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13 **UNITED STATES DISTRICT COURT**
14 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

15 DEFENSE FOR CHILDREN
16 INTERNATIONAL – PALESTINE; AL-
17 HAQ; AHMED ABU ARTEMA;
18 MOHAMMED AHMED ABU ROKBEH;
19 MOHAMMAD HERZALLAH; A.N.;
20 LAILA ELHADDAD; WAEIL ELBHASSI;
21 BASIM ELKARRA; and DR. OMAR EL-
22 NAJJAR

23 Plaintiffs,

24 v.

25 JOSEPH R. BIDEN, JR., *President of the*
26 *United States*, ANTONY J. BLINKEN,
27 *Secretary of State*, LLOYD JAMES
28 AUSTIN III, *Secretary of Defense*, in their
official capacities,

Defendants.

Case No.: 3:23-cv-05829

**DECLARATION OF WILLIAM A.
SCHABAS IN SUPPORT OF
PLAINTIFFS' MOTION FOR
PRELIMINARY INJUNCTION**

Hearing: _____, 2023 at _____

1 Legal opinion on the obligation to prevent genocide in international law

2 I, William A. Schabas, pursuant to 28 U.S.C. § 1746, declare the following is true and correct:

- 3
- 4 1. I have been asked by the Center for Constitutional Rights to provide an opinion on the
- 5 obligation to prevent genocide under international law, and its current application in relation
- 6 to the United States of America in regard to Israel's actions against the Palestinian population
- 7 in Gaza. I understand the opinion is to be submitted in support of an application for declaratory
- 8 and injunctive relief in the Federal Court of the United States on behalf of Palestinian human
- 9 rights organizations and individuals against President Biden, Secretary of State Blinken and
- 10 Secretary of Defense Austin (sued in their official capacity) for violations of customary
- 11 international law, as codified in the Genocide Convention and under United States law.
- 12
- 13 2. I am professor of international law at Middlesex University London, emeritus professor of
- 14 international criminal law and human rights at Leiden University in the Netherlands and
- 15 emeritus professor of human rights law at the University of Galway in Ireland. I am a past
- 16 president of the International Association of Genocide Scholars. I am the author of *Genocide*
- 17 *in International Law* (Cambridge University Press, 2000, second edition 2009), of the chapter
- 18 on 'Genocide' in the Max Planck Encyclopedia of International Law and of many other
- 19 publications on the law of genocide. I am the presenter on the topic of 'Genocide' in the United
- 20 Nations Audiovisual Library of International Law. A full curriculum vitae is annexed to this
- 21 opinion.
- 22
- 23 3. In preparation for this opinion, I have been shown the application. For the purposes of this
- 24 opinion, I am assuming that the factual allegations it makes are supported by admissible and
- 25 credible evidence.
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1 **The Genocide Convention and customary international law**

2 4. On 11 December 1946 the United Nations General Assembly adopted unanimously a resolution
3 entitled The Crime of Genocide, A/RES/96 (I). The resolution is understood to be declaratory
4 of international law at the time, confirming that the obligations to prevent and punish the crime
5 of genocide precede the drafting and adoption of the Convention on the Prevention and
6 Punishment of the Crime of Genocide, which was to follow. In other words, the obligations to
7 prevent and punish the crime of genocide are part of customary international law. The General
8 Assembly resolution calls upon States ‘to enact the necessary legislation for the prevention and
9 punishment of this crime’. When the Resolution was being adopted, the representative of the
10 United States in the General Assembly said ‘the United States supported the affirmation that
11 this horrible crime was a crime against the community of nations’.¹

12 5. The Convention on the Prevention and Punishment of the Crime of Genocide was adopted by
13 the United Nations General Assembly on 9 December 1948. It entered into force on 12 January
14 1951, having obtained the requisite twenty ratifications or accessions. There are now 153 States
15 Parties to the Convention. In proceedings before the International Court of Justice in 1951 the
16 United States of America explained its view of the origins of the Convention: ‘The Genocide
17 Convention resulted from the inhuman and barbarous practices which prevailed in certain
18 countries prior to and during World War II, when entire religious, racial and national minority
19 groups were threatened with and subjected to deliberate extermination. The practice of
20 genocide has occurred throughout human history. The Roman persecution of the Christians,
21 the Turkish massacres of Armenians, the extermination of millions of Jews and Poles by the
22 Nazis are outstanding examples of the crime of genocide.’²

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27 ¹ A/C.6/SR.32, 9 December 1946, p. 172.

28 ² *Reservations to the Convention on the Prevention of Genocide, Advisory Opinion, Pleadings, Oral Arguments, Documents*, ‘Written Statement of the United States of America’, pp. 23–47, at p. 25.

1 6. The United States of America signed the Convention on the Prevention and Punishment of the
2 Crime of Genocide (the ‘Genocide Convention’) on 11 December 1948, two days after its
3 adoption by the United Nations General Assembly. The United States ratified the Convention
4 on 25 November 1988. The ratification was accompanied by two reservations that do not
5 appear to be relevant to the present litigation. It was also accompanied by five
6 ‘understandings’, of which three may be germane to the proceedings: ‘(1) That the term ‘intent
7 to destroy, in whole or in part, a national, ethnical, racial, or religious group as such’ appearing
8 in article II means the specific intent to destroy, in whole or in substantial part, a national,
9 ethnical, racial or religious group as such by the acts specified in article II’; ‘(2) That the term
10 ‘mental harm’ in article II (b) means permanent impairment of mental faculties through drugs,
11 torture or similar techniques’; ‘(4) That acts in the course of armed conflicts committed without
12 the specific intent required by article II are not sufficient to constitute genocide as defined by
13 this Convention.’

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16 7. Israel signed the Genocide Convention on 17 August 1949 and ratified it on 9 March 1950,
17 without any reservation or other declaration. The State of Palestine acceded to the Genocide
18 Convention on 2 April 2014, without any reservation or other declaration.

19
20 8. That the obligations to prevent and punish genocide are derived both from treaty law – the
21 Genocide Convention, with respect to States Parties – and customary international law is
22 uncontroversial. The customary law applicable to genocide is in some respects even broader
23 than that set out in the Convention. In 1961 the District Court of Jerusalem in the *Eichmann*
24 *case* described the 1948 Genocide Convention as ‘the confirmation of certain principles as
25 established rules of law in customary international law’.³ The District Court relied upon the
26 1951 Advisory Opinion of the International Court of Justice which said ‘that the principles
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28 ³ *A-G Israel v. Eichmann*, (1968) 36 ILR 5 (District Court, Jerusalem), para. 21.

1 underlying the Convention are principles which are recognized by civilized nations as binding
2 on States, even without any conventional obligation'.⁴

3 **The definition of genocide and the specific intent**

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5 9. The crime of genocide is defined in article II of the 1948 Convention:

6 In the present Convention, genocide means any of the following acts committed with intent
7 to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

8 (a) Killing members of the group;

9 (b) Causing serious bodily or mental harm to members of the group;

10 (c) Deliberately inflicting on the group conditions of life calculated to bring about its
11 physical destruction in whole or in part;

12 (d) Imposing measures intended to prevent births within the group;

13 (e) Forcibly transferring children of the group to another group.

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15 10. This remains the authoritative definition and has been incorporated in much more recent
16 international instruments, such as the Statutes of the International Criminal Tribunals for the
17 former Yugoslavia and Rwanda and the Rome Statute of the International Criminal Court as
18 well as in the national criminal law of many States, including the United States of America.

19
20 11. The definition consists of two components. The first is the introductory paragraph or *chapeau*
21 wherein are contained what are called the contextual elements: the 'intent to destroy, in whole
22 or in part, a national, ethnical, racial or religious group, as such'. The second, consisting of
23 five sub-paragraphs, lists the punishable acts. Each of the punishable acts has its own *actus*
24 *reus* and *mens rea*. However, genocide is considered to be a crime of 'specific intent'. None of
25 the punishable acts can be considered an act of genocide unless committed with the 'specific
26 intent' set out in the preliminary paragraph.

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28 ⁴ *Reservations to the Convention on Genocide, Advisory Opinion, ICJ Reports 1951*, p. 15, at p. 24.

1 12. In the present conflict in Gaza, there is certainly evidence of the commission of the first three
2 punishable acts of genocide. The acts of killing members of the group and of causing serious
3 bodily or mental harm to members of the group are not in any significant way different from
4 how these concepts are understood in the national criminal law of most if not all countries. As
5 for ‘deliberately imposing conditions of life calculated to destroy the group in whole or in part’,
6 this has been described by the International Court of Justice as covering ‘methods of physical
7 destruction, other than killing, whereby the perpetrator ultimately seeks the death of the
8 members of the group’.⁵ The authoritative Elements of Crimes of the International Criminal
9 Court provide that ‘[t]he term “conditions of life” may include, but is not necessarily restricted
10 to, deliberate deprivation of resources indispensable for survival, such as food or medical
11 services, or systematic expulsion from homes’.⁶ International case law has provided many
12 examples, including subjecting the group to a subsistence diet, failing to provide adequate
13 medical care, systematically expelling members of the group from their homes, poisoning of
14 wells, and ‘generally creating circumstances that would lead to a slow death such as the lack
15 of proper food, water, shelter, clothing, sanitation, or subjecting members of the group to
16 excessive work or physical exertion’.⁷ The term ‘deliberately’ and the phrase ‘calculated to
17 destroy the group in whole or in part’ are somewhat redundant to the extent that they repeat
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23 ⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*
24 *(Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 161.

⁶ Elements of Crimes, ICC-ASP/1/3, p. 114.

⁷ *Prosecutor v. Karadžić* (IT-95-5/18-T), Judgment, 24 March 2016, para. 547; *Prosecutor v. Brđanin*
25 *(IT-99-36-T)*, Judgment, 1 September 2004, para. 691; *Prosecutor v. Stakić* (IT-97-24-T), Judgment,
26 31 July 2003, para. 517; *Prosecutor v. Musema* (ICTR-96-13-T), Judgment, 27 January 2000, para.
27 157; *Prosecutor v. Bashir* (ICC-02/05-01/09), Second Decision on the Prosecution's Application for a
28 Warrant of Arrest (12 July 2010), para. 38; *Application of the Convention on the Prevention and*
Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015, p. 3, para.
161. Also Report of the detailed findings of the Independent International Fact-Finding Mission on
Myanmar, A/HRC/39/CRP.2 (17 September 2018), para. 1401.

1 components of the specific intent which is set out in the preliminary paragraph or *chapeau* of
2 article II of the Convention.

3 13. Each of the sub-paragraphs in article II refers to ‘the group’ or to ‘members of the group’. This
4 requires reference to the phrase ‘national, ethnical, racial or religious group’ in the preliminary
5 paragraph. Case law of international tribunals has identified various groups for the purposes of
6 applying the Convention, including Bosnian Muslims, Croats, Krajina Serbs in Croatia and
7 Hutu, Tutsi and Twa in Rwanda. I cannot imagine that there could be any dispute about
8 describing the Palestinian people as a group protected by one or more of the adjectives listed
9 in article II of the Genocide Convention.

10 14. The preliminary paragraph of article II of the Convention as well as sub-paragraph (c) employ
11 the phrase ‘in whole or in part’. As mentioned above, at the time it ratified the Convention the
12 United States formulated an understanding that this means ‘in whole or in substantial part’. In
13 fact, the additional qualifier ‘substantial’ is widely accepted in international case law.⁸ There
14 are two approaches to this issue in the present case. One would be to consider the Palestinians
15 of Gaza as a distinct group. The second would be to consider them as a part of a larger group,
16 namely, the Palestinians. If the latter approach is adopted, they constitute approximately 40%
17 of the 5 million Palestinians resident in both Gaza and the West Bank, in which case they are
18 a ‘substantial part’ of a distinct group.

19 15. The phrase ‘intent to destroy’, which also appears in the preliminary paragraph of article II of
20 the Convention, has been held to refer only to physical destruction (or ‘biological’ destruction
21 in the case of imposing measures to prevent births within the group). Thus, it excludes from
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27 ⁸ For example, *Prosecutor v. Krstić* (IT-98-33-A), Judgment, 19 April 2004, paras. 8-11; *Application*
28 *of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and*
Herzegovina v. Serbia and Montenegro), Judgment, *I.C.J. Reports 2007*, p. 43, para. 201.

1 the scope of the Genocide Convention measures intended to destroy the culture of the group
2 with a view to its assimilation.

3 16. Because the intent to destroy the group in whole or in part is a specific intent, the intent cannot
4 be presumed in the way that it is for ordinary crimes where only general intent is required. The
5 evidence of specific intent may be direct, in the form of documents and statements, for
6 example, but it may also be based upon inferences drawn from what international tribunals
7 have referred to as a 'pattern of conduct'.
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9 17. In the present case, there is much direct evidence in the form of statements by senior officials
10 and politicians in Israel indicating an intent to destroy the people of Palestine. Furthermore,
11 the conduct of the State of Israel provides evidence from which genocidal intent may be
12 inferred. The avowed policy of depriving Gaza of water, food, medicine and electricity, bearing
13 in mind the rather desperate economic situation in the territory prior to the conflict and the fact
14 that the borders are sealed, leaving the people of Gaza with nowhere to go, will inexorably lead
15 to their physical destruction. If the siege and blockade continue, there can be no other outcome.
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17 **The obligation to prevent genocide**

18 18. The full title of the Convention is the Convention on the Prevention and Punishment of the
19 Crime of Genocide. Article I of the Convention declares that genocide 'is a crime under
20 international law which [the Contracting Parties] undertake to prevent and to punish'. The
21 Convention is quite laconic. Most of its provisions deal with matters relating to the punishment
22 of the crime and the implementation of the Convention itself. The Convention itself provides
23 little guidance on the interpretation and application of the terms 'prevention' and 'prevent'.
24 The prohibitions of 'conspiracy' and 'direct and public incitement' are directed at prevention
25 because they are inchoate in nature. Our contemporary understanding of the obligation to
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1 prevent genocide is largely based on case law and in particular the 2007 judgment of the
2 International Court of Justice in *Bosnia v. Serbia*.

3 19. The reference to prevention in article I of the Genocide Convention is not merely ‘hortatory or
4 purposive’ the International Court of Justice said in its seminal judgment of February 2007 on
5 Bosnia and Herzegovina’s application against Serbia. The undertaking to prevent and punish
6 genocide is unqualified, said the Court. ‘It is not to be read merely as an introduction to later
7 express references to legislation, prosecution and extradition . . . That conclusion is also
8 supported by the purely humanitarian and civilizing purpose of the Convention.’⁹ The Court
9 explained that the preparatory work (*travaux préparatoires*) of the Convention confirms the
10 ‘operative and non-preambular character of Article I’.¹⁰

11
12 20. The International Court of Justice concluded that Serbia¹¹ had breached international law not
13 because it was directly responsible for perpetration of the crime but because it had failed to
14 prevent it. The Court had reached the conclusion that the massacre of several thousand
15 Muslims of Eastern Bosnia, in the Srebrenica enclave, constituted the crime of genocide. Its
16 perpetrators were Bosnian Serb forces, one of the factions in the civil war in Bosnia and
17 Herzegovina. However, the neighbouring State of Serbia was the respondent in the case. The
18 Court did not find sufficient evidence to attribute responsibility to Serbia for the killings.

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20 21. The Court concluded that even if a State itself is not responsible for actually committing
21 genocide, it may nevertheless incur liability for failing to prevent genocide that is perpetrated
22 by others outside its own borders. In other words, this obligation to prevent genocide is not
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26 ⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 162.

27 ¹⁰ *Ibid.*, para. 164.

28 ¹¹ Note that at the time of the massacre, Serbia was known as the Federal Republic of Yugoslavia. Its capital was and remains Belgrade.

1 only a collective one, in that it calls for appropriate action by international bodies like the
2 United Nations, but it is also an obligation that is imposed upon States individually.

3 22. This is a quite extraordinary obligation, one that underscores the importance of the duty to
4 prevent genocide under customary law as well as pursuant to the Convention. Some other
5 international treaties include a call for prevention. For example, the Convention against Torture
6 and Other Cruel, Inhuman or Degrading Treatment or Punishment imposes an obligation of
7 prevention but it specifies that this applies ‘in any territory under its jurisdiction’.¹² Three
8 other treaties specify an obligation of prevention but it is explicitly confined to ‘their respective
9 territories’.¹³ In *Bosnia v. Serbia* the International Court of Justice made reference to these
10 treaties.¹⁴ All four treaties presented as examples confine the obligation to prevent to the
11 territory of the State Party. By contrast, and underscoring the unique and fundamental
12 importance of prevention of genocide, the Court said that the obligation has an extraterritorial
13 scope.
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16 23. The obligation to prevent is one of means rather than one of result. The Court spoke of this as
17 a duty of ‘due diligence’ that varies depending upon circumstances, involving several
18 parameters:

19 The first, which varies greatly from one State to another, is clearly the capacity to
20 influence effectively the action of persons likely to commit, or already committing,
21 genocide. This capacity itself depends, among other things, on the geographical
22 distance of the State concerned from the scene of the events, and on the strength of the
23 political links, as well as links of all other kinds, between the authorities of that State
and the main actors in the events. The State’s capacity to influence must also be
assessed by legal criteria, since it is clear that every State may only act within the limits

24 ¹² Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,
(1987) 1465 UNTS 85, arts. 2(1), 16(1).

25 ¹³ Convention on the Prevention and Punishment of Crimes against Internationally Protected
26 Persons, Including Diplomatic Agents, (1977) 1035 UNTS 167, art. 4; Convention on the Safety of
United Nations and Associated Personnel, (1999) 2051 UNTS 363, art. 11; International Convention
27 on the Suppression of Terrorist Bombings, (2001) 2149 UNTS 256, art. 15.

28 ¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*
(*Bosnia and Herzegovina v. Serbia and Montenegro*), *Judgment*, I.C.J. Reports 2007, p. 43, para.
429.

1 permitted by international law; seen thus, a State's capacity to influence may vary
2 depending on its particular legal position vis-à-vis the situations and persons facing the
3 danger, or the reality, of genocide.¹⁵

4 24. I draw attention to the phrases 'likely to commit' and 'the danger ... of genocide'. These dictate
5 action to prevent genocide before it has been committed. Indeed, it would be quite illogical to
6 contend that there is only an obligation to prevent genocide after it has been committed.

7 25. Indeed, this is precisely what the International Court of Justice said in the *Bosnia v. Serbia*
8 case: '[A] State's obligation to prevent, and the corresponding duty to act, arise at the instant
9 that the State learns of, or should normally have learned of, the existence of a serious risk that
10 genocide will be committed. From that moment onwards, if the State has available to it means
11 likely to have a deterrent effect on those suspected of preparing genocide, or reasonably
12 suspected of harbouring specific intent (*dolus specialis*), it is under a duty to make such use of
13 these means as the circumstances permit.'¹⁶

14 26. In my opinion, the United States of America's relationship to Israel has many parallels with
15 that between Serbia and the Bosnian Serb forces at the time of the Srebrenica massacre in 1995.
16 The Bosnian Serb forces were very dependent upon weaponry and other logistical support from
17 Serbia, and there were strong political and economic ties. There has been a close relationship
18 between the United States of America and Israel for many decades, manifested in high levels
19 of development assistance, supply of weaponry and sharing of military technology and
20 intelligence.

21 27. In assessing Serbia's failure to prevent genocide, the Court noted its 'undeniable influence'
22 over the Bosnian Serbs, and said its federal authorities should 'have made the best efforts
23 within their power to try and prevent the tragic events then taking shape, whose scale, though
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28 ¹⁵ *Ibid.*, para. 430.

¹⁶ *Ibid.*, para. 431.

1 it could not have been foreseen with certainty, might at least have been surmised'. It noted that
2 Serbia and its leaders 'were fully aware of the climate of deep-seated hatred which reigned
3 between the Bosnian Serbs and the Muslims in the Srebrenica region'. The Court recognized
4 that 'it has not been shown that the decision to eliminate physically the whole of the adult male
5 population of the Muslim community of Srebrenica was brought to the attention of the
6 Belgrade authorities'. Nevertheless, 'given all the international concern about what looked
7 likely to happen at Srebrenica' and the fact that 'the dangers were known and that these dangers
8 seemed to be of an order that could suggest intent to commit genocide, unless brought under
9 control, it must have been clear that there was a serious risk of genocide in Srebrenica'.¹⁷

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11 28. I note that the Court did not require Serbia to make a definitive determination that genocide
12 was actually taking place or that it had taken place. I draw attention to the Court's observation
13 that the 'dangers were known' and 'seemed to be of an order that could suggest intent to commit
14 genocide, unless brought under control'. Nor is it necessary, for the purposes of this opinion,
15 to reach such a conclusion. For the duty to prevent genocide to arise it is sufficient that there
16 be a serious risk the crime will be committed.

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18 29. This is the position of the United States of America, formulated in a Declaration that was
19 submitted to the International Court of Justice in the ongoing proceedings between Ukraine
20 and the Russian Federation based upon the Genocide Convention. There, the United States
21 referred to its 'long history of supporting efforts to prevent and punish genocide'. The United
22 States cited the *Bosnia v. Serbia* judgment of the International Court of Justice, noting that 'the
23 Court has interpreted Article I [of the 1948 Convention], in particular its undertaking to prevent
24 genocide, to create obligations distinct from those that appear in the subsequent articles of the
25 Convention, which primarily address the punishment of genocide by individuals'. It went on
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28 ¹⁷ *Ibid.*, para. 438.

1 to refer to the same paragraphs in the judgment that I have cited in the preceding paragraphs
2 of this opinion. The Declaration reproduced the following phrase, italicizing the words ‘serious
3 risk’: ‘[A] State's obligation to prevent, and the corresponding duty to act, arise at the instant
4 that the State learns of, or should normally have learned of, the existence of a *serious risk* that
5 genocide will be committed.’¹⁸
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7 30. The Declaration was filed with the Court in accordance with article 63 of the Statute of the
8 International Court of Justice, accompanied by a covering letter from Secretary of State Antony
9 Blinken dated 29 August 2022. Article 63(2) of the Statute declares that if a State exercises its
10 right to intervene in proceedings, ‘the construction given by the judgment will be equally
11 binding upon it’. The Court has yet to rule on the merits of the *Ukraine v. Russia* case, and it
12 may make no pronouncement on the obligation to prevent genocide if it deems this to be
13 unnecessary. It is very unlikely that the Court will in any way reverse what it said in the 2007
14 judgment about the duty to prevent genocide. Regardless of the outcome of the *Ukraine v.*
15 *Russia* case, I consider that the Declaration of the United States is a unilateral act that has legal
16 effects, and that the United States is bound by the interpretation of the duty to intervene that it
17 set out, including its endorsement of the reasoning of the International Court of Justice.
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27 ¹⁸ *Ukraine v. Russian Federation*, Declaration of Intervention of the Government of the United
28 States of America pursuant to article 63 of the Statute of the International Court of Justice, 6
September 2022, para. 22.

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31. I conclude that there is a serious risk of genocide committed against the Palestinian population of Gaza and that the United States of America is in breach of its obligation, under both the 1948 Genocide Convention to which it is a party as well as customary international law, to use its position of influence with the Government of Israel and to take the best measures within its power to prevent the crime taking place.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on 9 November 2023 in Paris, France.



Prof. William A. Schabas OC MRIA