countries, including Canada, France, Germany, Norway, Sweden, the United Kingdom and the United States.

Although it attaches great importance to cooperation with allies, the government notes that it is undesirable to be completely dependent on another power for certain technologies and systems, in terms of both knowledge and industrial and operational capabilities, even if the power in question is an ally.[7] In the interests of protecting the Netherlands' sovereignty and national security, the government may accordingly prioritise other considerations.

Export control and investment screening

Close cooperation with EU member states in the areas of preparation, implementation and execution lies at the heart of Dutch export control policy. Like other military goods, weapon systems with autonomous features are subject to rigorous scrutiny against the eight criteria of the EU's Common Position on arms exports.[8] The export of dual-use technology and goods is governed by the EU's Dual-Use Regulation.[9] The list of dual-use items that appears in the annex to this regulation is compiled on the basis of consensus decisions in the four export control regimes. In the field of autonomous weapon systems, the designated regimes are the Wassenaar Arrangement and the Missile Technology Control Regime (MTCR). Based on the control lists compiled by these regimes, technology and software relating to potential delivery systems for weapons of mass destruction and/or conventional weapon systems are already subject to a licensing requirement and are thus governed by the Dual-Use Regulation regardless of the level of autonomy involved.

There are also various initiatives aimed at containing threats to national security arising from investments. Work is currently under way on a sector-specific screening mechanism for investments in the defence industry.[10] In the summer of 2021, the Investments, Mergers and Acquisitions (Security Screening Mechanism) Bill (VIFO) was presented to the House of Representatives. The aim of this bill is to contain the threats to national security arising from investments, mergers and acquisitions involving critical providers and companies that operate in the area of sensitive technology. In this context, reference is made to various instruments, including the applicable European export control frameworks for military and dual-use goods. On the basis of the EU's

[7] Ministry of Defence, *Strategic Knowledge and Innovation Agenda 2021-2025*, December 2020 (in Dutch).
[8] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:02008E0944-20190917&from=EN.
[9] Regulation (EU) 2021/821 of 20 May 2021 setting up a Union regime for the control of exports, brokering, technical assistance, transit and transfer of dual-use items, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02021R0821-20220107.
[10] The Netherlands currently has three sector-specific investment screening mechanisms for the telecommunications, gas and electricity sectors.

Foreign Direct Investment (FDI) Regulation, member states exchange information about foreign direct investments that have a bearing on national security or public order.[11] When it comes to investment screening, the EU also cooperates with the US in the framework of the EU-US Trade and Technology Council.

Extensive consultations between government, businesses and knowledge institutions
The AIV and the CAVV also advise the government to push for regular consultations with knowledge institutions and businesses to jointly address the industrial, legal and ethical aspects of autonomous weapon systems. The government is already driving various initiatives in this area within the EU and NATO and is also taking its own initiatives.

The Netherlands actively participates in the implementation of the EU's strategic process on the responsible use of artificial intelligence (AI) in a military context and will, where possible, continue to explore the legal and ethical aspects of autonomous weapon systems and put them on the agenda. In addition, the Netherlands believes that the military use of AI should occupy a higher place on the global agenda and is seizing the initiative in this regard by organising an international conference. Although the planned initiative will encompass issues beyond autonomous weapon systems, the Netherlands will include the AIV/CAVV advisory report and the rise of autonomous weapon systems where possible. The government will inform the House of Representatives separately about the conference and the formulation of a political agenda.

As indicated above, the government largely accepts recommendation 6, and certain aspects of it are already part of existing policy. The Netherlands is actively exploiting opportunities to cooperate with allies, businesses and other partners in the development and production of autonomous systems (in which meaningful human control is effectively assigned), export control and investment screening for dual-use technologies.

Recommendation 7: '*Encourage NATO allies to jointly play a key role in pursuing interoperability and standardisation in the field of disruptive technology and partially autonomous weapon systems.*'

As NATO itself emphasises, interoperability and standardisation are preconditions for effective military action. The Netherlands will advocate even more strongly for interoperability and standardisation so that we and our partners can work together as effectively as possible. Within NATO and the EU, processes should be coordinated to

[11] Regulation (EU) 2019/452 of 19 March 2019 establishing a framework for the screening of foreign direct investments into the Union, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32019R0452&qid=1656663903857.

ensure that capability development and investments yield maximum returns. The Netherlands therefore welcomes the proposal of NATO Secretary-General Jens Stoltenberg for a Defence Innovation Initiative to promote interoperability and act as a catalyst for transatlantic cooperation on defence innovation, specifically in the field of disruptive technologies. NATO's Science and Technology Organization (STO) also plays a key role in this regard. Within the STO, about 5,000 scientists work on joint research programmes in the field of disruptive technologies. The government emphasises that the application of disruptive technologies requires sustained effort, both in terms of technology development and in terms of ensuring interoperability and pursuing standardisation.

NATO also makes an important contribution to the debate on new technologies, promoting a coherent approach between allies. As with the establishment of the EDTR, the Netherlands will continue to call attention to the arms control aspects of new technologies within NATO. This does not change the fact that, in line with NATO policy, the Netherlands regards the application of new technologies in the military domain as essential for maintaining a technological edge. In this context, preserving meaningful human control over autonomous weapon systems obviously remains the basic premise.

Recommendation 8: *'Make the concept of explainable artificial intelligence the basis for Dutch policy when it comes to the development, procurement and use of partially autonomous weapon systems.'*

According to the Scientific Council for Government Policy (WRR), artificial intelligence (AI) is a system technology that will fundamentally change our lives.[12] The government ought to establish frameworks within which AI can develop in a positive direction. The call from the AIV and CAVV to the effect that the AI underlying partially autonomous weapon systems must be explainable is therefore consistent with the government-wide task in this area. In practical terms, this means that the underlying mathematical models – and the data underlying those models – must be traceable and explainable at all times. In addition, it must be clear throughout the decision-making process where and how meaningful human control is assigned and who is responsible for what. The AIV and the CAVV recommend that the armed forces be trained in this.

The government embraces this recommendation and refers in general to its forthcoming response to the WRR's advisory report, which is expected to appear in the autumn and will provide guidance in this area. At the military level, the Defence organisation has identified these topics as an explicit area of focus. Roles, responsibilities and decision

[12] Scientific Council for Government Policy, *Opgave AI. De nieuwe systeemtechnologie* [Mission AI: The New System Technology], 2021.

making in the field of AI must be better embedded in the organisation. The Defence organisation is already developing normative frameworks and design guidelines to document the operation of algorithms, the choices they make, their validation and their implementation and use. The basic premise is already that algorithms are amenable to testing against standards and verification frameworks by means of audits. Commercially developed applications whose procurement is being considered must comply with the Defence organisation's frameworks and guidelines. In order to develop the necessary knowledge base, the Defence organisation is carrying out research programmes in collaboration with knowledge institutions, for example on man-machine teaming and methods for verifying autonomous systems. In addition, it is collaborating with international knowledge institutions in several NATO STO activities.[13] The Defence organisation will also have to develop and adapt its human resources policy to working with AI. The government recognises the need for education and training at all levels. The Defence organisation is putting this into practice through various initiatives, including a data and cyber masterclass for senior Defence officials and a general data course.

Recommendation 9: '*Make agreements with businesses and scientific institutions on the development and procurement of partially autonomous weapon systems.*'

The AIV and the CAVV highlight the importance of human-machine interaction in fleshing out the concept of meaningful human control. This involves looking beyond the mere moment of deployment of an autonomous weapon system. The AIV and the CAVV argue that ethical considerations and legal criteria should be articulated in the system's design phase. According to the AIV and the CAVV, agreements should be made with developers and manufacturers concerning the verifiability of crucial criteria. The AIV and the CAVV further advise the government to promote a culture of shared responsibility and also point to the basic principles of corporate responsibility. Finally, they state that the government should develop concrete guidelines, verification tools and certifications. As noted in the response to recommendation 8, the Defence organisation is developing knowledge in this area together with national and international parties. The Netherlands Defence Academy is also working on a system for verification, validation and accreditation. The government endorses recommendation 9 and additionally refers to its response to recommendations 6 and 8.

Recommendation 10: '*Have this advisory report updated.*'

[13] Examples include 'Human Systems Integration for Meaningful Human Control over AI-based systems' (HFM-330) and 'Robustness and Accountability in Machine Learning Systems' (IST-169), available at: https://www.sto.nato.int/Pages/activitieslisting.aspx.

Lastly, the government accepts recommendation 10 and will request an update of this advisory report at a future milestone.

Conclusion

This response constitutes the new basis for the government's policy position on autonomous weapon systems. As explained above, the government endorses the majority of the AIV and CAVV recommendations. It believes that partially autonomous weapon systems are indispensable for a technologically advanced military that is able to defend the Netherlands and NATO territory. The use and proliferation of unmanned and autonomous weapon systems is increasing among allies and opponents alike, as confirmed during recent and current conflicts. The use of these systems is reducing response times and increasing unpredictability when it comes to threats. Defending against these threats requires information-driven operations, advanced automation and interoperability within NATO. In addition, it is becoming increasingly important that military units and critical infrastructures are able to protect themselves against these threats in order to preserve their freedom of action. On the other hand, unmanned and autonomous weapon systems provide armed forces with significant added value in terms of their information position and escalation dominance. Along with the AIV and CAVV, the government also recognises the risks and disadvantages of these systems. In the interests of national and international security, the government will continue to closely monitor the rapid developments in the field of autonomous weapon systems and will continue to promote responsible development and use of autonomous weapon systems at the international level. In order to guarantee this, the government emphasizes the importance of further specifying existing legal rules. The starting point is that autonomous weapons must be used in accordance with international law and that human judgment must be retained in the deployment of autonomous weapon systems. Weapon systems that cannot be used in accordance with international law must be explicitly prohibited, for example by adding a new protocol to the CCW. Finally, the government will continue to conduct a broad and open discussion on autonomous weapon systems with knowledge institutions, civil society, government agencies, parliament and the industry.