NJORD Estonia: Estonia's intervention in the Ukraine-Russia dispute before ICJ

Last Thursday, Estonia filed a declaration of intervention in the Registry of the International Court of Justice to participate in the hearing of the Ukraine-Russia case. While, as a rule, the dispute of the International Court of Justice (ICJ) is only a matter between specific parties, Estonia joined 14 other countries that have expressed their wish to intervene the Ukraine-Russia case, based on an exceptional provision in the Statute of the ICJ.

What is the content of the dispute before ICJ?

As a reminder, on February 26, Ukraine filed an application instituting proceedings against the Russian Federation before the ICJ to initiate a case against Russia for the court to confirm that Ukraine had not committed genocide. In doing so, Ukraine wants to refute Russia's claim that the invasion of Ukraine was based on an alleged genocide committed by Ukraine, which according to Russia provides the legal basis for its actions as a "special military operation". As an initial measure, Ukraine also asked the court to order Russia to end its military operation in Ukraine.

Russia has so far refused to participate in court proceedings on the grounds that the ICJ has no jurisdiction to rule on the dispute. Therefore, Russia did not attend the hearing held in early March either. Nevertheless, the court granted Ukraine's request for an initial measure and prohibited Russia from continuing its military operation and obstructing the proceedings. As can be seen, Russia has not complied with the court's orders.

What does Article 63 of the Statute provide for?

Under the second paragraph of Article 63 of the Statute, States have the right to join a case pending before the ICJ, but in this case, the Court's interpretation of the rule of the relevant instrument is also binding on the intervening States. The prerequisite for such intervention is that the State is a party to the applicable international agreement.

The question of how the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) is interpreted is important for the intervening States because such interpretation will also be used to determine whether Russia was allowed to invade Ukraine in February to prevent the alleged genocide. Estonia has been a party to the Genocide Convention since 1992, making it possible for Estonia to file a declaration of intervention. Following the rules of the Statute, Ukraine and Russia can express their opinions on the declaration of intervention.

What can the intervening States do?

The States joining the case do not, however, become parties to the proceedings. The right of the intervening States to speak up is limited to how the provisions of the international agreement in question should be interpreted. This means that Estonia and other intervening States will have the opportunity to express their opinion on how the Genocide Convention and the code of conduct contained therein should be interpreted.

In the previous case law of the ICJ, it is unclear whether the opinion expressed by the intervening States on the jurisdiction of the Court also falls within the scope of Article 63 of the Statute. However, most of the States that filed declarations of intervention, including Estonia, have addressed the question and affirmed the jurisdiction of the ICJ in resolving the dispute.

What did Estonia say in its statement?

Supporting Ukraine's argument that the ICJ has jurisdiction to resolve the dispute, Estonia stressed, among other things, that if the Genocide Convention gives the court the right to declare that genocide has been committed, the court has the right to declare that it has not been committed. The ICJ also has jurisdiction over disputes over the unilateral use of military force to prevent and punish the alleged genocide.

Regarding the substantive interpretation of the convention, Estonia stressed that the Genocide Convention requires the collection of impartial evidence before taking action, for example through international criminal investigations. Besides, preventing and punishing genocide as an internationally condemned act cannot be a unilateral action of a single state but requires concerted action by the international community. This is particularly the case for the measures carried out on the territory of a foreign State.

Who else has filed a declaration of intervention?

In July, Latvia and Lithuania were the first States to file the declarations. They have been joined by New Zealand, Great Britain, Germany, the United States, Sweden, France, Romania, Poland, Italy, Denmark, and Ireland. Finland submitted a declaration of intervention on the same day as Estonia.