

INTERNATIONAL COURT OF JUSTICE

**ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE
PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE**

(UKRAINE V. RUSSIAN FEDERATION)

**WRITTEN STATEMENT OF OBSERVATIONS AND SUBMISSIONS ON THE
PRELIMINARY OBJECTIONS OF THE RUSSIAN FEDERATION**

SUBMITTED BY UKRAINE

3 February 2023

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CHAPTER 1: INTRODUCTION

1. Pursuant to this Court’s Order of 7 October 2022, Ukraine submits this Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation.

2. Ukraine has brought this case under the Convention on the Prevention and Punishment of the Crime of Genocide. In ratifying that landmark human rights treaty, the Russian Federation made a solemn undertaking to prevent and punish genocide. Yet instead of fulfilling that obligation in good faith, Russia has distorted and abused it. Ukraine’s Memorial demonstrated Russia’s cynical manipulation of the Genocide Convention. Genocide has long “occupie[d] a special place as ‘the crime of crimes’” under international law.¹ Since 2014, the Russian Federation has leveled against Ukraine and its officials the exceptionally serious accusation of genocide in violation of the Genocide Convention. Russia has made these allegations despite their utter falsity, and on the basis of no due diligence. In this regard, Ukraine and Russia have a long-standing dispute relating to the Genocide Convention: Russia has alleged since 2014 that Ukraine has been committing genocide in violation of the Convention; Ukraine strongly denies these allegations.

3. In February 2022, the Russian Federation escalated the situation. Relying on its baseless allegations, the Russian Federation took unilateral measures for the express purpose of stopping a genocide allegedly committed by Ukraine in Donbas. Russia recognized the purported independence of the Donetsk and Luhansk regions of Ukraine in reliance on these false allegations. Russia also commenced what it called a “special military

¹ William A. Schabas, *Introductory Note, Convention for the Prevention and Punishment of the Crime of Genocide*, United Nations Audiovisual Library of International Law (2008), p. 4, accessed at https://legal.un.org/avl/pdf/ha/cppcg/cppcg_e.pdf.

operation,” but what in fact was a full-scale invasion, perpetrated through brutality and criminality. Russia could not have been clearer as to the justification for, and purpose of, these actions. In the words of Russia’s president in a speech submitted to the U.N. Security Council, Russia “had to stop that atrocity, that genocide,” and its “purpose” was “to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime.”² Thus, an existing dispute related to allegations of a State’s responsibility for genocide under the Genocide Convention crystallized into a dispute relating to an unprecedented misuse and abuse of that Convention, amounting to a violation of the Convention’s core tenets.

4. When the Russian Federation ratified the Genocide Convention, it did more than commit to a good faith fulfilment of its terms. Russia consented to the jurisdiction of this Court over any dispute “relating to the interpretation, application or fulfilment of” the Convention, “including those relating to the responsibility of a State for genocide.” Article IX of the Convention is written expansively; for example, it reaches beyond matters of “interpretation or application” encompassed by many compromissory clauses, and adds a further basis for jurisdiction over disputes that relate to “fulfilment” of the Convention. The dispute that Ukraine has brought to the Court falls squarely within Article IX.

5. Nevertheless, Russia has now raised a series of preliminary objections in an attempt to evade its consent to the Court’s jurisdiction. Russia’s Preliminary Objections misstate the law, ignore the facts, and should be rejected by the Court. Under a proper interpretation of the Genocide Convention consistent with this Court’s well-established jurisprudence, as well as a review of the full evidentiary record put forward by Ukraine, the

² President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6); *Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/2022/154 (24 February 2022) (transmitting the speech to the U.N. Security Council).

Ukraine uses its own transliteration spellings of Ukrainian place names such as “Donbas” and “Kyiv.”

dispute before the Court relates to the interpretation, application, or fulfilment of the Genocide Convention. As such, this dispute is within the Court’s jurisdiction to resolve. Nor is there any basis for Russia’s admissibility objections, which in large part are merely re-packaged versions of Russia’s meritless jurisdictional objections.

A. The Russian Federation Attempts to Distract from Its Violations of the Genocide Convention.

6. In evaluating Russia’s Preliminary Objections, this Court should take special note of Russia’s allegations of abuse of process, which are not only specious, but indicative of Russia’s legally flawed approach more broadly. In submitting the parties’ dispute to this Court, Ukraine has done precisely what Article IX envisages. By filing its Application, requesting provisional measures, demanding reparation from Russia, and seeking relief from the principal judicial organ of the United Nations, Ukraine has reaffirmed its commitment to international law and the peaceful resolution of disputes. The Court’s exercise of its fundamental role within the United Nations system is all the more important where other parts of that system are immobilized.

7. As the Court noted in its Provisional Measures Order, “[t]he Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court.”³ Ukraine is equally mindful of the Court’s proper role, and the significant responsibility placed on the Court by the Contracting Parties to the Genocide Convention under its compromissory clause, encompassing all disputes related to the interpretation, application, or fulfilment of the Convention.

8. The Russian Federation, by contrast, defies international law and the authority of this Court. It does so not only through its flawed arguments seeking to narrow the Court’s

³ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, para. 18 [hereinafter Provisional Measures Order of 16 March 2022].*

jurisdiction under the Genocide Convention, but through its blatant, express rejection of the Court's Provisional Measures Order. Against this backdrop, it is remarkable that Russia devotes a considerable portion of its Preliminary Objections to accusing *Ukraine* of an "abuse of process."⁴ The Russian Federation's claim of "abuse" by Ukraine is emblematic of Russia's backwards view of international law. In Russia's conception, the Genocide Convention is not a shield to protect vulnerable peoples from the most heinous of crimes, but a sword to wield against a sovereign State, its democratically elected government, and its people.

9. In Russia's vision, it may repeatedly allege that a Contracting Party has violated the Genocide Convention without creating a dispute that relates to the Genocide Convention. According to Russia, nothing in the Genocide Convention restrains States from performing their obligations in bad faith and abusing their undertaking to prevent and punish genocide, in order to harm another party to the Convention. The only "abuse" that Russia is able to perceive is the peaceful act of filing an application with the International Court of Justice. Russia's willingness to advance such an argument is revealing as to the nature of its Preliminary Objections as a whole.

10. Indeed, even when not framed directly as an abuse of process, much of Russia's Preliminary Objections consist of flawed procedural critiques of Ukraine's manner of proceeding before this Court. For example, Russia claims that Ukraine has made "a remarkable substantial change" in its case, which supposedly "transformed its initial request to confirm that the Russian Federation's actions had no basis in the Genocide Convention into requests to establish the responsibility of the Russian Federation for allegedly violating

⁴ See Russia's Objections, Chapter V, Section D.

Articles I and IV of the Convention.”⁵ Yet the “remarkable substantial change” that Russia perceives does not exist. From the beginning of this case, the Court correctly understood Ukraine’s central claim: that “the Russian Federation has acted inconsistently with its obligations and duties, as set out in Articles I and IV of the Convention,” and that it had “a right under the Convention not to be harmed by the Russian Federation’s misuse and abuse of the Convention.”⁶

11. The Russian Federation’s lack of justification for its actions under the Genocide Convention, and its violation of the Genocide Convention through those actions, are simply two sides of the same coin — or, in this case, the same dispute. It is routine in this Court’s practice for a party to elaborate on and develop its claims and legal arguments in its Memorial, and that is what Ukraine has done. Ukraine has not transformed the dispute, much less committed an abuse of process.

B. The Russian Federation Distorts the Factual Background to this Dispute.

12. The Russian Federation also distorts the factual record in this dispute in Chapter II of its submission, which purports to present a lengthy “Factual Background” in order “to set the record straight.”⁷ In reality, Chapter II of Russia’s Preliminary Objections is a work of fiction.

13. Ukraine is prepared to address the facts in detail at the appropriate time — at the merits stage of this proceeding. It is well settled that, in order to determine its jurisdiction *ratione materiae* at the preliminary objections phase, the Court assesses whether the dispute is capable of falling within the provisions of the treaty in question, on the basis of the facts *alleged by the Applicant*.⁸ At the merits phase, Russia will have an opportunity to try to persuade the Court that its alternative narrative should be accepted. What is relevant now

⁵ *Ibid.*, para. 72; *see also ibid.*, Chapter V, Section A.

⁶ Provisional Measures Order of 16 March 2022, paras. 52, 54.

⁷ Russia’s Objections, para. 5.

⁸ *See infra* Chapter 3, Section B.

are the facts as Ukraine has alleged them. For that reason, Ukraine will not respond in detail to Russia’s narrative, which, for the avoidance of doubt, Ukraine rejects in all respects. Ukraine will, however, offer three brief observations on the Russian Federation’s presentation.

14. *First*, Ukraine invites the Court to compare the sources upon which each party has relied in presenting the factual background to this case. In its Memorial, Ukraine’s presentation of the facts is based principally on impartial reports of international organizations, including the U.N. Office of the High Commissioner for Human Rights and the Organization for Security and Co-operation in Europe (“OSCE”).⁹ Russia, by contrast, principally cites press reports, and, in particular the organizations TASS and Russia Today, which are owned by the Russian government.¹⁰ This difference in approach is a strong indication as to which party is presenting the facts, and which is presenting propaganda.

15. *Second*, the Russian Federation presents an alternate reality where the victim, not the perpetrator, is responsible for suffering invasion and atrocity. In accusing Ukraine of starting a “civil war” on its own territory in 2014, for example, Russia ignores what U.N. human rights monitors found to be a “reign of intimidation and terror” perpetrated by illegal armed groups on Ukrainian territory, as well as the Russian Federation’s own well-documented role in fueling that conflict.¹¹ Russia applies the same approach to the consequences of its February 2022 invasion. In one egregious example, Russia accuses the Ukrainian armed forces of shelling Ukrainian civilians at the Kramatorsk train station on

⁹ See, e.g., Ukraine’s Memorial, paras. 27–30, 52–54, 66–68 and accompanying notes.

¹⁰ See, e.g., Russia’s Objections, paras. 23, 56 and accompanying notes.

¹¹ See OHCHR, *Report on the Human Rights Situation in Ukraine* (15 July 2014), para. 26, accessed at https://www.ohchr.org/sites/default/files/Documents/Countries/UA/Ukraine_Report_15July2014.pdf.

8 April 2022 — citing only a statement of Russia’s own Ministry of Defense.¹² Impartial observers, by contrast, including the OSCE, have rejected Russia’s attempt to shift responsibility, finding not only that Russia was responsible, but that “[b]ased on the collected evidence, it is reasonable to believe that the Russian Federation deliberately attacked civilians seeking safety at Kramatorsk train station.”¹³

16. *Third*, Russia also applies its tactic of distorting the facts to matters more relevant to its Preliminary Objections, *i.e.*, the existence of a dispute relating to the Genocide Convention. The Russian Federation selectively quotes the speeches by President Putin of 21 and 24 February 2022, including the absurd remark that “Russia has done everything to preserve Ukraine’s territorial integrity.”¹⁴ In doing so, however, Russia omits the part of President Putin’s 21 February speech claiming that 4 million people in Ukraine were facing a “genocide.”¹⁵ Likewise, Russia’s presentation of President Putin’s 24 February speech simply ignores his justification of the use of force based on a “genocide perpetrated by the Kyiv regime” and the need to “stop that atrocity, that genocide of the millions of people who live

¹² Russia’s Objections, para. 55.

¹³ OSCE & ODIHR, *Interim Report on Reported Violations of International Humanitarian Law and International Human Rights Law in Ukraine* (20 July 2022), para. 46 [hereinafter OSCE Interim Report], accessed at https://www.osce.org/files/f/documents/c/d/523081_o.pdf; see also Pierre Vaux, Benjamin Strick, and Benjamin Den Braber, *Verification of a Bombing: Kramatorsk, Ukraine*, Centre for Information Resilience (October 2022), pp. 3–4, accessed at <https://www.info-res.org/post/verification-of-a-bombing-kramatorsk-ukraine>. The attack on the Kramatorsk train station was carried out using Tochka-U missiles with cluster munitions. The OSCE concluded that, “[c]ontrary to the claims by the Russian Federation, there is substantial evidence indicating that its armed forces have been using Tochka-U systems during the current conflict.” OSCE Interim Report, para. 44.

¹⁴ Russia’s Objections, para. 39.

¹⁵ See *ibid.*, paras. 38–39.

there.”¹⁶ While Putin’s comments were false and absurd, they also are directly relevant to the existence of a dispute, and Russia’s failure to mention them is telling. In short, Russia mischaracterizes the reality of the situation — and the nature of Ukraine’s claims — in order to try to avoid accountability under the Genocide Convention.

C. Brief Procedural History and Structure of Ukraine’s Written Statement.

17. On 26 February 2022, two days after Russia commenced its full-scale invasion of Ukraine, Ukraine filed its Application Instituting Proceedings against the Russian Federation. That same day, Ukraine also requested that the Court indicate provisional measures. On 7 March 2022, the Court held a public hearing on Ukraine’s request for provisional measures. On 16 March 2022, the Court issued an order indicating provisional measures (the “Order” or “Provisional Measures Order”), finding on a *prima facie* basis that it had jurisdiction over the parties’ dispute and that Ukraine had invoked plausible rights under the Genocide Convention.¹⁷ The Court ordered as follows:

1. “The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine”;
2. “The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations”; and
3. “Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”¹⁸

¹⁶ See Russia’s Objections, paras. 44–45; President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6).

¹⁷ Provisional Measures Order of 16 March 2022, paras. 48, 64.

¹⁸ *Ibid.*, para. 86.

18. On 17 March 2022, the day after this Court issued its Provisional Measures Order, the spokesperson for the President of the Russian Federation announced that Russia “will not be able to take this decision into account.”¹⁹

19. On 23 March 2022, the Court issued an order fixing the time-limits for the submission of Ukraine’s Memorial and Russia’s Counter-Memorial. Ukraine filed its Memorial and accompanying annexes on 1 July 2022. The Russian Federation filed its Preliminary Objections on 3 October 2022.

20. On 7 October 2022, the Court issued an order fixing 3 February 2023 as the time-limit within which Ukraine may present a written statement of its observations and submissions on the preliminary objections raised by the Russian Federation. Pursuant to that order, Ukraine now respectfully presents its Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation, which is organized as follows:

21. **Chapter 2** addresses the Russian Federation’s first preliminary objection alleging that there is no dispute under the Genocide Convention. Contrary to Russia’s assertions, the evidence before this Court demonstrates that at the time of Ukraine’s Application to this Court, there existed a dispute between Ukraine and the Russian Federation relating to the interpretation, application, or fulfilment of the Genocide Convention.

22. **Chapter 3** addresses the Russian Federation’s second preliminary objection which asserts that the Court lacks jurisdiction *ratione materiae* over Ukraine’s claims. Russia’s objections raise interpretative issues that present merits questions not appropriately resolved at the preliminary objections stage of these proceedings. In any event, Ukraine has properly interpreted the Convention. A party that abuses its solemn undertaking to prevent

¹⁹ Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022), accessed at <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine/>.

and punish genocide, and takes measures in purported fulfilment of the Convention that are not within the limits of international law, violates the Genocide Convention.

23. **Chapter 4** sets out Ukraine's response to the Russian Federation's objections to the admissibility of Ukraine's claims. Contrary to Russia's admissibility objections, (1) the claims presented in Ukraine's Memorial fall within the subject-matter of the dispute presented in its Application, (2) a judgment from this Court upholding Ukraine's claims would have practical effect, (3) the Court may declare that there is no credible evidence that Ukraine has violated the Genocide Convention, and (4) Ukraine's Application is in not an abuse of process.

24. **Chapter 5** explains that the Court has jurisdiction over Ukraine's claim that the Russian Federation is responsible for violating the Court's binding Provisional Measures Order. Russia's submissions ask the Court to declare that it lacks jurisdiction over all of Ukraine's claims, which would include its claim regarding Russia's violations of provisional measures. Chapter 5 establishes — for the avoidance of doubt — that the Court has jurisdiction over Russia's violations of the Provisional Measures Order, either in conjunction with adjudicating the merits, or on the independent basis of its authority under Article 41 of the Statute.

25. Finally, Ukraine offers brief concluding observations and sets out its **Submissions**.

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26. The Russian Federation's violations of the Convention are far from academic, as the people of Ukraine continue to bear the consequences of Russia's brutal abuse, misuse, and violation of the Genocide Convention, as well as of Russia's continuing violation of this Court's Provisional Measures Order. Ukraine urges the Court to reject Russia's Preliminary Objections and promptly proceed to the merits, thereby contributing to the purposes of the U.N. Charter and advancing the peaceful settlement of this significant dispute between the parties.

CHAPTER 2: THERE IS A DISPUTE BETWEEN UKRAINE AND THE RUSSIAN FEDERATION RELATING TO THE GENOCIDE CONVENTION

27. Ukraine’s Memorial demonstrated that there exists a dispute between Ukraine and the Russian Federation relating to the interpretation, application, or fulfilment of the Genocide Convention. Specifically, Ukraine asks this Court to resolve a dispute relating to Russia’s allegations that Ukraine is committing genocide in violation of the Genocide Convention and Russia’s reliance on these false allegations to take unilateral action in and against Ukraine beginning in February 2022.²⁰

28. In its first preliminary objection, the Russian Federation contends that there is no dispute between the parties relating to the Genocide Convention.²¹ Russia claims that Ukraine has failed to submit sufficient evidence establishing the existence of such a dispute at the time Ukraine filed its Application.²² In the alternative, Russia argues that, to the extent there exists a dispute between the parties, that dispute concerns issues that are manifestly outside the Convention’s scope.²³

29. As Ukraine demonstrates in this Chapter, the Russian Federation’s objection is unsustainable. Russia both misrepresents Ukraine’s claims and inappropriately discounts the relevance of the evidence Ukraine has presented demonstrating the existence of a dispute. Section A of this Chapter addresses Russia’s unfounded attempt to impose a new, more burdensome test for establishing the existence of a dispute, inconsistent with the Court’s well-established jurisprudence. Section B demonstrates that a dispute existed at the time Ukraine

²⁰ Ukraine’s Memorial, para. 149.

²¹ Russia’s Objections, Chapter III.

²² See generally *ibid.*, Chapter III, Sections A–C.

²³ *Ibid.*, Chapter III, Section D.

filed its Application, and that the two sides held opposing positions regarding the subject-matter of this dispute. Finally, Section C addresses Russia’s incorrect and unilateral attempt to reframe the dispute that Ukraine has brought to the Court.

30. The Court examined much of the evidence relevant to the Russian Federation’s first preliminary objection when it indicated provisional measures, finding “prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.”²⁴ The Court can now definitively conclude that a dispute exists within the scope of Article IX of the Convention.

A. The Russian Federation Applies the Wrong Test to Determine Whether a Dispute Existed Between the Parties Under the Genocide Convention at the Time of Ukraine’s Application.

31. The standards the Court applies when determining the existence of a dispute are well established. In its first preliminary objection, however, the Russian Federation asks the Court to effectively disregard these standards and require a level of specificity in the parties’ exchanges that is wholly unsupported by the Court’s jurisprudence.²⁵ Specifically, the Russian Federation maintains that Ukraine “must demonstrate that a dispute existed *with respect to each of the claims as formulated in the Memorial* at the time of the filing of the Application” — which according to Russia, Ukraine has failed to do.²⁶ Further, Russia asserts — without support — that the Court’s jurisprudence requires the evidence of a dispute to be “specific enough and made in such a manner that the Parties were aware, or could not have been unaware, that they hold positively opposed views *with respect to the specific*

²⁴ Provisional Measures Order of 16 March 2022, para. 47.

²⁵ See Russia’s Objections, para. 61–62.

²⁶ *Ibid.*, para. 72 (emphasis added); see also *ibid.*, para. 63 (“Ukraine must demonstrate that the claims it has put before the Court on the basis of the Convention had been positively opposed by the Russian Federation before these proceedings were instituted.”).

obligations under the Convention, which are the subject-matter of Ukraine's claim."²⁷ In short, according to Russia, the existence of a dispute under a particular treaty would require an applicant to fully set out its legal and factual claims under that treaty, and to share them with the respondent before it seizes the Court.

32. By attempting to impose this novel test on Ukraine, the Russian Federation asks the Court to depart from its recent judgment in *The Gambia v. Myanmar*.²⁸ In that case, also brought under the Genocide Convention, Myanmar contested the existence of a dispute on the basis that statements made prior to The Gambia's application "did not specifically articulate its legal claims."²⁹ Like Russia does now, Myanmar argued that the existence of a dispute required "the prospective respondent State to be made aware of the facts said to amount to a breach of international law, as well as of the provisions of international law said to have been thereby breached."³⁰ Rejecting that argument, the Court explained that it "does not consider that a specific reference to a treaty or to its provisions is required in this regard."³¹ The Court reiterated that "it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court," and that States may instead "refer to the subject-matter of the treaty with

²⁷ *Ibid.*, para. 65 (emphasis added).

²⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections*, Judgment of 22 July 2022, paras. 72–77.

²⁹ *Ibid.*, para. 70; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections of Myanmar (20 January 2021)*, paras. 530–531, 538–540, 552.

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections of Myanmar (20 January 2021)*, para. 531.

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections*, Judgment of 22 July 2022, para. 72; see also *Provisional Measures Order of 16 March 2022*, para. 44.

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.”³²

33. The Court’s decision in *The Gambia v. Myanmar* is consistent with the well-established principle that “it is for the Court to determine, taking account of the parties’ submissions, the subject-matter of the dispute of which it is seised.”³³ If no dispute could be brought to this Court without prior articulation of detailed factual claims and specific reference to individual provisions of a treaty, arguably there would not be any reason for the Court to inquire into the subject-matter of the dispute: its subject-matter would be clear. Further, if Russia were correct that a party’s detailed legal and factual claims need to have been explicitly specified in advance of seizing the Court, the Court would have found no dispute in a number of cases where the Court has in fact exercised jurisdiction. To take just

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, para. 72 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 85, para. 30); see also Provisional Measures Order of 16 March 2022, para. 44.

Russia relies on *Marshall Islands v. United Kingdom* and *Questions Relating to the Obligation to Prosecute or Extradite* to support its position, but those cases are not helpful to Russia. See *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 853, para. 49 (finding that a single statement made in a multilateral forum in hortatory terms had not referred to the subject-matter of a claim with sufficient clarity to enable the United Kingdom, in that case, to identify that there was a dispute with regard to that subject-matter); *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, pp. 444–445, para. 54 (finding that though Belgium had set out clearly the dispute between the parties relating to the interpretation or application of the Convention against Torture, it had not set out any dispute relating to Senegal’s obligations to prosecute the alleged crimes under customary international law and therefore the subject-matter and scope of the dispute did not extend to this specific obligation under customary international law).

³³ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 52 (citing *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447–449, paras. 29–32).

one example, in *Oil Platforms*, there was no suggestion that Iran had earlier invoked the Treaty of Amity, much less its specific provisions, prior to seizing the Court.³⁴

34. In this case, the subject-matter of the dispute is genocide and the appropriate measures to be taken to prevent and punish genocide. As discussed below, Ukraine has shown that, since 2014, the Russian Federation has accused Ukraine and its officials of committing genocide in Donbas in violation of the Genocide Convention and that, in February 2022, on the explicit basis of bringing this alleged genocide to an end, Russia took unilateral action in and against Ukraine. By the time of its Application, Ukraine had rejected Russia's allegations of genocide, as well as Russia's reliance on these allegations to recognize the so-called "Donetsk People's Republic" ("DPR") and "Luhansk People's Republic" ("LPR") and to invade Ukraine.

35. Russia wrongly asserts that Ukraine has "transformed its initial request to confirm that the Russian Federation's actions had no basis in the Genocide Convention into requests to establish the responsibility of the Russian Federation for allegedly violating Articles I and IV of the Convention."³⁵ There has been no such transformation. Ukraine's Memorial clarifies and elaborates upon the claims Ukraine made in its Application, in which it maintained that Russia's actions are "incompatible with the Genocide Convention and violate[] Ukraine's rights."³⁶ Ukraine's development of this claim in its Memorial is permitted

³⁴ Iran and the United States had no diplomatic relations at the time the dispute arose, and Iran's application referred only to a meeting between civil servants during which the Iranian representative requested payment of damages, with no mention of the Treaty of Amity. See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 809–810, para. 16; see also *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Iran's Application Instituting Proceedings (2 November 1992), pp. 5–6.

³⁵ Russia's Objections, para. 72.

³⁶ Ukraine's Application Instituting Proceedings, para. 29.

by the Court's Rules and jurisprudence (as discussed in more detail in Chapter 4, with respect to Russia's admissibility objection making the same argument).³⁷ Whether Russia's actions are justified under the Genocide Convention, and whether Russia has violated the Genocide Convention by those actions, are simply two sides of the same coin and constitute the same dispute.³⁸

B. The Evidence Before the Court Demonstrates that a Dispute Between Ukraine and the Russian Federation Relating to the Genocide Convention Existed at the Time of Ukraine's Application.

36. In its Memorial, Ukraine presented ample evidence of the parties' dispute. Ukraine has shown that, since 2014, the Russian Federation has alleged that Ukraine and its officials are committing genocide in the Donbas region of eastern Ukraine, and Russia has stated that this purported genocide violates the Genocide Convention.³⁹ On the asserted basis of bringing this alleged genocide to an end, in February 2022, Russia recognized the "independence" of the DPR and LPR and shortly thereafter commenced a large-scale military invasion of Ukraine. Through both words and actions, Ukraine has contested Russia's allegations of genocide and rejected Russia's reliance on allegations of genocide as grounds for Russia's February 2022 actions in and against Ukraine. Conversely, by taking unilateral action on the explicit basis of bringing an alleged genocide to an end, Russia also has demonstrated through its conduct that it had a dispute with Ukraine relating to Ukraine's interpretation, application, or fulfilment of the Genocide Convention.

37. The Russian Federation asks this Court to disregard the evidence and instead to conclude that there existed no such dispute between the parties. This strains credulity. The evidence before the Court confirms that Russia has accused Ukraine and its officials of committing genocide in violation of the Genocide Convention and has seized upon these allegations as a pretext for unilateral action in and against Ukraine. The evidence also

³⁷ See *infra* Chapter 4, Section A.

³⁸ See *infra* Chapter 4, Section A; *supra* Chapter 1, Section A.

³⁹ Ukraine's Memorial, paras. 34–51.

confirms that by the time of its Application, Ukraine had rejected Russia’s allegations of genocide as well as Russia’s reliance on those allegations to recognize the DPR and LPR and to invade Ukraine on 24 February 2022. In these circumstances, there existed a divergence of views between the parties relating to the interpretation, application, or fulfilment of the Genocide Convention.

1. The Russian Federation Has Accused Ukraine of Committing Genocide in Violation of the Genocide Convention, and It Has Used These Allegations to Justify Its Unilateral Action in and Against Ukraine.

38. The evidentiary record reflects that the Russian Federation has repeatedly accused Ukraine and its officials of responsibility for an alleged genocide committed on Ukraine’s own territory in violation of the Genocide Convention — an accusation on which Russia expressly relied in February 2022 to justify its recognition of the DPR and LPR and its large-scale invasion of Ukraine. In its Memorial, Ukraine recalled, among other examples, that:

- Beginning in 2014, the Investigative Committee of the Russian Federation (the “Investigative Committee”) has pursued criminal proceedings against high-ranking Ukrainian officials based on alleged acts of genocide against the Russian-speaking population of the Donbas region of Ukraine, and has repeatedly alleged that Ukrainian officials have committed crimes under the Genocide Convention.⁴⁰
- In the lead-up to Russia’s invasion of Ukraine on 24 February 2022, high-ranking Russian officials intensified their allegations, asserting, for example, that “Kyiv’s actions . . . actually fall under the UN Convention On the Prevention of Genocide.”⁴¹
- On 21 February 2022, Russian President Vladimir Putin recognized the “independence” of the DPR and LPR on the basis that the people living in this

⁴⁰ See *ibid.*, paras. 36–37; see also Provisional Measures Order of 16 March 2022, para. 37.

⁴¹ See Ukraine’s Memorial, para. 38.

region were victims of genocide.⁴² President Putin later reiterated that “the main motivating force behind our decision to recognise the independence of the Donbas people’s republics” was the “feelings and pain of these people” in Donbas who have suffered “genocide.”⁴³

- On 24 February 2022, President Putin announced a so-called “special military operation” against Ukraine, explaining that “[t]he purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime.”⁴⁴

39. President Putin’s statements leave no doubt as to the purpose of Russia’s recognition of the DPR and LPR and Russia’s so-called “special military operation.” The existence of an alleged genocide in Donbas was the expressly claimed reason for the invasion of Ukraine in February 2022. President Putin’s statements confirmed that “for eight years” there had been a dispute between the parties relating to Russia’s allegations that “the Kyiv regime” committed genocide, a dispute that Russia then took unilateral action to address in February 2022.

40. The Russian Federation does not and cannot challenge the fact that it made these repeated and grave accusations of genocide against Ukraine. Instead, Russia seeks to undermine the relevance of its statements — or it simply ignores them. *First*, Russia argues that it “has not invoked Ukraine’s responsibility under the Convention,”⁴⁵ and further claims that, in any event, the use of the word genocide does not necessarily refer to the Genocide

⁴² *Ibid.*, para. 40.

⁴³ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6); see also Ukraine’s Memorial, para. 41.

⁴⁴ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6); see also Ukraine’s Memorial, paras. 42–43.

⁴⁵ Russia’s Objections, para. 95.

Convention.⁴⁶ *Second*, Russia claims that Ukraine relies on “statements that do not represent the position of [the] State on the international level.”⁴⁷ *Third*, Russia attempts to advance its objection through omission: Russia all but ignores the statements of President Putin and other high-ranking Russian officials expressly justifying Russia’s unilateral February 2022 actions in and against Ukraine on the basis of bringing an alleged genocide to an end.⁴⁸ In short, Russia asks the Court to ignore the express claims of its leaders and State organs and conclude that Russia’s actions have nothing to do with genocide or the Genocide Convention. Such arguments should be rejected.

i. Express Invocation of State Responsibility, or of the Name of the Treaty, Are Not Required for a Dispute to Exist, But in Any Event Both Are Present.

41. The Russian Federation asks this Court to disregard all evidence of its allegations that Ukraine is committing genocide in violation of the Genocide Convention on the basis that Russia never formally “invoked” Ukraine’s responsibility under the Convention.⁴⁹ Specifically, Russia asserts that “Ukraine has produced no evidence showing that the Russian Federation has taken the necessary steps to invoke Ukraine’s responsibility for the breach of the obligations under the Convention.”⁵⁰ Relying on the International Law

⁴⁶ *Ibid.*, para. 104.

⁴⁷ *See ibid.*, para. 108.

⁴⁸ *See generally ibid.*, Chapter III.

⁴⁹ *Ibid.*, para. 95; *see also ibid.*, paras. 96–97, 106. The Investigative Committee did in fact allege that Ukrainian officials were violating the Genocide Convention, beginning in 2014. *See* Ukraine’s Memorial, paras. 35–36. Russia appears not to directly advance its “invocation” argument with respect to the statements of the Investigative Committee. *See* Russia’s Objections, para. 106, n.149. Instead, Russia claims that the Investigative Committee’s statements “do not represent the position of [the] State on the international level” or are concerned with a “national investigation of the crime of genocide.” *Ibid.*, paras. 108–112. Those arguments also should be rejected and are discussed below. *See infra* Chapter 2, Section (B)(1)(i).

⁵⁰ *See, e.g.*, Russia’s Objections, para. 95.

Commission’s Articles on Responsibility of States for Internationally Wrongful Acts (“ILC Articles on State Responsibility”), Russia argues that “invocation” of responsibility must be done through “measures of a relatively formal character,”⁵¹ and that “an injured State which wishes to invoke the responsibility of another State [must] give notice of its claim to that State.”⁵²

42. Here again, Russia’s position is inconsistent with this Court’s jurisprudence. In *Marshall Islands*, the United Kingdom relied on Article 43 of the ILC Articles on State Responsibility to contend that “a State intending to invoke the responsibility of another State must give notice of its claim to that State, such notice being a condition of the existence of a dispute.”⁵³ The Court disagreed, reiterating that the existence of a dispute is a matter of “substance,” and observing that the commentaries to the ILC Articles on State Responsibility specify that the articles “are not concerned with questions of the jurisdiction of international courts and tribunals, or in general with the conditions for the admissibility of cases brought before such courts or tribunals.”⁵⁴

43. Yet even if the Court were to consider the framework for invocation of State responsibility as reflected in the ILC Articles on State Responsibility, Russia has invoked

⁵¹ *Ibid.*, para. 96 (quoting ILC Report of the International Law Commission on the Work of Its Fifty-Third Session, *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, 53rd Session, U.N. Doc. No. A/56/10 (23 April–1 June, 2 July–10 August 2001), art. 42, p. 117, para. 2 [hereinafter ILC Commentaries on Draft Articles on State Responsibility]).

⁵² *Ibid.*, para. 97 (quoting ILC Commentaries on Draft Articles on State Responsibility, art. 43, p. 119, para. 3).

⁵³ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 846, para. 27.

⁵⁴ *Ibid.*, para. 45 (citing ILC Commentaries on Draft Articles on State Responsibility, art. 44, p. 120, para. 1).

Ukraine's responsibility for alleged violations of the Genocide Convention. The commentaries explain that invocation consists not only of making an allegation, but also of "taking measures" in response, and offer a non-exclusive set of examples of "specific actions" that could constitute invocation of responsibility.⁵⁵ In this case, Russia has not merely advanced allegations that Ukraine violated the Genocide Convention, but has taken measures against Ukraine on the basis of that allegation: recognizing the DPR and LPR, and using force in and against Ukraine.

44. The Russian Federation next asserts that the "use of the word *genocide* by no means automatically implies expression of a position regarding *the performance or non-performance of international obligations under the Convention*."⁵⁶ In short, Russia suggests that when it alleged "genocide," it did not mean "genocide" under the international treaty that defines and addresses genocide.⁵⁷ But, as noted above, the existence of a dispute does not turn on whether a State has referred expressly to a specific treaty.⁵⁸ It is sufficient that there is a reference "to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to ascertain that there is, or may be, a dispute with regard to that subject-matter."⁵⁹ The Russian Federation's allegations of genocide against Ukraine and

⁵⁵ See ILC Commentaries on Draft Articles on State Responsibility, art. 42, p. 117, para. 2.

⁵⁶ Russia's Objections, para. 104 (emphasis in original).

⁵⁷ See Florian Jeßberger, *The Definition of Genocide*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* (Paola Gaeta, ed., Oxford University Press 2009), p. 88 ("Today, the definition [of genocide] contained in Article II of the [Genocide] Convention is widely accepted and generally recognized as the authoritative definition of the crime of genocide.") (Ukraine's Memorial, Annex 25).

⁵⁸ See *supra* Chapter 2, Section A.

⁵⁹ Provisional Measures Order of 16 March 2022, para. 44 (citing *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 85, para. 30).

its officials unquestionably fall within the subject-matter of the Genocide Convention: genocide, and the prevention and punishment thereof.

45. Further, and in any event, the Russian Federation’s argument is directly refuted by the statements of its State organs and high-ranking officials that have repeatedly, and expressly, made clear that its allegations fall under the Genocide Convention.⁶⁰ For example, the Investigative Committee explicitly alleged that Ukrainian officials are committing genocide “in violation of the 1948 Convention ‘On the Prevention and Punishment of the Crime of Genocide,’” in the regions of Donetsk and Luhansk.⁶¹ Nowhere in its Preliminary Objections does Russia even attempt to address why the Investigative Committee’s explicit claims that Ukrainian officials violated the Genocide Convention do not constitute evidence of the parties’ dispute under that Convention.⁶²

46. High-ranking Russian officials also claimed that Ukraine’s actions violate the Genocide Convention. For example, just a few months before Russia’s large-scale invasion of Ukraine, a Russian diplomat responsible for the Contact Group on Settling the Situation in Eastern Ukraine expressly claimed that a decree by President Putin supporting the DPR and LPR was a “forced response to Kyiv’s actions, which are aimed at escalating the conflict and actually fall under the UN Convention On the Prevention of Genocide.”⁶³ Similarly, shortly

⁶⁰ See *supra* Chapter 2, Section B(1); see also Ukraine’s Memorial, paras. 36–38.

⁶¹ Investigative Committee of the Russian Federation, *The Investigative Committee Opened a Criminal Investigation Concerning the Genocide of the Russian-Speaking Population in the South-East of Ukraine* (29 September 2014) (Ukraine’s Memorial, Annex 9); see generally Ukraine’s Memorial, paras. 35–37.

⁶² Ukraine addresses the Russian Federation’s claims that the Investigative Committee does not represent Russia at the “international level” or are concerned with a “national investigation of the crime of genocide” below at Chapter 2, Section (B)(1)(i). See Russia’s Objections, para. 108.

⁶³ RIA Novosti, *Gryzlov Called Putin’s Decree on Donbas a Response to Kyiv’s Actions* (18 November 2021) (Ukraine’s Memorial, Annex 35); see also TASS, *Putin’s Decree on Donbas is Response to Kyiv’s*

after the February 2022 invasion commenced, the Russian Ambassador to the European Union defended President Putin’s reliance on genocide by referring to “the official term of genocide as coined in international law,” asserting that “[i]f you read the definition, it fits pretty well.”⁶⁴

47. Finally, the Russian Federation asserts that its past statements did not “refer[] specifically to Ukraine’s State responsibility for commission of genocide,” whereas Ukraine’s claims purportedly “excluded” matters such as “individual criminal responsibility for genocide or State responsibility for failing to prevent and punish genocide.”⁶⁵ Russia mischaracterizes Ukraine’s claims, which do assert that Russia has accused Ukraine *and its officials* of committing genocide in violation of the Genocide Convention.⁶⁶ Russia also mischaracterizes its own statements, which unequivocally accuse Ukraine itself of responsibility under the Genocide Convention. For example, as noted above, a high-ranking official referenced the actions of “Kyiv” — a reference to the Ukrainian government, not any individual — as actions that “fall under” the Convention.⁶⁷

Refusal to Honor Minsk Accords – Envoy (18 November 2021), accessed at <https://tass.com/politics/1363441>.

⁶⁴ Georgi Gotev, *Russian Ambassador Chizhov: Nord Stream 2 Is Not Dead, It’s a Sleeping Beauty*, EURACTIV (25 February 2022), accessed at <https://www.euractiv.com/section/global-europe/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/>.

Whether or not there is an alternative definition of “genocide” under domestic or international law, that is irrelevant in the present dispute, where Russia’s allegations have often been specifically grounded in the Convention.

⁶⁵ Russia’s Objections, para. 107.

⁶⁶ See generally Ukraine’s Memorial, paras. 34–46.

⁶⁷ See, e.g., RIA Novosti, *Gryzlov Called Putin’s Decree on Donbas a Response to Kyiv’s Actions* (18 November 2021) (18 November 2021) (Ukraine’s Memorial, Annex 35); see also TASS, *Putin’s Decree on Donbas is Response to Kyiv’s Refusal to Honor Minsk Accords – Envoy* (18 November 2021), accessed at <https://tass.com/politics/1363441>.

48. Russia's argument also ignores the fact that allegations that Ukrainian officials are committing genocide *are* allegations that Ukraine is responsible for committing genocide. The Investigative Committee, for example, alleged that "persons from among the top political and military leadership of Ukraine,"⁶⁸ including two consecutive Ministers of Defense, violated the Genocide Convention.⁶⁹ Under established principles of State responsibility, the actions of these officials are attributable to Ukraine as a State.⁷⁰ As the Court has observed, where a State's officials commit genocide, the State is responsible for genocide under the Convention.⁷¹ Having directly accused Ukraine's officials, including its Ministers of Defense, of committing genocide in violation of the Genocide Convention, Russia cannot credibly insist

⁶⁸ Investigative Committee of the Russian Federation, *The Investigative Committee Opened a Criminal Investigation Concerning the Genocide of the Russian-Speaking Population in the South-East of Ukraine* (29 September 2014) (Ukraine's Memorial, Annex 9); see also Investigative Committee of the Russian Federation, *Kommersant: "Ukraine Has Been Compared to South Osetia"* (30 September 2014) (Ukraine's Memorial, Annex 10).

⁶⁹ Investigative Committee of the Russian Federation, *A Criminal Case Has Been Initiated Against a Number of High-Ranking Officials of the Armed Forces of Ukraine* (2 October 2014) (Ukraine's Memorial, Annex 11); Investigative Committee of the Russian Federation, *Criminal Proceedings Have Been Initiated Against High-Ranking Ukrainian Military Personnel, As Well as Against Oleg Lyashko, A Member of the Parliament* (10 September 2015) (Ukraine's Memorial, Annex 13).

⁷⁰ See U.N. General Assembly Resolution 56/83, U.N. Doc. A/RES/56/83, *Responsibility of States for Internationally Wrongful Acts* (12 December 2001), Annex, art. 4 ("The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.").

⁷¹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015*, p. 130, para. 449 (finding that, since the acts Serbia alleged constituted genocide were committed by the regular armed forces or police of Croatia, they would be sufficient to "engage Croatia's international responsibility . . . simply because they were carried out by one or more of its organs"); see also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 242, paras. 213–214 (noting that it is a "well-established rule of international law," reflected in Article 91 of Additional Protocol I to the Geneva Conventions, that "a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces," whether or not the individual soldiers and officers "acted contrary to the instructions given or exceeded their authority").

that it has never alleged that Ukraine is responsible for genocide under the Genocide Convention.

ii. The Russian Federation’s Allegations Against Ukraine Cannot Be Disregarded Because of Russia’s Assertion that Its Statements Do Not Represent the Position of the State “on the International Level.”

49. The Russian Federation also argues that “Ukraine attempts to use statements that do not represent the position of [the] State on the international level (because the authority to speak on behalf of the Russian Federation is not included in the relevant mandate of the speakers), are taken out of context or made in an informal setting.”⁷² Simply put, it is nonsensical to suggest that State organs and high-ranking officials can accuse another State and its officials of genocide without raising any issue “on the international level.”⁷³ An allegation of genocide against another State, particularly an allegation often made expressly in terms of violations of an international treaty, is an inherently international allegation.

50. The Russian Federation has cited no authority that suggests this Court should disregard numerous statements of Russian officials for purposes of establishing a dispute on the basis that the statements do not represent the State internationally. For example, in *Democratic Republic of Congo v. Rwanda*, relied upon by Russia, the Court considered whether Rwanda’s Minister of Justice had authority to withdraw Rwanda’s reservation to the Genocide Convention.⁷⁴ But that case is inapposite. The question of whether a particular official has authority to make binding international legal commitments for the State is wholly different from whether a particular statement is evidence that two States have opposing views

⁷² Russia’s Objections, para. 108.

⁷³ *See ibid.*

⁷⁴ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, p. 27, para. 46.*

on a matter.⁷⁵ In Ukraine’s case before the Court, numerous Russian officials and organs exercising governmental authority — up to and including the President of the Russian Federation — made allegations of genocide against Ukraine, and took action on the explicit basis of preventing and punishing such alleged genocide.

51. The Russian Federation develops its “international level” argument only with respect to the statements and conduct of its Investigative Committee.⁷⁶ Yet the Investigative Committee is a State organ of the Russian Federation that is supervised by its President.⁷⁷ Whatever authority the Investigative Committee may or may not have under domestic law to “represent the position of the Russian Federation at the international level,”⁷⁸ the Investigative Committee has, as a matter of fact, done precisely that. In addition to leveling allegations of an inherently international nature against Ukrainian officials, representatives of the Investigative Committee have, for example, attended formal negotiations between

⁷⁵ Russia is also not aided by *Georgia v. Russian Federation*, where the Court merely observed that, in considering the evidence of the parties’ dispute, it would pay “primary attention” to “statements made or endorsed by the Executives of the two Parties.” *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 87, para. 37. The Court did not suggest that no other statements could be relevant. On the contrary, as the Court reiterated in *The Gambia v. Myanmar*, in determining whether a dispute exists between Contracting P, “it takes into account in particular any statements or documents exchanged between the parties,” paying “special attention to ‘the author of the statement or document, their intended or actual addressee, and their content.’” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Preliminary Objections, Judgment of 22 July 2022*, para. 64 (citing to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, *Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 100, para. 63).

⁷⁶ See Russia’s Objections, paras. 108–114; *ibid.*, n.152.

⁷⁷ Investigative Committee of the Russian Federation, *The Federal Law of 28.12.2010 No 403-FZ “On the Investigative Committee of the Russian Federation” (Extract)*, accessed at https://en.sledcom.ru/Legal_information.

⁷⁸ Russia’s Objections, para. 110.

Ukraine and Russia.⁷⁹ Further, even as a matter of Russian law, the Investigative Committee is not envisioned as a purely domestic institution. Its domestic statute confers upon it the competency to interact with the authorities of foreign states and international organizations.⁸⁰

52. Russia's attempts to dismiss the Investigative Committee's statements on the basis that the Investigative Committee is "conducting a national investigation into the crime of genocide,"⁸¹ also make no sense. Ukraine does not rely on the mere fact of an investigation, but on the Investigative Committee's explicit assertion that high-ranking Ukrainian officials committed genocide in violation of the Genocide Convention.

53. Otherwise, the Russian Federation does little to clarify which statements of its officials it considers "informal" or "taken out of context,"⁸² but the facts speak for themselves. Ukraine has referred to statements by Russian State organs and high-ranking officials made in their official capacity in which these State organs and officials reference allegations of genocide against Ukraine.⁸³ Russia has no response, for example, regarding the statement by

⁷⁹ See Report on the Results of the First Round of Negotiations of the Delegation of Ukraine with the Russian Federation on the Meaning and Application of the International Convention for the Suppression of the Financing of Terrorism (28 February 2015) (Ukraine's Written Statement, Annex 2). Petr Andreevich Lytvynshko was Head of the Unit of International Cooperation of the Department of International and Legal Cooperation of the Investigative Committee of the Russian Federation at the time.

⁸⁰ Investigative Committee of the Russian Federation, The Federal Law of 28.12.2010 No 403-FZ "On the Investigative Committee of the Russian Federation" (Extract), art. 3, *accessed at* https://en.sledcom.ru/Legal_information ("The Investigative Committee within the powers interacts with competent authorities of foreign states, concludes agreements, cooperates with the international organizations according to international treaties and participates in development of international treaties of the Russian Federation in the established field of activity.").

⁸¹ Russia's Objections, para. 110.

⁸² See *ibid.*, para. 108.

⁸³ See *generally* Ukraine's Memorial, paras. 35–39.

Russia's international envoy to the Contact Group on Settling the Situation in Eastern Ukraine that "Kyiv's actions . . . actually fall under the UN Convention On the Prevention of Genocide."⁸⁴ By definition, Russia's appointed envoy responsible for settling the situation in Donbas has authority to speak for the State internationally in describing Russia's assessment of the situation in that region of eastern Ukraine.

54. All of the allegations made by the Russian Federation over eight years must also be viewed in light of their culmination in February 2022, when the Russian Federation recognized the DPR and LPR as independent and commenced a large-scale invasion of Ukraine for the stated purpose of bringing a genocide to an end. Given these specific actions, Russia's suggestion that prior allegations of genocide should be disregarded as informal, out of context, or not reflecting of the position of the Russian Federation, is simply untenable.

iii. The Statements of President Putin and Other High-Ranking Officials Expressly Relying on Genocide to Justify Russia's Actions Are Clear Evidence of the Parties' Dispute.

55. In the context of its first preliminary objection, Russia all but ignores the statements of its President. In a single footnote, Russia suggests that certain statements to which Ukraine refers — apparently including those of President Putin, though without mentioning these statements directly — do not refer to or invoke Ukraine's responsibility under the Convention.⁸⁵ Yet President Putin was plainly addressing the subject-matter of the Convention: genocide, and the prevention and punishment of genocide.⁸⁶

⁸⁴ RIA Novosti, *Gryzlov Called Putin's Decree on Donbas a Response to Kyiv's Actions* (18 November 2021) (Ukraine's Memorial, Annex 35); see also TASS, *Putin's Decree on Donbas is Response to Kyiv's Refusal to Honor Minsk Accords – Envoy* (18 November 2021), accessed at <https://tass.com/politics/1363441>.

⁸⁵ Russia's Objections, paras. 106–107, n.149.

⁸⁶ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, para. 72.

56. Further, the statements President Putin made were not made in the abstract, but were linked to the recognition of the DPR and LPR and to the invasion of Ukraine. In an address made on 21 February 2022, President Putin recognized the “independence” of the DPR and LPR, describing the situation in those regions as a “horror and genocide, which almost 4 million people are facing.”⁸⁷ Later, on 24 February 2022, President Putin explained that the “purpose” of Russia’s use of force in and against Ukraine was “to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime.”⁸⁸ President Putin stated that Russia “had to stop that atrocity, that genocide of the millions of people who live there,” adding that Russia “will seek to demilitarise and denazify Ukraine, as well as bring to trial those who perpetrated numerous bloody crimes against civilians, including against citizens of the Russian Federation.”⁸⁹

57. These statements show that the Russian Federation took unilateral action against another sovereign State on the stated basis of bringing to an end an alleged genocide. Russia confirmed this fact when it communicated President Putin’s statement of 24 February 2022 to the U.N. Security Council as the official justification for its actions.⁹⁰ As Ukraine noted in its Memorial, other Russian officials, including ambassadors, echoed President

⁸⁷ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 February 2022), accessed at <http://en.kremlin.ru/events/president/transcripts/statements/67828> (Ukraine’s Memorial, Annex 5).

⁸⁸ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6).

⁸⁹ *Ibid.*

⁹⁰ *Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/2022/154 (24 February 2022).

Putin's justification.⁹¹ It is not credible for Russia to suggest that Russia's express reliance on genocide to justify its actions had nothing to do with the Genocide Convention.

58. In the months since Ukraine's Application, the Russian Federation has continued to traffic in these lies. Russian officials, including President Putin himself, have continued to claim that Ukraine is committing genocide and to justify Russia's ongoing invasion of Ukraine on the purported basis of bringing this alleged genocide to an end.⁹² In the months since Ukraine filed its Memorial, Russian officials have repeated this rationale for Russia's actions. For example, on 21 December 2022, at a meeting of Russia's Defense Ministry Board 10 months after the invasion commenced, Russian Defense Minister Sergei Shoigu stated plainly, "[w]e are taking action to save the population from genocide and terrorism."⁹³ The Court should reject Russia's plea not to be bound by the repeated words of its most senior leaders.

2. Ukraine Rejected the Russian Federation's Allegations of Genocide as well as Russia's Reliance on Those Allegations to Take Unilateral Action in and Against Ukraine.

59. Ukraine demonstrated in its Memorial that, through its statements, Ukraine rejected Russia's claims of genocide and its unilateral actions to bring an end to that alleged genocide in Ukraine. Had Ukraine remained silent in the face of Russia's allegations, however, such silence would itself support the existence of a dispute between the parties relating to Ukraine's responsibility for genocide. This Court has consistently recognized that "the existence of a dispute may be inferred from the failure of a State to respond to a claim in

⁹¹ Ukraine's Memorial, paras. 44–45.

⁹² See *ibid.*, para. 46; *infra* Chapter 4, Section B.

⁹³ The Kremlin, *Vladimir Putin Spoke at an Expanded Meeting of the Board of the Defence Ministry, Which Was Held at the National Defence Control Centre (21 December 2022)* (Ukraine's Written Statement, Annex 8).

circumstances where a response is called for.”⁹⁴ Given the seriousness of an allegation of genocide, the failure of a State to respond to such an allegation would constitute evidence that the allegation is rejected and a dispute exists between the parties.⁹⁵

60. Such a conclusion is particularly warranted in relation to allegations of genocide under the Genocide Convention where, pursuant to Article I, a State has an *obligation* to take action to prevent and punish genocide that it is aware is occurring. Since Ukraine would have been obliged to act had there been merit in Russia’s allegations, failure to act to prevent and punish the alleged genocide in the Donbas region of Ukraine reflects Ukraine’s denial by conduct of the allegations against it. As the Court has previously stated, “[i]n the determination of the existence of a dispute, as in other matters, the position or the attitude of a party can be established by inference.”⁹⁶ Ukraine’s inaction thus would have provided sufficient evidence of the parties’ dispute relating to an alleged genocide in Donbas in contravention of the Genocide Convention.

61. Ukraine, however, did not remain silent. Ukraine’s State organs and officials denied the Russian Federation’s allegations of genocide and rejected Russia’s reliance on

⁹⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30; see also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

⁹⁵ This conclusion is supported by the only case on which Russia relies to object to the relevance of Ukraine’s conduct to the parties’ dispute. See Russia’s Objections, para. 113 (citing *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, Award, 29 September 2012, para. 223). In that case, the arbitral tribunal observed that “positive opposition” may be inferred in situations including, for example, “when a State remains silent when faced with a serious allegation of breach of its international obligations.” *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, Award, 29 September 2012, para. 223.

⁹⁶ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89.

these allegations as a basis for its actions in and against Ukraine in February 2022.⁹⁷ Nonetheless, Russia asks the Court to disregard Ukraine’s statements and conduct. Russia attempts to dismiss statements made by Ukrainian officials as the statements of “low-ranking officials,”⁹⁸ or as “imprecise” or “vague”⁹⁹ in their content. Russia also seeks to diminish the evidentiary value of Ukraine’s conduct in response to Russia’s unilateral actions in and against Ukraine to purportedly prevent and punish genocide. Lastly, Russia attempts to discredit the statement published by the Ministry of Foreign Affairs of Ukraine on 26 February 2022 “on Russia’s False and Offensive Allegations of Genocide as a Pretext for its Unlawful Military Aggression.”¹⁰⁰ As explained below, there is no sound basis to ignore Ukraine’s statements and conduct, which confirm the existence of a dispute prior to the filing of Ukraine’s Application.

i. Ukraine’s Statements and Conduct Confirm the Existence of a Dispute.

62. In its Memorial, Ukraine demonstrated that, through both its statements and conduct, Ukraine rejected the Russian Federation’s false allegations of genocide, as well as Russia’s reliance on those allegations as a pretext for its actions in and against Ukraine in February 2022.¹⁰¹ For example, Ukraine noted that:

⁹⁷ See Ukraine’s Memorial, paras. 47–51.

⁹⁸ Russia’s Objections, para. 99.

⁹⁹ *Ibid.*, para. 80.

¹⁰⁰ Ministry of Foreign Affairs of Ukraine, *Statement of the Ministry of Foreign Affairs of Ukraine on Russia’s False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression* (26 February 2022), accessed at <https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodonepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi>.

¹⁰¹ See Ukraine’s Memorial, paras. 47–51.

- Ukrainian officials denounced the allegations of genocide put forward by Russia’s Investigative Committee beginning in 2014. These statements included those of two advisers to the Ukrainian Minister of the Interior denouncing the actions of the Investigative Committee as “nonsense.”¹⁰² As one adviser remarked, it was a “thankless task” to comment on the “nonsense of the Investigative Committee of the Russian Federation,” “[e]specially when they use terms like genocide.”¹⁰³ It was also publicly reported that the Prosecutor General’s Office of Ukraine had stated that the Investigative Committee’s actions were “groundless.”¹⁰⁴
- Ukraine continued to reject Russia’s allegations of genocide as Russian officials intensified their rhetoric in the lead-up to Russia’s recognition of the DPR and LPR and its large-scale invasion in late February 2022.¹⁰⁵ For example, on 26 January 2022, the information agency of the Ukrainian Ministry of Defense published an article responding to Kremlin propaganda “myths” in which it stated “there is no evidence that Russian-speaking or ethnic Russians in eastern Ukraine are being persecuted, not to mention genocide, by the Ukrainian authorities.”¹⁰⁶
- Through its actions, Ukraine rejected the Russian Federation’s reliance on false allegations of genocide to recognize the DPR and LPR and to launch its large-scale military attack on Ukraine: Ukraine did not permit Russia to enter its

¹⁰² BBC News, *The Prosecutor General’s Office Opened Proceedings Against Russian Investigators* (30 September 2014) (Ukraine’s Memorial, Annex 31); Lyubov Chyzhova, *It is Putin Who Should be Tried for Genocide—Adviser to the Head of the Ministry of Internal Affairs of Ukraine*, RFE/RL (1 October 2014) (Ukraine’s Memorial, Annex 32).

¹⁰³ Lyubov Chyzhova, *It is Putin Who Should be Tried for Genocide—Adviser to the Head of the Ministry of Internal Affairs of Ukraine*, RFE/RL (1 October 2014) (Ukraine’s Memorial, Annex 32).

¹⁰⁴ BBC News, *Investigative Committee of Russia Accused the Military Leadership of Ukraine of “Genocide”* (2 October 2014) (Ukraine’s Memorial, Annex 33). As Ukraine explained in its Memorial, also at this time the Prosecutor General’s Office initiated its own criminal proceedings against Russian officials of the Investigative Committee. See Ukraine’s Memorial, para. 49 and accompanying sources.

¹⁰⁵ See Ukraine’s Memorial, para. 50.

¹⁰⁶ Ruslan Tkachuk, *Seven Myths of the Kremlin Propaganda About the Russian-Ukrainian Conflict*, ArmyINFORM (26 January 2022) (summarizing the research of EUvsDisinfo, a project of the European External Action Service’s East StratCom Task Force) (Ukraine’s Memorial, Annex 3). ArmyINFORM is the information agency of the Ukrainian Ministry of Defense. See ArmyINFORM, *About Us* (27 May 2019) (Ukraine’s Memorial, Annex 2).

territory for the stated purpose of halting genocide, but instead mounted a strong national defense.¹⁰⁷

63. The Russian Federation cannot reasonably contest the evidentiary relevance of Ukraine's statements and conduct to the existence of the parties' dispute. Instead, Russia attempts to dismiss statements made by Ukrainian officials as the statements of "low-ranking officials,"¹⁰⁸ or as "imprecise" or "vague"¹⁰⁹ in their content, and seeks to diminish the evidentiary value of Ukraine's conduct.¹¹⁰ Russia also asks the Court to attribute weight to the absence of any formal diplomatic correspondence in which Ukraine set out its "concerns regarding the Genocide Convention."¹¹¹ These arguments are unsustainable and should be rejected.

64. The Russian Federation first claims that it "could not have been expected to be aware" of statements by "low-ranking officials" that "do not have the authority to represent the view of a State at the international level."¹¹² But the statements to which Ukraine has referred — statements by Ukrainian officials and state agencies — are evidence of Ukraine's consistently held position, and many were publicized in independent news outlets, such as the BBC and Radio Free Europe.¹¹³ In any event, these statements are merely examples of Ukraine's rejection of the Russian Federation's false allegations of genocide. Additional examples are numerous and include the following:

¹⁰⁷ Ukraine's Memorial, para. 51.

¹⁰⁸ Russia's Objections, para. 99.

¹⁰⁹ *Ibid.*, para. 80; *see also ibid.*, para. 100.

¹¹⁰ *Ibid.*, paras. 113–114.

¹¹¹ *Ibid.*, paras. 76; *see also ibid.*, para. 98.

¹¹² *Ibid.*, para. 99.

¹¹³ *See* Ukraine's Memorial, paras. 47–49 and accompanying sources.

- In October 2014, then-President of Ukraine, Petro Poroshenko, “comment[ed] on the decision of the investigative bodies of the Russian Federation to open a criminal case against the military leadership of Ukraine for the alleged genocide of the Russian-speaking population of Donbas,” remarking, “I am sure that the blow to the Russian-speaking people was inflicted by the northern neighbor.”¹¹⁴
- At the same time, one of the officials accused by the Investigative Committee — the then-Minister of Defense, Mr. Valeriy Heletey — publicly rejected the Committee’s allegations, denouncing “the criminal case against [him] and [his] colleagues in Russia for ‘genocide of the Russia-speaking population’” as “a complete delusion.”¹¹⁵ Mr. Heletey added that only “Kremlin propagandists can accuse the Ukrainian army, which is 40% Russian-speaking, of hating other Russian-speakers.”¹¹⁶
- Later, in November 2015, following additional allegations of genocide by the Investigative Committee, the press secretary to Ukraine’s Presidential Administration on Anti-Terrorist Operational Issues explained that “the Russian side is fabricating data about Ukraine’s alleged genocide of the Russian-speaking population in Donbas.”¹¹⁷

65. For the Russian Federation to suggest it was not aware of Ukraine’s position with respect to its allegations of genocide is nonsensical.¹¹⁸ Russia accused Ukraine of committing one of the most heinous crimes under international law — the crime of genocide. This claim was consistently contested by Ukraine. And, as Ukraine has explained, even had

¹¹⁴ VGOLOS, *It Was Russia Who Dealt a Blow to the Russian-Speaking Population – Poroshenko* (11 October 2014) (Ukraine’s Written Statement, Annex 15); UNIAN, *Russian-Speaking Ukrainians Suffered the Most from the Actions of Russia – Poroshenko* (11 October 2014) (Ukraine’s Written Statement, Annex 14).

¹¹⁵ Facebook Post of Valeriy Heletey (Minister of Defense of Ukraine) (3 October 2014) (Ukraine’s Written Statement, Annex 1).

¹¹⁶ *Ibid.*

¹¹⁷ Tatiana Tkachenko, *Russia is Going to Accuse Ukraine of “Genocide” of the Russian-Speaking Population in The Hague – Presidential Administration’s Speaker*, ZU.UA (12 November 2015) (Ukraine’s Written Statement, Annex 17); see also Korrespondent.net, *Poroshenko’s Officials Accused the Russian Federation of Preparing Provocations* (12 November 2015) (Ukraine’s Written Statement, Annex 16).

¹¹⁸ See Russia’s Objections, para. 99.

it not been, the parties' dispute would have been evident. The Russian Federation was aware — and certainly could not have been unaware — that Ukraine disputed Russia's allegations of genocide against Ukraine and its officials.

66. Russia further complains about the statement before the U.N. General Assembly of Ukraine's Foreign Minister, Mr. Dmytro Kuleba, following Russia's recognition of the so-called DPR and LPR on the basis of an alleged genocide in Donbas on 23 February 2022.¹¹⁹ As Russia concedes, Minister Kuleba "railed against 'Russia's absurd accusations.'"¹²⁰ While Russia is correct that Mr. Kuleba did not directly refer to the Genocide Convention in his remarks, his statement condemning Russia's rhetoric and actions on Ukrainian territory was a rejection of the Russian narrative.

67. In addition to its statements, Ukraine openly demonstrated by its actions that it rejected the Russian Federation's claimed right under the Genocide Convention to use force to prevent, punish, and bring to an end purported acts of genocide: Ukraine did not permit Russia to enter its territory for this purpose, but instead mounted a strong national defense.¹²¹ Russia's objection to the relevance of Ukraine's conduct simply assumes the correctness of its position on the merits, advanced throughout its Preliminary Objections, that Russia did not in fact justify its invasion as a measure to address an alleged genocide. According to Russia:

[W]here the Russian Federation has been compelled to use force based on Article 51 of the UN Charter and related rules of customary international law, and made these reasons publicly

¹¹⁹ See *ibid.*, paras. 100–101.

¹²⁰ *Ibid.*, paras. 100–101; see also Ministry of Foreign Affairs of Ukraine, *Statement by H.E. Mr. Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, at the UN General Assembly Debate on the Situation in the Temporarily Occupied Territories of Ukraine* (23 February 2022), accessed at <https://www.kmu.gov.ua/en/news/vistup-ministra-zakordonnih-sprav-ukrayini-dmitra-kuleba-na-debatah-generalnoyi-asambleyi-oon-situaciya-na-timchasovo-okupovanih-teritoriyah-ukrayini-23022022>.

¹²¹ Ukraine's Memorial, para. 51.

known, Ukraine's conduct can at best be interpreted as evidence of a response to what Ukraine identifies as 'an attack on the sovereignty and territorial integrity of Ukraine' that are categories beyond the scope of the Genocide Convention.¹²²

68. If the Russian Federation wishes to defend its actions as based on the U.N. Charter rather than the Genocide Convention, the appropriate time to do so is on the merits. But Ukraine's claim is that Russia invaded Ukraine for the stated purpose of stopping a genocide, which is amply supported by the Russian Federation's contemporaneous justification for its actions. When President Putin called out Ukraine's alleged wrongdoing to justify Russia's invasion of Ukraine, the only accusation he directed at Ukraine was one of genocide.¹²³ Ukraine's refusal to let Russia on its territory to (in Putin's words) "protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime" was a rejection of Russia's position and reflects a disagreement between Russia and Ukraine within the subject-matter of the Genocide Convention.¹²⁴

69. The Court has previously confirmed that the "conduct of the parties may also be relevant" to the assessment of whether or not a dispute exists, "especially when there have

¹²² Russia's Objections, para. 114. In support of this claim, Russia cites a single case from the Permanent Court of Arbitration to argue that "[c]onduct can be interpreted as 'positive opposition,' 'only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded.'" *Ibid.*, para. 113 (quoting *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, Award, 29 September 2012, para. 223). This standard has not been articulated by this Court, and there is no basis for the Court to apply such a heightened standard to its assessment of the parties' conduct in this case. Nonetheless, for the reasons Ukraine has explained above, Ukraine's conduct in this case satisfies even this standard.

¹²³ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine's Memorial, Annex 6).

¹²⁴ *Ibid.*

been no diplomatic exchanges.”¹²⁵ In *Marshall Islands v. United Kingdom*, for example, the Court pointed to *Bosnian Genocide* as a case where, in circumstances of an ongoing armed conflict, the conduct of the parties alone was sufficient to establish the existence of a dispute.¹²⁶ Here, there is much more, but the conduct of the parties alone is also powerful evidence of the existence of a dispute relating to the Genocide Convention.

70. Finally, in the circumstances of the present case, the absence of formal diplomatic correspondence evidencing the existence of a dispute is not determinative. For example, it is unsurprising that there are no *notes verbales* subsequent to 24 February 2022, as Ukraine severed diplomatic relations with the Russian Federation on that date after Russia’s invasion.¹²⁷ Russia cannot credibly suggest, in these circumstances, that Ukraine could not submit a dispute to the Court pursuant to Article IX of the Genocide Convention without first utilizing formal diplomatic channels which were no longer open. As the Court observed in *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia)*, “a formal protest is not a necessary condition” to the existence

¹²⁵ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 850, para. 40.

¹²⁶ *Ibid.*, para. 54 (discussing the Court’s judgment on preliminary objections in *Bosnian Genocide* and observing that “the Court did not explicitly reference any evidence before the filing of the application demonstrating the existence of a dispute . . . in the particular context of that case, which involved an ongoing armed conflict, the prior conduct of the parties was sufficient to establish the existence of a dispute”); see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 614, paras. 27–29.

¹²⁷ Ministry of Foreign Affairs of Ukraine, *Statement by the Ministry of Foreign Affairs of Ukraine Regarding the Severance of Diplomatic Relations with the Russian Federation* (24 February 2022), accessed at <https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-regarding-severance-diplomatic-relations-russian-federation>.

of the parties' dispute.¹²⁸ The question of whether or not a dispute exists is one of substance, and not of form. As Judge Crawford observed in his dissenting opinion in *Marshall Islands v. United Kingdom*, “[e]gregious conduct can create a dispute *ipso facto*, without the need for a letter before action or other communication.”¹²⁹ Russia’s invasion of Ukraine on 24 February 2022 — on the expressly stated reason of bringing to an end an alleged genocide without any evidence to substantiate that claim — is a paradigmatic example of such “egregious conduct.”

ii. The Existence of the Parties’ Dispute Was Conclusively Confirmed Prior to Ukraine’s Application to the Court on 26 February 2022.

71. Ukraine has demonstrated above that, at the time of its Application on 26 February 2022, there existed a dispute between the parties relating to the Russian Federation’s allegations of genocide and Russia’s reliance on those allegations as a pretext for its recognition of the DPR and LPR and its invasion of Ukraine. As of 26 February 2022, the opposing positions of the two sides were already established by each State’s statements and conduct, and no further action was required from either the Russian Federation or Ukraine

¹²⁸ *Alleged Violations of Sovereign Rights and Maritime Space in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 32, para. 72:

Concerning Colombia’s argument that Nicaragua did not lodge a complaint of alleged violations with Colombia through diplomatic channels until long after it filed the Application, the Court is of the view that although a formal diplomatic protest may be an important step to bring a claim of one party to the attention of the other, such a formal protest is not a necessary condition. As the Court held in the case concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, in determining whether a dispute exists or not, ‘[t]he matter is one of substance, not of form’ (*Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*), p. 84, para. 30).

¹²⁹ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, Dissenting Opinion of Judge Crawford, p. 1100, para. 17.

in order to evidence the existence of a dispute relating to the Genocide Convention.¹³⁰ The Court could end its analysis here.

72. In light of the Russian Federation’s objections, however, Ukraine emphasizes that the existence of the parties’ dispute was conclusively confirmed by the statement of Ukraine’s Ministry of Foreign Affairs “on Russia’s False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression,” published prior to Ukraine’s Application on 26 February 2022.¹³¹ Russia attempts to undermine the relevance of this statement to the Court’s determination of the existence of a dispute based on its timing and the manner its publication, as well as Ukraine’s word choice.¹³² But an examination of the 26 February statement reveals that it confirms the existence of a dispute between the parties.

73. Ukraine filed its Application with the Court at 21:30 on 26 February 2022 (22:30 Kyiv time and 23:30 Moscow time).¹³³ As Russia notes, the statement was published on the Ministry’s website approximately four hours earlier, at 18:39 Kyiv time and 19:39 Moscow time.¹³⁴ It is therefore common ground that Ukraine’s Application was made *after*

¹³⁰ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, para. 71 (observing that “the conclusion that the parties hold clearly opposite views concerning the performance or non-performance of legal obligations does not require that the respondent must expressly oppose the claims of the applicant”). This conclusion is consistent with the broad terms of Article IX, where the existence of a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention is the *only* precondition to the seisen of the Court. There was no requirement to negotiate with Russia once the dispute crystallized.

¹³¹ Ministry of Foreign Affairs of Ukraine, *Statement of the Ministry of Foreign Affairs of Ukraine on Russia’s False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression* (26 February 2022), accessed at <https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodonepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi>.

¹³² Russia’s Objections, paras. 80–82.

¹³³ Provisional Measures Order of 16 March 2022, para. 1.

¹³⁴ Russia’s Objections, para. 81.

the Ministry of Foreign Affairs published the 26 February 2022 statement. Given the fast-paced nature of events and the fact that Russia would have been monitoring Ukraine’s public statements since diplomatic relations had ceased two days earlier, the 26 February statement is relevant to confirming that a dispute had materialized by the time the Application was filed.

74. There is also nothing in the Court’s jurisprudence or the Genocide Convention’s compromissory clause to suggest that a dispute between parties relating to the Convention could not “materialise” on the same day as a State’s application, as Russia claims.¹³⁵ It is sufficient that the dispute exist “at the time” the application is submitted to the Court.¹³⁶ Article IX of the Convention includes no precondition to the Court’s jurisdiction beyond the existence of a dispute relating to interpretation, application, or fulfilment of the Convention, and the Court has made plain that “notice of an intention to file a case is not required as a

¹³⁵ *Ibid.* The sources cited by Russia in support of this argument are not applicable to this case. *Ibid.*, n.125 (citing Hugh Thirlway, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE*, Vol. 1 (Oxford University Press 2013), p. 568; G. Distefano, *Time Factor and Territorial Disputes*, in, *RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW* (M. Kohen & M. Hebie eds., Elgar Publishing, 2018), pp. 402–403). Both sources address the “critical date” principle in territorial disputes that is used to determine which party possesses title at a particular time. There is simply no analogy to be drawn between these cases and the situation before the Court.

¹³⁶ See, e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, p. 84, para. 30 (“[t]he dispute must in principle exist *at the time* the Application is submitted to the Court.” (emphasis added)); *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 851, para. 42 (noting that the Court’s function under Article 38(1) of the Court’s Statute to decide disputes “relates to disputes existing *at the time of their submission*” (emphasis added)); see also *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012*, p. 445, para. 55 (analyzing whether or not a dispute existed “*at the time of the filing* of the Application” (emphasis added)); *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 34, para. 79 (same); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, para. 77 (same).

condition for the seisen of the Court.”¹³⁷ Accordingly, the only question for the Court is whether or not there existed a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention “at the time of the filing of the Application.”¹³⁸ A public statement issued before the filing of an application, even shortly before, may confirm that there was a dispute “at the time of the filing of the Application.”

75. In view of the severance of diplomatic relations between Ukraine and the Russian Federation, the Ministry of Foreign Affairs published the statement on its website and across its official social media platforms, including Facebook and Twitter.¹³⁹ Russia’s argument that this statement should not be credited because Ukraine issued this public statement on a “non-working day” borders on the ridiculous, since Russia most obviously did not pause its invasion of Ukraine because it was a Saturday, and it is reasonable to presume that it did not stop monitoring the statements of the Ukrainian government over the weekend, either.¹⁴⁰

76. As to Russia’s claim that the Ministry’s statement of 26 February is “imprecise, vague and therefore cannot serve as evidence of a dispute that had crystallised between the

¹³⁷ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, *I.C.J. Reports 2016*, p. 849, para. 38.

¹³⁸ *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 445, para. 55.

¹³⁹ *MFA Statement on Russia’s False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression*, Facebook Post of the Ukrainian Ministry of Foreign Affairs / MFA of Ukraine, dated 26 February 2022 (Ukraine’s Written Statement, Annex 3); *MFA Statement on Russia’s False and Offensive Allegations of Genocide As a Pretext For Its Unlawful Military Aggression*, Twitter Post of the Ukrainian Ministry of Foreign Affairs (@MFA_Ukraine), dated 26 February 2022 (Ukraine’s Written Statement, Annex 4). The statement was posted on Twitter at 18:02 Kyiv time (or 11:02 UTC-05:00).

¹⁴⁰ Russia’s Objections, para. 81.

Parties regarding an alleged violation of Articles I and IV of the Convention,” this argument is refuted by the plain text of the Ministry’s statement.¹⁴¹ The Ministry issued its statement “on Russia’s False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression.”¹⁴² In that statement, the Ministry emphasized that “Ukraine strongly denies Russia’s allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for unlawful aggression.”¹⁴³ In addition, the Ministry explained that “the Russian Federation has twisted the concept of genocide, and the solemn treaty obligations concerning genocide, in order to justify aggression and its own blatant human rights violations.”¹⁴⁴ The Ministry criticized Russia’s “brazen manipulation” of the Genocide Convention, strongly denied Russia’s allegations of genocide against Ukraine, and called upon Russia to “immediately cease its unlawful aggression against Ukraine taken under this baseless pretext.”¹⁴⁵ Accordingly, the Ministry emphasized that “Russia’s claims of genocide as justification for its lawless conduct are an insult to the Genocide Convention, and to the work of the international community in preventing and punishing the world’s most serious crime.”¹⁴⁶

¹⁴¹ *Ibid.*, para. 80.

¹⁴² Ministry of Foreign Affairs of Ukraine, *Statement of the Ministry of Foreign Affairs of Ukraine on Russia’s False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression* (26 February 2022), accessed at <https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodonepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi>.

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*

¹⁴⁵ *Ibid.*

¹⁴⁶ *Ibid.*

77. It is hard to imagine a clearer repudiation of Russia’s allegations of genocide and its abuse and misuse of the Genocide Convention. This statement of Ukraine’s Ministry of Foreign Affairs is far more specific in its reference to the Genocide Convention than, for example, statements made by Georgia prior to filing its application in *Georgia v. Russian Federation*, where the Court found that statements that did not mention the relevant treaty at all were sufficient to establish the existence of a dispute under that treaty.¹⁴⁷

78. Moreover, even after the Ministry’s statement on 26 February 2022, after Ukraine filed its Application, and after this Court indicated provisional measures, Russia’s response has been unflinching. Russia has continued to claim that its actions in and against Ukraine are based on bringing to an end an alleged genocide.¹⁴⁸ As the Court recently confirmed in *The Gambia v. Myanmar*, “conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute.”¹⁴⁹ Russia’s statements and conduct subsequent to Ukraine’s Application leave no doubt that a dispute exists between the parties relating to the Genocide Convention.

C. The Subject-Matter of the Dispute Relates to the Interpretation, Application, or Fulfilment of the Genocide Convention.

79. The Russian Federation argues in the alternative that, even if a dispute exists between the parties, it concerns issues that are manifestly outside the scope of the

¹⁴⁷ See generally *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 118–120, paras. 108–113.

¹⁴⁸ Ukraine’s Memorial, para. 46; see also *supra* Chapter 2, Section B(1); *infra* para. 156.

¹⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, para. 64; see also *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 851, para. 43.

Convention.¹⁵⁰ According to Russia, the “real issues” in dispute are: “(a) whether the Russian Federation’s recognition of the DPR and LPR complies with customary international law, and (b) whether the Russian Federation’s use of force as an act of collective self-defence meets the criteria of Article 51 of the UN Charter.”¹⁵¹

80. The Russian Federation’s argument that the real object of the dispute is something other than the Genocide Convention is based on Russia’s improper tactic of ignoring Ukraine’s actual claims and the statements made by the Russian Federation on which those claims are based. It is well established that “it is for the Court to determine, taking account of the parties’ submissions, the subject-matter of the dispute of which it is seised.”¹⁵² Put another way, “it is the Court’s duty to isolate the real issue in the case and to identify the object of the claim.”¹⁵³ The Court has explained that its “determination of the subject-matter of the dispute is made ‘on an objective basis’ . . . , ‘while giving particular attention to the formulation of the dispute chosen by the Applicant.’”¹⁵⁴ The Court has also stated that:

¹⁵⁰ Russia’s Objections, Chapter III, Section D.

¹⁵¹ *Ibid.*, para. 136.

¹⁵² See, e.g., *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 52; *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, pp. 447–449, paras. 29–32.

¹⁵³ See, e.g., *Nuclear Tests (Australia v. France)*, *Judgment, I.C.J. Reports 1974*, p. 262, para. 29; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 52.

¹⁵⁴ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 53 (quoting *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Preliminary Objection, Judgment, I.C.J. Reports 2015*, pp. 602–603, para. 26 and *Fisheries*

To identify the subject-matter of the dispute, the Court bases itself on the application, as well as on the written and oral pleadings of the parties. *In particular, it takes account of the facts that the applicant identifies as the basis for its claim.*¹⁵⁵

81. Ukraine has demonstrated that the dispute that it has brought to the Court relates to the Genocide Convention. As Ukraine has explained above, the subject-matter of this dispute is the Russian Federation’s long-standing allegation that Ukraine is committing genocide in violation of the Genocide Convention, and Russia’s reliance on this false allegation to recognize the independence of the DPR and LPR and engage in its large-scale invasion of Ukraine. Ukraine alleges that Russia’s actions violate the Genocide Convention. The Russian Federation may disagree with Ukraine’s position on the merits, but that does not change the fact that, considering the claims Ukraine has brought to the Court, there is a dispute that relates to the Genocide Convention.

82. Even if Ukraine and Russia *also* had a dispute that related to customary international law or the U.N. Charter, that would not affect the Court’s jurisdiction to hear this dispute. As the Court recently observed in *Alleged Violations of the 1955 Treaty of Amity*, “[c]ertain acts may fall within the ambit of more than one instrument and a dispute relating to those acts may relate to the ‘interpretation or application’ of more than one treaty or other instrument.”¹⁵⁶

Jurisdiction (Spain v. Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 448, para. 30).

¹⁵⁵ *Ibid.* (emphasis added); *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015*, pp. 602–603, para. 26.

¹⁵⁶ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 27, para. 56; see also Provisional Measures Order of 16 March 2022, para. 46; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 576, para. 28 (“The fact that a dispute before

83. The Court’s analysis in *Alleged Violations of the 1955 Treaty of Amity* is directly relevant to the dispute before this Court. In that case, the United States objected to the Court’s jurisdiction on the grounds that the dispute before the Court was solely concerned with the United States’ withdrawal from the Joint Comprehensive Plan of Action (“JCPOA”), “and has no real relationship to the Treaty of Amity.”¹⁵⁷ In support of this argument, the United States emphasized diplomatic correspondence on which Iran relied as evidencing the dispute before the Court, in which Iran had referred only to the JCPOA and made no reference to the Treaty of Amity.¹⁵⁸ The United States also noted that Iran brought its claims regarding the alleged wrongful conduct under the Treaty of Amity only after the measures it challenged were reinstated as a result of the United States’ withdrawal from the JCPOA, even though the measures at issue had been in force prior to the JCPOA.¹⁵⁹

84. The Court unanimously rejected the United States’ objection.¹⁶⁰ Dismissing the United States’ objection, the Court concluded:

The Respondent’s argument is that the very subject-matter of Iran’s claims in this case relates exclusively to the JCPOA, and not to the Treaty of Amity. The Court does not see how it could support such an analysis without misrepresenting Iran’s claims as formulated by the Applicant. *The Court’s ‘duty to isolate the real issue in the case and to identify the object of the claim’ . . . does not permit it to modify the object of the submissions, especially when they have been clearly and precisely formulated.*

the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met.”).

¹⁵⁷ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 24, para. 42.

¹⁵⁸ *Ibid.*, para. 43.

¹⁵⁹ *Ibid.*, para. 44.

¹⁶⁰ *Ibid.*, para. 114(1).

In particular, the Court cannot infer the subject-matter of a dispute from the political context in which the proceedings have been instituted, rather than basing itself on what the applicant has requested of it.¹⁶¹

85. The Court’s analysis applies to the present dispute with equal force. Ukraine has brought to the Court a dispute relating to the Genocide Convention. As in *Alleged Violations of the 1955 Treaty of Amity*, the Court cannot conclude that that the subject-matter of Ukraine’s claims relates exclusively to matters outside that treaty, and only to customary international law or the U.N. Charter, “without misrepresenting [Ukraine’s] claims as formulated by the Applicant.” Russia’s protest that this dispute has no relationship with the Genocide Convention should be rejected.

86. Further, to the extent the Russian Federation asks this Court to adjudicate the question of whether or not it expressly invoked Article 51 as the sole and independent basis for its unilateral actions in and against Ukraine, and should the Court accept Russia’s invitation to consider that issue, that is plainly for consideration at the merits stage of these proceedings. As Ukraine explained in its Memorial, Russia’s invocation of Article 51 was both legally incoherent and not independent of Russia’s reliance on the Genocide Convention.¹⁶² In the speech that Russia transmitted to the United Nations as the sole justification for its actions in and against Ukraine, Russia referred to Article 51 only in stating that “[t]he people’s republics of Donbas have asked Russia for help,” and Russia stated expressly that the “purpose” of that help was to “protect people” from “genocide.”¹⁶³

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¹⁶¹ *Ibid.*, para. 59 (emphasis added).

¹⁶² Ukraine’s Memorial, para. 159.

¹⁶³ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine’s Memorial, Annex 6); *Letter Dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations Addressed to the Secretary-General*, U.N. Doc. S/2022/154 (24 February 2022).

87. Ukraine has brought to the Court a dispute relating to the Russian Federation's allegations that Ukraine has committed genocide in violation of the Genocide Convention, and the actions that Russia has taken in and against Ukraine on the pretext of preventing and punishing this alleged genocide and bringing it to an end. Both parties' statements and conduct demonstrate the existence of such a dispute, and, accordingly, Russia's first preliminary objection should be dismissed.

CHAPTER 3: THE COURT HAS JURISDICTION *RATIONE MATERIAE* OVER UKRAINE'S CLAIMS THAT THE RUSSIAN FEDERATION VIOLATED ARTICLES I AND IV OF THE GENOCIDE CONVENTION

88. As detailed in Ukraine's Memorial, the undertaking to prevent and punish genocide is held *erga omnes* among the Contracting Parties and creates both duties and correlative rights to see violations by other Contracting Parties brought to an end. In committing to this undertaking, a State commits to perform these rights and duties in good faith and without abuse. Ukraine claims that Russia has done the opposite. Based on false allegations of genocide in Donbas, the Russian Federation has undertaken to prevent and punish genocide to the severe prejudice of Ukraine — a gross abuse, and violation, of Articles I and IV of the Genocide Convention.

89. Under Russia's view, Articles I and IV impose no constraint on abusive or unlawful measures taken for the stated purpose of preventing and punishing genocide, and this Court has no jurisdiction over a dispute relating to abusive acts taken in purported fulfilment of the Convention. If the Court were to adopt Russia's interpretation, any Contracting Party may falsely accuse another of a violation of the Convention and use that as a pretext for military invasion. As explained below, however, such an interpretation is contrary to the text of Articles I and IV, interpreted in good faith, in context, and in light of the object and purpose of the Convention.

90. Russia's objection that Ukraine's claims fall outside the Court's jurisdiction *ratione materiae* is notably silent regarding Article IX of the Convention, the provision that defines the scope of this Court's jurisdiction. Accordingly, Section A of this Chapter addresses the proper interpretation of Article IX. Section B addresses the premature nature of Russia's objection, through which Russia advances an interpretation of Articles I and IV without regard to the standard applicable at this stage of the proceedings. The only proper inquiry at the preliminary objections stage is whether Ukraine's claims are capable of falling within the

scope of the Convention.¹⁶⁴ For the reasons explained in its Memorial and on which it elaborates in Section C below, Ukraine’s claims are well founded under Articles I and IV and therefore meet this test.

A. The Court’s Broad Jurisdiction Under Article IX of the Convention.

91. The Russian Federation’s failure to engage with the language of Article IX, interpreted according to customary rules of treaty interpretation, is particularly striking in light of Article IX’s distinctive characteristics. This Court, in the *Bosnian Genocide* case, had occasion to note that “one unusual feature” of Article IX that distinguishes it from “a standard dispute settlement provision” is that the Court’s jurisdiction “includ[es] those disputes relating to the responsibility of a State for genocide.”¹⁶⁵ In *Democratic Republic of the Congo v. Rwanda*, five Members of the Court pointed to another unusual feature of Article IX, observing that it “speaks not only of disputes over the interpretation and application of the

¹⁶⁴ See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2018*, p. 319, para. 85 (“The Court will determine whether the actions by France of which Equatorial Guinea complains are capable of falling within the provisions of the Palermo Convention.”); see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 2019*, p. 584, para. 57 (“[I]n order to determine the Court’s jurisdiction *ratione materiae* under a compromissory clause concerning disputes relating to the interpretation or application of a treaty, it is necessary to ascertain whether the acts of which the applicant complains ‘fall within the provisions’ of the treaty containing the clause.”); *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order*, *I.C.J. Reports 1999*, p. 137, para. 38 (“[T]he Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.”).

¹⁶⁵ *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. 114, paras. 168–169.

Convention, but over the ‘fulfilment of the Convention.’”¹⁶⁶ As further noted in *The UN Genocide Convention: A Commentary*:

[Article IX was written] to close down all possible loopholes weakening the jurisdictional reach of the Court. The purpose pursued in 1948 was to grant the Court a jurisdiction as wide as possible in the life of the Convention, forestalling all the potential subtle arguments denying jurisdiction on account of an insufficient link with that Convention.¹⁶⁷

92. Russia now argues that there is an insufficient link between this dispute and the Convention, doing precisely what the drafters of the Genocide Convention sought to forestall. The present dispute would fall within this Court’s jurisdiction even under a more typical compromissory clause, but the specific features of Article IX reinforce the flawed nature of Russia’s attempt to avoid that provision’s broad conferral of jurisdiction.

1. The Convention’s Compromissory Clause Covers Disputes Related to the “Interpretation, Application or Fulfilment of the Present Convention.”

93. Like other compromissory clauses that come before this Court, Article IX refers to the “interpretation” and “application” of the Convention. The reference to the Convention’s “interpretation” is straightforward. With regard to “application,” as the PCIJ explained in *Factory at Chorzów*, a dispute “relating to the application” of provisions of a treaty “include[s] not only those relating to the question [of] whether the application of a particular clause has or has not been correct, but also those bearing upon the applicability of these articles, that is to say, upon any act or omission creating a situation contrary to the said

¹⁶⁶ *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, Joint Separate Opinion of Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, p. 72, para. 28.

¹⁶⁷ Robert Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* (Paola Gaeta, ed., Oxford University Press 2009), p. 453 (Ukraine’s Memorial, Annex 26).

articles.”¹⁶⁸ Ukraine’s claims of an abuse, misuse, and violation of the Genocide Convention by Russia relate to whether Russia has applied Articles I and IV of the Genocide Convention correctly, as well as whether Russia’s acts have created a situation contrary to Articles I and IV.

94. In addition, unlike other compromissory clauses, Article IX includes the word “fulfilment.” That addition must be understood to add something to this Court’s jurisdiction, consistent with the principle that each term of a treaty should be given effect and not rendered superfluous.¹⁶⁹ The ordinary meaning of “fulfilment” is “[t]he action or an act or process of fulfilling something; accomplishment, performance, completion.”¹⁷⁰ To “fulfil” is “[t]o carry out (something commanded or required); to obey, to follow (the law, a command, etc.); to accomplish (a duty, task, mission, etc.),” “[t]o achieve, to realize (a purpose, plan, end); to satisfy, to meet (a requirement, condition, standard, etc.); to perform (a function).”¹⁷¹ The term used in the official French-language version of the Convention, “*l’exécution*,” is likewise ordinarily used to refer to the performance of an obligation. Thus, the addition of the word “fulfilment” to Article IX clarifies that it encompasses disputes relating to the manner in

¹⁶⁸ *Factory at Chorzów, Judgment No. 8, 26 July 1927, Jurisdiction, P.C.I.J., Series A. – No. 9*, pp. 20–21.

¹⁶⁹ See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 125–126, paras. 133–134 (rejecting an interpretation because “a key phrase of this provision would become devoid of any effect” and would render the phrases “meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible”); *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011*, p. 673, para. 92 (rejecting an interpretation because it would render a phrase “without legal effect”).

¹⁷⁰ Oxford English Dictionary, *fulfilment*, *n.* (3rd ed., 2016), accessed at <https://www.oed.com/view/Entry/75295?redirectedFrom=fulfilment#eid>.

¹⁷¹ Oxford English Dictionary, *fulfil*, *v.* (3rd ed., 2016), accessed at <https://www.oed.com/view/Entry/75291?redirectedFrom=fulfil&>.

which the parties “fulfil,” *i.e.*, perform and carry out (*exécutent*), their undertakings under the Genocide Convention. That addition is notable in the present case, where the dispute relates to the abusive manner in which the Russian Federation has purported to fulfil its rights and obligations under the Genocide Convention.

95. The *travaux préparatoires* confirm the added breadth intended by the word “fulfilment.” The first draft of what would become Article IX included the more traditional phrase “interpretation or application.”¹⁷² Belgium and the United Kingdom submitted an amendment to add the word “fulfilment,” which was adopted.¹⁷³ The Indian delegation commented that “the word ‘fulfilment’ referred to the compliance or non-compliance of a party with the provisions of the [C]onvention,” which it regarded as having “a much wider meaning” than the term “application.”¹⁷⁴ Following this intervention, the delegations defeated a proposal to delete the word “fulfilment,” confirming the parties’ intent to extend the Court’s jurisdiction to a broad range of possible disputes relating to the Convention, including the parties’ performance of their obligations under the Convention.¹⁷⁵

¹⁷² U.N. Economic and Social Council, *Draft Convention on the Crime of Genocide*, U.N. Doc. No. E/447 (26 June 1947), p. 10.

¹⁷³ Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, U.N. Doc. No. A/C.6/SR.61-140, pp. 428, 447.

¹⁷⁴ *Ibid.*, p. 437.

¹⁷⁵ *Ibid.*, p. 447. Some commentators have suggested that the concept of “fulfilment” is a subset of, and already encompassed by, the word “application.” See Robert Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* (Paola Gaeta, ed., Oxford University Press 2009), p. 452 (Ukraine’s Memorial, Annex 26). That interpretation would render the word “fulfilment” as mere surplusage. At the time the Genocide Convention was drafted, the inclusion of the word “fulfilment” reflected a decision to adopt a compromissory clause that would extend as broadly as possible.

2. The Phrase “Relating to” and the Use of the Word “Including” in Article IX Underscore Its Broad Scope.

96. Article IX also uses the phrase “relating to” (in French, “*relatifs à*”). The ordinary meaning of “relate” is to have a “connection with” or “relation to” something.¹⁷⁶ Thus, to fall within Article IX, it is sufficient that a dispute has a connection or relationship with the interpretation, application, or fulfilment of the Convention.

97. The word “concerning” is often used as a synonym of “relating.”¹⁷⁷ The Court has explained that a dispute may “concern” certain measures even if the dispute’s “immediate ‘subject-matter’” is not itself “the measures in question.”¹⁷⁸ The same logic applies to the word “relating.” Judge Schwebel reached a similar conclusion in an advisory proceeding interpreting the phrase “question of law relating to the provisions of the Charter of the United Nations.” He explained that “an error of law ‘relating to’ provisions of the United Nations Charter need not squarely and directly engage a provision of the Charter.”¹⁷⁹ Citing dictionary definitions of “relate” and “relating,” Judge Schwebel observed that “[i]t is sufficient if such an error is ‘in relationship to’ the Charter, ‘has reference to’ the Charter, or ‘is connected with’

¹⁷⁶ Oxford English Dictionary, *relate*, v. (3rd ed., 2009), accessed at <https://www.oed.com/view/Entry/161807?rskey=ODDggi&result=1&isAdvanced=false#eid>; see also Merriam-Webster Dictionary, *relate*, v., accessed at <https://www.merriam-webster.com/dictionary/relate>.

¹⁷⁷ As noted above, the French version of Article IX of the Genocide Convention uses “*relatifs à*” to correspond to the English “relating to.” By way of an additional example, in the compromissory clause of the U.N. Convention on the Law of the Sea, the English word “concerning” corresponds to the French phrase “*relatif à*.” U.N. Convention on the Law of the Sea, 10 December 1982, 1833 U.N.T.S. 397, art. 288.

¹⁷⁸ *Fisheries Jurisdiction (Spain v. Canada)*, *Jurisdiction, Judgment*, I.C.J. Reports 1998, p. 458, para. 62; see also *Aegean Sea Continental Shelf (Greece v. Turkey)*, *Judgment*, I.C.J. Reports 1978, pp. 34, 36, paras. 81, 86.

¹⁷⁹ *Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal, Advisory Opinion*, I.C.J. Reports 1987, Dissenting Opinion of Judge Schwebel, pp. 113–114. Although Judge Schwebel made these observations in dissent, this interpretive point was not remarked upon by the majority.

the Charter.”¹⁸⁰ By the same token, a dispute relates to the interpretation, application, or fulfilment of the Genocide Convention if the dispute is in relationship to, has reference to, or is connected with, the Convention’s interpretation, application, or fulfilment.

98. The phrase “including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III” also underscores the comprehensive nature of Article IX. As the Court previously observed in *Bosnian Genocide*, the “including” clause is an “unusual feature of Article IX.”¹⁸¹ The Court explained that “[t]he word ‘including’ tends to confirm that disputes relating to the responsibility of Contracting Parties for genocide, and the other acts enumerated in Article III to which it refers, are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention.”¹⁸²

3. Disputes May Be Submitted to the Court “At the Request of Any of the Parties to the Dispute.”

99. Article IX provides that when a dispute exists and relates to the interpretation, application, or fulfilment of the Convention, the Court has jurisdiction when “any of the parties” submits it to the Court. This language further underscores that the Court’s jurisdiction is not limited to situations where the applicant claims the respondent is responsible for genocide. Where there is a dispute between two parties to the Convention, and where that dispute relates to the interpretation, application, or fulfilment of the

¹⁸⁰ *Ibid.*, p. 114; see also *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, *Advisory Opinion*, *I.C.J. Reports 1988*, Separate Opinion of Judge Shahabuddeen, pp. 62–63 (noting Judge Schwebel’s interpretation of “relating to” as applicable to “concerning,” a word that Judge Shahabudeen viewed as having “amplitude and elasticity”).

¹⁸¹ *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. 114, para. 169.

¹⁸² *Ibid.*

Convention, including but not limited to a State's responsibility for genocide, "any of the parties" to that dispute may submit it to the Court for resolution.

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100. By its express terms, therefore, Article IX encompasses *any* dispute *relating to* the interpretation, application, *or fulfilment* of the Genocide Convention; such disputes *include* (though are not limited to) those relating to the responsibility of a State for genocide; and a dispute may be submitted to this Court by *any* of the parties to the dispute. Together, these textual features accomplish Article IX's recognized purpose of "grant[ing] the Court a jurisdiction as wide as possible in the life of the Convention."¹⁸³

101. Applying Article IX, the Court's jurisdiction over the present case is straightforward. As demonstrated in Chapter 2, Ukraine and the Russian Federation have a dispute relating to Russia's allegations that Ukraine is responsible for committing genocide in violation of the Convention, and Russia's reliance on those allegations to take action in and against Ukraine under the pretext of preventing and punishing genocide. That dispute relates to, *i.e.*, has a connection or relationship with, "the responsibility of a State for genocide." An important component of this dispute is Russia's allegation that Ukraine is responsible for genocide. The dispute further relates to Ukraine's claim that Russia has violated Articles I and IV of the Genocide Convention, which is unquestionably a matter of interpretation, application, or fulfilment of the Convention. And, finally, this dispute relates to the application and/or fulfilment of the Convention, as Ukraine complains of the abusive and unlawful manner in which the Russian Federation has purported to carry out its rights and obligations under the Genocide Convention.

102. In objecting to this Court's jurisdiction *ratione materiae*, Russia never addresses the obvious: that a dispute over allegations of genocide under the Convention, and

¹⁸³ Robert Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* (Paola Gaeta, ed., Oxford University Press 2009), p. 453 (Ukraine's Memorial, Annex 26). *See also* Ukraine's Memorial, para. 148.

measures taken to prevent and punish such a genocide, naturally relate to the interpretation, application, or fulfilment of the Genocide Convention. For this reason, much of Russia's argument is beside the point. The crux of Russia's second preliminary objection is that Ukraine bases its claims on sources of law external to the Genocide Convention, such as general principles of good faith and international law rules on the use of force. Russia incorrectly characterizes Ukraine's claims, which are grounded in Articles I and IV of the Convention. But even if other sources of law are relevant and place limits on the manner in which the Russian Federation may perform its rights and obligations under the Genocide Convention, a claim that Russia breached those limits straightforwardly relates to the application and/or fulfilment of the Convention. In light of the comprehensive nature of Article IX, the Russian Federation's second preliminary objection is readily dismissed at the threshold.

B. Ukraine's Claims Are Capable of Falling Within the Provisions of the Genocide Convention, and a Definitive Interpretation of Articles I and IV Can Be Deferred to the Merits.

103. A further threshold error made by Russia is to insist that the Court engage in a definitive interpretation of Articles I and IV at this stage of the proceedings. The Court's well-established inquiry for assessing a preliminary objection based on lack of jurisdiction *ratione materiae* is whether the applicant's claims are "capable of falling within the provisions" of the relevant treaty.¹⁸⁴

104. The Court has previously recognized that the scope of the duty to prevent and punish genocide under the Genocide Convention raises merits questions. At the preliminary objections stage of *Bosnian Genocide*, Yugoslavia advanced a narrow interpretation of the

¹⁸⁴ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, *I.C.J. Reports 2018*, p. 319, para. 85.

duty to prevent and punish, contending that the Convention did not encompass questions regarding State responsibility for genocide.¹⁸⁵ The Court dismissed Yugoslavia's objection, observing that:

[I]t is sufficiently apparent from the very terms of that objection that the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions.¹⁸⁶

The Court concluded that there was “no doubt that there exists a dispute between them relating to ‘the interpretation, application or fulfilment of the . . . Convention.’”¹⁸⁷

105. The Court should follow a similar approach here. The interpretive issue in this case concerns the scope and content of the undertakings in Articles I and IV of the Genocide Convention — precisely the type of interpretive dispute that this Court in *Bosnian Genocide* concluded was a merits question. That approach is particularly warranted here, since the question of whether an abuse of Articles I and IV occurred is not a pure question of law to be assessed in the abstract, but one best considered in light of particular factual circumstances alleged to constitute the abuse.¹⁸⁸

¹⁸⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 32.

¹⁸⁶ *Ibid.*, para. 33.

¹⁸⁷ *Ibid.* In its merits judgment, the Court recalled that arguments concerning the scope of the duty to prevent genocide had been “left by the Court for resolution at the merits stage.” *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. 107, para. 152.

¹⁸⁸ *Cf. Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019*, p. 586, para. 63 (dismissing preliminary objection requiring interpretation of the mental elements of the offence of

106. If, however, the Court chooses to address the interpretation of Articles I and IV at this stage, the Court’s task remains more limited than Russia suggests. To determine whether claims are “capable” of falling under a treaty, the Court has consistently followed the methodology used in its *Oil Platforms* judgment, considering the legal plausibility of a claim after accepting as true the applicant State’s factual allegations. As Judge Higgins observed in her separate opinion in that case, “[t]he only way in which . . . it can be determined whether” the applicant’s claims “are sufficiently plausibly based upon the . . . Treaty is to accept *pro tem* the facts as alleged . . . to be true.”¹⁸⁹ Under this approach, the Court assesses “whether the facts as claimed by the applicant might give [rise] to a violation of a specified provision.”¹⁹⁰

107. For present purposes, therefore, the Court should assume as true, *inter alia*: that there is no credible evidence of Ukraine’s responsibility for genocide in Donbas; that Russia conducted no due diligence before taking actions based on its allegations of genocide; and that Russia relied on its false accusation of genocide as the justification for its recognition

terrorism financing, because whether the requisite *scienter* was present “raises complex issues of law and especially of fact that divide the Parties and are properly a matter for the merits”).

In *Alleged Violations of the 1955 Treaty of Amity*, the Court found that because some of the economic measures at issue “directly target third States or the nationals or companies of third States does not suffice for them to be automatically excluded from the ambit of the Treaty,” “[o]nly through a detailed examination of each of the measures in question, of their reach and actual effects” could the Court determine whether they fell within the scope of the Treaty of Amity. On the merits, the Court’s evaluation of whether the United States’ measures violated the provisions at issue would require assessing the “reach and actual effects” of the United States’ measures. Thus, the Court held that the U.S. objection raised legal and factual questions which were “properly a matter for the merits.” *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 33–34, paras. 81–82.

¹⁸⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, Separate Opinion of Judge Higgins, p. 856, para. 32.

¹⁹⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, Separate Opinion of Judge Higgins, p. 219.

of the DPR and LPR and its invasion of Ukraine. On the basis of these facts as alleged by Ukraine, Ukraine's claims are "capable" of falling within the Convention.

C. A Proper Interpretation of Articles I and IV of the Genocide Convention Supports the Court's Exercise of Jurisdiction *Ratione Materiae*.

108. As Ukraine explained in its Memorial, when interpreted pursuant to customary rules of treaty interpretation, Articles I and IV do not permit a Contracting Party to act to another Contracting Party's detriment on the pretext of responding to a falsely alleged genocide.¹⁹¹ States taking measures to prevent and punish genocide, or to bring another State's violation of the Convention to an end, must act in good faith and without abuse, as well as abide by the limits of international law.¹⁹²

109. Ukraine does not, as Russia contends, seek to "unduly broad[e]n" the Court's jurisdiction by incorporating into the Genocide Convention "alleged implicit" obligations untethered to its text.¹⁹³ As explained below, Ukraine's claims are firmly grounded in the text of the Genocide Convention and Russia's undertakings therein.

1. The Genocide Convention Does Not Permit a Contracting Party to Act to Prevent and Punish a Falsely Alleged Genocide.

110. Articles I and IV are to 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."¹⁹⁴ Properly interpreted, the mutual undertakings set forth in these

¹⁹¹ See Ukraine's Memorial, Chapter 3, Section A(1).

¹⁹² See *ibid.*, Chapter 3, Section A(2)–(3).

¹⁹³ See Russia's Objections, paras. 143–144; see also *ibid.*, paras. 170, 216.

¹⁹⁴ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, art. 31(1).

provisions do not allow a Contracting Party to invoke the prevention and punishment of an alleged genocide as a pretext for destructive actions against another State.¹⁹⁵

111. Russia mischaracterizes Ukraine’s position as requiring that “every reference to genocide made at a political level triggers a breach of Articles I and IV of the Convention and engages international responsibility of the State concerned, unless the latter produces or discloses evidence in support of that allegation.”¹⁹⁶ That is not Ukraine’s position. Instead, Ukraine’s position is that Articles I and IV do not authorize, but rather prohibit, one Contracting Party harming another Contracting Party under the guise of preventing and punishing a genocide that has been alleged without basis or due diligence. As further elaborated below, that position is supported by settled principles of treaty interpretation.

112. Ukraine’s interpretation follows, in part, from the collective nature of the duty to prevent and punish genocide, as reflected in the text of the Convention. Article I states that “[t]he 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.” The word “undertake” reflects a mutual commitment among the Contracting Parties. As noted by the Court in *Bosnian Genocide*, “[t]he ordinary meaning of the word ‘undertake’ is to give a formal promise, to bind or engage oneself, to give a pledge or promise, to agree, to accept an obligation.”¹⁹⁷

¹⁹⁵ Ukraine’s Memorial, Chapter 3, Section A(1).

¹⁹⁶ Russia’s Objections, para. 153; *see also ibid.*, paras. 152–154. Russia’s second preliminary objection focuses mainly on whether Russia has violated Articles I and IV by abusing those articles and acting outside the limits of international law. Those arguments do not apply to Ukraine’s request for a declaration that there is no credible evidence that Ukraine is responsible for committing genocide. *See* Ukraine’s Memorial, para. 178(b).

¹⁹⁷ *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. 111, para. 162.

113. As this Court also explained in *Bosnian Genocide* in regard to Article I, “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.”¹⁹⁸ In its Memorial, Ukraine detailed how the ordinary meaning of “prevent” indicated that a genocide or risk of genocide must exist before action to prevent can be taken.¹⁹⁹

114. A similar result holds true with regard to Article IV. Article IV states that “[p]ersons 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.” The ordinary meaning of “punish” is “[t]o cause (an offender) to suffer for an offence, esp. a transgression of a legal or moral code; to subject to a penalty or sanction as retribution or as a caution against further offences.”²⁰⁰ If no offense has occurred, there is nothing that a State could, or should, “punish.” Russia declines to engage with the ordinary meaning of these terms.

115. Reading Articles I and IV in their context, and in light of the object and purpose of the Convention, further underscores that a State may not act to prevent and punish a falsely alleged genocide. The Preamble of the Convention refers to “international co-operation” as a core objective, and multiple other provisions speak to cooperative measures of

¹⁹⁸ *Ibid.*, para. 431.

¹⁹⁹ See Ukraine’s Memorial, para. 81. The ordinary meaning of “prevent” is “[t]o preclude the occurrence” of “an anticipated event, state, etc.” See Oxford English Dictionary, *prevent*, v. (3rd ed., 2007), accessed at <https://www.oed.com/view/Entry/151073?rskey=aXTcHQ&result=2&isAdvanced=false#eid>. As Ukraine explained in its Memorial, the meaning “[t]o preclude the occurrence of” indicates that the possibility of genocide must be reasonably anticipated before action can be taken to “prevent.”

²⁰⁰ See Oxford English Dictionary, *punish*, v. (3rd ed., 2007), accessed at <https://www.oed.com/view/Entry/154671?redirectedFrom=punish#eid>. See also Ukraine’s Memorial, para. 81.

enforcement.²⁰¹ In addition, as enunciated in the Court's 1951 Advisory Opinion on *Reservations to the Genocide Convention*, "[t]he Convention was manifestly adopted for a purely humanitarian and civilizing purpose," including to "confirm and endorse the most elementary principles of morality."²⁰² When a State fulfils its "undertaking" under Article I, it must do so consistent with the Convention's objective of fostering international cooperation, and may not instead unilaterally take harmful measures to the detriment of another Contracting Party based on a false accusation of genocide.

116. The *travaux préparatoires* further reflect a concern with misuses of the Convention that would harm other Contracting Parties.²⁰³ For example, the drafters rejected a proposal for the protection of "political groups," which was viewed as "provid[ing] a very convenient pretext for interference in the internal affairs of States."²⁰⁴ Similarly, the drafters rejected a proposal to penalize certain forms of propaganda because of the risk such a provision could "become a pretext for serious abuses."²⁰⁵ Articles I and IV, which codify a solemn undertaking to prevent and punish genocide, should not be interpreted in a way that would permit the serious abuses that the drafters sought to prevent.

²⁰¹ Article VII refers to a pledge among the Contracting Parties to "grant extradition," and Article VIII provides that Parties "may call upon the competent organs of the United Nations," a forum for international cooperation, to take action "for the prevention and suppression of acts of genocide."

²⁰² *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

²⁰³ *See* Ukraine's Memorial, para. 84.

²⁰⁴ *See* Summary Record of Meetings of the Economic and Social Council, Two Hundred and Eighteenth Meeting, U.N. Doc. E/SR.218, p. 712 (26 August 1948) (Mr. Katz-Suchy (Poland)). *See also* Ukraine's Memorial, para. 84, n.158.

²⁰⁵ *See* Sixth Committee of the General Assembly, Eighty-Seventh Meeting, U.N. Doc. A/C.6/SR.87, pp. 251, 253 (29 October 1948) (Mr. Fitzmaurice (United Kingdom)). *See also* Ukraine's Memorial, para. 84, n.159.

2. A Contracting Party Taking Action to Prevent or Punish Genocide Under the Convention Must Act in Good Faith and Without Abuse.

117. Articles I and IV must not only be properly interpreted, but the rights and obligations they embody must be fulfilled in good faith and without abuse. The Russian Federation attempts to diminish this requirement by referring to it as an “alleged implicit” obligation, but ignores the specific ways in which these obligations are rooted in the text of the Convention and established principles of the law of treaties.²⁰⁶

118. For example, under the principle of *pacta sunt servanda* and as explained by the Court in its *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* judgment, parties are obliged to “apply [the treaty] in a reasonable way and in such a manner that its purpose can be realized.”²⁰⁷ With respect to Article I of the Genocide Convention in particular, the Court in its Provisional Measures Order recognized that although “Article I does not specify the kinds of measures that a Contracting Party may take to fulfil th[e] obligation” to prevent and punish genocide, “the Contracting Parties must implement this obligation in good faith.”²⁰⁸

119. Thus, when the Contracting Parties undertook to prevent and to punish genocide, they necessarily bound themselves to good faith implementation of that obligation — and of the correlative right to take action to address another Contracting Party’s breach. In particular, the Contracting Parties committed themselves to take measures only to prevent and punish a genocide that has diligently and reasonably been determined to be occurring or at serious risk of occurring, and not to abuse or misuse their rights for improper purposes.

²⁰⁶ See Russia’s Objections, paras. 143–144.

²⁰⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, pp. 78–79, para. 142. See also Ukraine’s Memorial, para. 87, n.162 (and sources cited therein).

²⁰⁸ Provisional Measures Order of 16 March 2022, para. 56.

120. The principles governing the proper implementation of Articles I and IV are well supported in international law. As Judge Keith observed in his Declaration in *Mutual Assistance in Criminal Matters*, under “the principles of good faith, abuse of rights and *détournement de pouvoir*,” a State exercising a treaty-supplied right must “exercise the power for the purposes for which it was conferred and without regard to improper purposes or irrelevant factors.”²⁰⁹ Professor Bin Cheng similarly wrote that “[t]he reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of another State.”²¹⁰ The eighth edition of Oppenheim’s *International Law* treatise explained that a State abuses a right “when [it] avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage.”²¹¹ Contrary to Russia’s cursory assertion that Ukraine “made no effort in its Memorial to demonstrate the existence of the prohibition of abuse of rights as a rule of international law, and what the precise conditions for its application are,” these authorities do precisely that.²¹²

²⁰⁹ *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, *Judgment*, *I.C.J. Reports 2008*, Declaration of Judge Keith, p. 279, para. 6. See Ukraine’s Memorial, para. 89.

²¹⁰ Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS*, pp. 131–132 (Stevens and Sons Ltd. 1953) (Ukraine’s Memorial, Annex 20).

²¹¹ L. Oppenheim, *INTERNATIONAL LAW: A TREATISE, VOLUME 1 — PEACE*, p. 345 (H. Lauterpacht, ed., David McKay Company Inc., 8th ed. 1955) (Ukraine’s Memorial, Annex 21); see also OPPENHEIM’S *INTERNATIONAL LAW: VOLUME 1 PEACE*, p. 407 (Robert Jennings & Arthur Watts, eds., Oxford University Press, 9th ed. 2008) (Ukraine’s Memorial, Annex 24); Robert Kolb, *GOOD FAITH IN INTERNATIONAL LAW*, p. 144 (Hart 2017) (explaining that a “more general sphere of abuse of rights . . . encompasses arbitrary, unreasonable and fraudulent acts”) (Ukraine’s Memorial, Annex 28).

²¹² Russia’s Objections, para. 218; see also Ukraine’s Memorial, paras. 87–89 and accompanying notes.

121. Russia's criticism of so-called "implied" obligations is particularly misplaced in the context of the Genocide Convention. The Court has previously recognized that although some obligations might not be expressly stated by that Convention, they follow from its terms.²¹³ In the *Bosnian Genocide* case, the Court identified an obligation not to commit genocide that was not stated "*expressis verbis*," but followed from what the Convention "necessarily implies."²¹⁴ When the Contracting Parties agreed to "categorize[] genocide as 'a crime under international law,'" they "must logically be undertaking not to commit the act so described."²¹⁵ Similarly, a State that undertakes to prevent and punish the crime of genocide must also logically be undertaking not to abuse that responsibility.

122. The Russian Federation also has no response to Ukraine's explanation that Russia's abuse and misuse of the Convention violates the Convention. In *Certain German Interests in Polish Upper Silesia*, the PCIJ recognized that an abuse of right can amount to a treaty breach.²¹⁶ Discussing the Treaty of Versailles, the PCIJ explained that a "misuse" of a right to alienate property would "endow" such an act "with the character of a breach of the Treaty."²¹⁷ Similarly, Professor Bin Cheng observed in his treatise that an action "inconsistent with the bona fide execution of the treaty obligation" constitutes "a breach of the treaty."²¹⁸

²¹³ See Ukraine's Memorial, para. 93.

²¹⁴ *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. 113, para. 166. See Ukraine's Memorial, para. 93.

²¹⁵ *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. 113, para. 166.

²¹⁶ Ukraine's Memorial, para. 91 (citing *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Judgment No. 7, 25 May 1926, P.C.I.J., Series A. – No. 7, p. 30).

²¹⁷ *Certain German Interests in Polish Upper Silesia (Germany v. Poland)*, Merits, Judgment No. 7, 25 May 1926, P.C.I.J., Series A. – No. 7, p. 30.

²¹⁸ Bin Cheng, GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS, p. 125 (Stevens and Sons Ltd. 1953) (Ukraine's Memorial, Annex 20). With respect to *United States -*

Russia addresses these authorities in a cursory manner, and points to nothing rejecting Ukraine's position.²¹⁹ Nor does Russia respond to Ukraine's point that this conclusion applies with particular force to Articles I and IV, in light of the Genocide Convention's "purely humanitarian and civilizing purpose."²²⁰ As the Court set forth in its Advisory Opinion on *Reservations to the Genocide Convention*, the Genocide Convention's performance must reflect the Contracting Parties' "common interest" in "the accomplishment of those high purposes which are the *raison d'être* of the convention."²²¹

123. The Russian Federation's main response to Ukraine's extensive discussion of how its claims flow directly from the text of the Genocide Convention is to frame Ukraine's abuse claim as based solely on a claimed "violation of a general principle, and not of a particular treaty."²²² This contention is both wrong and irrelevant.

Import Prohibition of Certain Shrimp and Shrimp Products, Russia asserts that "the Appellate Body did not find that the US had abused Article XX, but that it applied it in an arbitrary and discriminatory manner." See Russia's Objections, para. 218, n.273. However, Ukraine's point was simply that the reasoning of the Appellate Body itself suggests that a measure applied in an arbitrary manner constitutes an abuse of right in violation of the treaty. The Appellate Body noted: "[W]e address now the issue of whether the *application* of the United States measure, although the measure itself falls within the terms of Article XX(g), nevertheless constitutes 'a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail' or 'a disguised restriction on international trade.' We address, in other words, whether the application of this measure constitutes an abuse or misuse of the provisional justification made available by Article XX(g)." Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (12 October 1998), p. 62, para. 160.

²¹⁹ See Russia's Objections, para. 218.

²²⁰ See Ukraine's Memorial, para. 92 (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23).

²²¹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

²²² Russia's Objections, para. 218.

124. As reflected in *Certain German Interests*, an abuse of substantive rights may constitute a violation of the relevant treaty; the concept is not merely a violation of a general principle outside of the treaty. In one of the main cases cited by Russia, *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, the Court indicates that good faith as a general principle is not independent of the underlying obligation.²²³ As the Court explained, good faith “is not in itself a source of obligation where none would otherwise exist,” but is “one of the basic principles governing the creation *and performance of legal obligations*.”²²⁴ At issue in this case is Russia’s performance of its legal obligations under the Genocide Convention. It is appropriate to consider Russia’s performance in light of the requirement that treaty rights and obligations under the Genocide Convention be exercised in good faith and without abuse.

125. Moreover, even if the Russian Federation were correct that its obligation to implement the Convention in good faith and without abuse derives only from general principles of international law, this Court’s jurisdiction *ratione materiae* would be unaltered.

²²³ See *ibid.*, para. 219, n.277.

²²⁴ *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 1988*, p. 105, para. 94 (emphasis added). See also Hugh Thirlway, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE*, Vol. I, p. 20 (Oxford University Press 2013) (Ukraine’s Written Statement, Annex 9) (explaining that “the argument of Honduras was not so much that good faith had created an obligation on Nicaragua’s part, as that the admitted commitment to the Contadora Process entered into by Nicaragua entailed an undertaking not to resort to judicial settlement procedures, such recourse being inconsistent with performance in good faith of the admitted obligation. Hence the question raised in this case—but not examined by the Court, for the reasons stated—was one of good faith execution of an obligation, good faith *stricto sensu*”). Similarly, in the *Nuclear Tests* cases, the Court suggested that “good faith” functions as a determinant of the creation and performance of other rights and duties. As the Court stated: “One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. . . . Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation” See *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, p. 268, para. 46.

As explained above, this Court has jurisdiction over any dispute that *relates to*, *i.e.*, has a relationship or connection with, the interpretation, application, or fulfilment of the Convention.²²⁵ A claim that a Contracting Party has performed its rights and obligations under Articles I and IV of the Convention in a bad-faith, abusive manner plainly has a relationship or connection with the fulfilment of the Convention, at the very least. By the unequivocal terms of Article IX, the Court has jurisdiction over such a dispute, regardless of whether the obligation of good faith performance arises from the Convention itself, general principles of law, or both.

126. In addition to its mistaken argument that abusive performance of the Genocide Convention does not relate to the interpretation, application, or fulfilment of the Genocide Convention, Russia faults Ukraine for “not identify[ing] *any* right under the Convention that the Russian Federation has allegedly abused.”²²⁶ Yet as explained above, Russia has obligations and rights under Articles I and IV, and it has abused both. As this Court has recognized on multiple occasions, “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*.”²²⁷ Despite the emphasis on this point in Ukraine’s

²²⁵ See *supra* paras. 96–97.

²²⁶ Russia’s Objections, para. 223.

²²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 616, para. 31; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order, I.C.J. Reports 2020*, p. 17, para. 41 (“[A]ny State party to the Genocide Convention, and not only a specially affected State, may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.”); *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of Congo v. Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, Joint Separate Opinion by Judges Higgins, Kooijmans, Elaraby, Owada, and Simma, p. 72, para. 28 (“Under that Convention it is States who are the monitors of each other’s compliance with prohibition on genocide.”); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Provisional Measures, Order, I.C.J. Reports 1993*, Separate Opinion of Judge

Memorial, Russia ignores its significance. As obligations held *erga omnes partes*, Articles I and IV entail a corresponding right and interest for every Contracting Party to take steps to bring to an end violations of the Convention by other Contracting Parties. Russia has undertaken to prevent and punish genocide, and it has abused that obligation by taking harmful action against Ukraine on the pretext of preventing and punishing genocide. It makes no sense for Russia to assert that this obligation does not “come into being” before there is an actual genocide;²²⁸ the obligation always exists (hence the requirement of due diligence), and Russia misused that obligation in order to attack a State that was not in fact committing genocide. Russia also has a right to take action to bring a breach of the Convention to an end: as summarized by Professor Giorgio Gaja in *Annuaire de l’Institut de droit international*, “[w]hen a State is under an obligation *erga omnes*, all the States to whom the obligation *erga omnes* is owed have a corresponding right.”²²⁹ Russia has abused that right by taking harmful action against Ukraine on the pretext of stopping a genocide committed by Ukraine.²³⁰

ad hoc Lauterpacht, p. 436, para. 86 (explaining that “[t]he duty to ‘prevent’ genocide is a duty that rests upon all parties and is a duty owed by each party to every other,” creating a “network of duties” that “is matched by a network of correlative rights”).

²²⁸ Russia’s Objections, para. 149.

²²⁹ Giorgio Gaja, *Obligations and Rights Erga Omnes in International Law*, Second Report, *Annuaire de l’Institut de droit international*, Vol. 71, p. 191 (Krakow Session, 2005) (Ukraine’s Memorial, Annex 23). The Court reiterated the same, with respect to the *erga omnes partes* obligations in the Convention against Torture, in the *Belgium v. Senegal* case. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, *I.C.J. Reports 2012*, p. 450, para. 69 (“It follows that any State party to the Convention may invoke the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*.”).

²³⁰ Russia also contends that it “has not taken any measure of a formal character to invoke Ukraine’s responsibility.” Russia’s Objections, para. 224. That is too narrow a characterization of the rights and obligations at issue, which go beyond a mere right to formally invoke the responsibility of a State. In any event, as explained above, a State may invoke the responsibility of another State not only through

127. The Russian Federation again errs when it suggests that the “right” Ukraine claims is abused is a right to “resort to the use of force or [to] recognise States on the basis of the Convention.”²³¹ Russia goes on to argue that “[i]t is hard to conceive how Ukraine’s claim of abuse of rights could succeed when the right allegedly abused is at the same time denied by Ukraine.”²³² This assertion misunderstands Ukraine’s argument. By improperly using force and recognizing the DPR and LPR for the stated purpose of bringing a violation of the Genocide Convention to an end, Russia has abused its undertaking to prevent and punish genocide, and its right to take lawful action to end genocide. Those obligations are firmly grounded in the text of the Genocide Convention.

128. Finally, Russia repeats its assertion that its actions were grounded in “other sources of international law,” including Article 51 of the U.N. Charter and principles of self-determination.²³³ But that is a merits argument that is wholly irrelevant to this Court’s jurisdiction *ratione materiae*. As noted above, the question of whether Ukraine’s claims are “capable” of falling within the Genocide Convention can only be answered by assuming as true, *pro tem*, Ukraine’s factual allegations. The claim advanced by Ukraine, supported by evidence, is that Russia recognized the DPR and LPR and used force in and against Ukraine for the express purpose of stopping a genocide committed by Ukraine. Russia cannot avoid the Court’s jurisdiction *ratione materiae* by advancing a factual argument that it acted for different reasons.

diplomatic protest, but by taking “specific action.” See ILC Commentaries on Draft Articles on State Responsibility, art. 42, p. 117, para. 2. Russia took such action against Ukraine. See *supra* para. 43.

²³¹ Russia’s Objections, paras. 225–226.

²³² *Ibid.*, paras. 225–226.

²³³ *Ibid.*, para. 226 (citing to Russia’s Objections, paras. 37, 44, 46–50, which refer to Russia’s purported international law bases for its actions).

3. A State Must Act Within the Limits of International Law When Taking Action Under Articles I and IV.

129. In contrast to the relatively cursory treatment that the Russian Federation's submission gives to Ukraine's claim of a misuse and abuse of the Convention, Russia devotes significant attention to Ukraine's observation that a State taking measures to prevent and punish genocide must act within the limits of international law.²³⁴ According to Russia, Ukraine improperly seeks to "incorporate into the Convention an indefinite number of rules of international law that fall outside its scope of application," with the goal of "unduly expanding the Court's jurisdiction *ratione materiae*."²³⁵ On this point as well, Russia's claim is based on a mischaracterization of Ukraine's argument and an unsupportable interpretation of the Convention.

130. A State may not claim to enforce international law by violating international law. As the Court explained in *Bosnian Genocide*, "it is clear that every State may only act within the limits permitted by international law."²³⁶ The Russian Federation's attempt to minimize this Court's observation as merely "hortatory in nature" is untenable.²³⁷ The Court's affirmation that "every State may only act within the limits permitted by international law" appears in a section of the Court's judgment in *Bosnian Genocide* discussing the obligation to prevent genocide under Article I of the Convention. As the Court stated:

Various parameters operate when assessing whether a State has duly discharged the obligation concerned. The first, which varies greatly from one State to another, is clearly the capacity

²³⁴ See *ibid.*, Chapter IV, Section D.

²³⁵ *Ibid.*, para. 170; see also *ibid.*, paras. 150, 173.

²³⁶ *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. 221, para. 430. See also Ukraine's Memorial, para. 95.

²³⁷ Russia's Objections, para. 176.

to influence effectively the action of persons likely to commit, or already committing, genocide. . . . 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 permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide.*²³⁸

131. No aspect of that reasoning suggests that the Court regarded this principle as merely hortatory. Rather, the Court set out generally applicable criteria to be applied when “assessing whether a State has duly discharged the obligation concerned.”²³⁹

132. Russia is no more successful criticizing this Court's reliance on *Bosnian Genocide* in its Provisional Measures Order.²⁴⁰ Responding to the Order, Russia asserts that “[t]he fact that a State should respect its obligations under international law when giving effect to a treaty is an obvious proposition. But those obligations arise under their relevant sources (treaties, customary international law or general principles of law); not under the treaty being executed.”²⁴¹ Contrary to Russia's suggestion, no one disputes that rules of international law, such as the prohibition on the use of force, originate outside of the Convention. The point reflected in *Bosnian Genocide* is that *when a State acts to prevent and punish genocide*, the Convention obligates States to respect the limits that international law imposes. As Judge Robinson explained in his Separate Opinion: “Article I of the Genocide

²³⁸ *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. 221, para. 430 (emphasis added).

²³⁹ Russia also asserts that the Court would have used the phrase “as provided for by article I of the Convention” had the obligation been derived from Article I. See Russia's Objections, para. 176. However, this assertion ignores the statement's contextualization in a paragraph elaborating on the content of the Article I obligation as a whole.

²⁴⁰ Russia's Objections, paras. 180–182.

²⁴¹ *Ibid.*, para. 181.

Convention imposes an obligation on Russia not only to act to prevent genocide, but to act *within the limits permitted by international law* to prevent genocide.”²⁴²

133. That conclusion is reinforced when Article I is read in its context. Articles VIII and IX indicate that the undertaking to prevent and punish genocide must be performed within the limits of international law and in a manner consistent with the goals and structure of the U.N. system.²⁴³ Articles VIII and IX refer to the role of the political and judicial organs of the United Nations with respect to genocide prevention and punishment.²⁴⁴ In particular, they describe the type of measures that, in the words of the Court in *The Gambia v. Myanmar*, a State might invoke to engage “the responsibility of another State party with a view to ascertaining the alleged failure to comply with its obligations *erga omnes partes*, and to bring that failure to an end.”²⁴⁵ Even if resort to these U.N. mechanisms is not the exclusive means available of stopping genocide, they reflect the type of measure contemplated by the

²⁴² Provisional Measures Order of 16 March 2022, Separate Opinion of Judge Robinson, para. 27.

²⁴³ See Ukraine’s Memorial, para. 97.

²⁴⁴ Genocide Convention, art. VIII (“Any Contracting Party 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 or any of the other acts enumerated in article III.”); art. IX (“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.”).

²⁴⁵ *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. 17, para. 41. In its recent judgment on preliminary objections, the Court repeated this view. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, para. 112 (“It follows that any State party to the Genocide Convention may invoke the responsibility of another State party . . . with a view to determining the alleged failure to comply with its obligations *erga omnes partes* under the Convention and to bringing that failure to an end.”).

Convention – and demonstrate that measures anathema to the principles and structure of the U.N. system cannot be permissible under the Convention.

134. Russia responds by misreading this Court’s judgment in *The Gambia v. Myanmar*, where the Court observed that Article VIII “does not govern the seisin of the Court.”²⁴⁶ Myanmar had sought to invoke its reservation to Article VIII, arguing incorrectly that this Court was one of the “organs” referred to in that provision.²⁴⁷ Ukraine does not argue that this Court is such an “organ,” or that anything about Article VIII qualifies the jurisdiction of this Court. Rather, Ukraine follows established principles of treaty interpretation by looking to Articles VIII and IX as relevant context, shedding light on the type of measures that are permitted and not permitted under Articles I and IV.²⁴⁸ Similarly, it is appropriate to read a compromissory clause such as Article IX as providing relevant context, not to treat such a clause as imposing substantive obligations, but to shed light on the obligations imposed in other provisions.²⁴⁹

135. Interpreting Article I to impose an obligation to act within the limits of international law is likewise supported by the Convention’s object and purpose. As the Court has observed, “[t]he Convention was manifestly adopted for a purely humanitarian and

²⁴⁶ See Russia’s Objections, para. 190 (quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Preliminary Objections*, Judgment of 22 July 2022, paras. 88–90).

²⁴⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, *Preliminary Objections*, Judgment of 22 July 2022, paras. 80–90.

²⁴⁸ For essentially the same reasons, Russia’s claim that Article VIII “does not impose a specific obligation upon States,” and its associated citation to *Bosnian Genocide*, are misplaced. See Russia’s Objections, para. 190. Ukraine neither refers to Article VIII in order to confer jurisdiction beyond that provided by the Statute, nor claims that Article VIII sets forth any additional substantive obligation.

²⁴⁹ See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment*, *I.C.J. Reports 2007*, p. 114, paras. 168–169 (relying on Article IX to confirm its interpretation of Article I).

civilizing purpose.”²⁵⁰ That purpose would surely be undermined if a Contracting Party could, consistent with Article I of the Convention, use a claim of genocide as a basis to violate fundamental rules of international law. This case illustrates the consequences of a Contracting Party acting for the express purpose of preventing and punishing genocide, but doing so with patently un-civilized aims and anti-humanitarian results.

136. In response, the Russian Federation asks this Court to ignore the well-recognized purposes of the Convention, asserting that “[i]t is clear from th[e] preamble that the object and purpose of the Convention is limited to criminalising genocide under international law and liberating mankind from this crime.”²⁵¹ The Preamble is far from limited in this manner, but rather speaks broadly of “the spirit and aims of the United Nations.” The Court has already repudiated the extreme suggestion that the Convention’s Preamble, as well as Articles VIII and IX, have no bearing on the manner in which a State can implement obligations under the Convention. As stated by the Court in its Provisional Measures Order, although “Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation,” “the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble.”²⁵² The Preamble’s reference to “the spirit and aims of the United Nations” is not a “superficial reference,” as Russia says,²⁵³ but indicative

²⁵⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

²⁵¹ Russia’s Objections, para. 187.

²⁵² Provisional Measures Order of 16 March 2022, para. 56.

²⁵³ Russia’s Objections, para. 187.

of the Convention’s humanitarian object and purpose, which would be undermined by Russia’s narrow reading of Article I.

137. Russia also offers misplaced reliance on various cases in which the Court has addressed the relationship between different treaties and other bodies of international law. Russia characterizes these cases as involving a rejection by the Court of a State’s attempt to “incorporat[e] other rules of international law with a view to expanding the Court’s jurisdiction *ratione materiae*.”²⁵⁴ However, the requirement that a State acting to prevent and punish genocide abide by international law limits in no way involves an “incorporation” of separate bodies of law into the Convention, so these cases do not support Russia’s position. Further, none of these cases involves a compromissory clause extending the Court’s jurisdiction to disputes relating to “fulfilment,” which encompasses claims of unlawful means of fulfilling treaty rights or obligations, regardless of the source of the norms making the party’s fulfilment of the treaty unlawful.

138. For example, Russia points to the Court’s conclusion in *Oil Platforms* that Article I of the Treaty of Amity between Iran and the United States did not “incorporat[e]” the international law concerning the use of force, in the sense that any unlawful use of force by one party against another would violate the treaty.²⁵⁵ Similarly, in *Certain Iranian Assets*,

²⁵⁴ *Ibid.*, para. 194.

²⁵⁵ *Ibid.*, para. 195 (citing *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 814, para. 28). More specifically, Iran argued that the attacks on certain oil platforms by United States naval forces breached, *inter alia*, Article I of the Treaty of Amity. As summarized by the Court, under Iran’s interpretation, Article I — which states that “[t]here shall be firm and enduring peace and sincere friendship between the United States . . . and Iran” — imposed on the parties an obligation to conduct themselves in “accordance with the relevant provisions of the Charter of the United Nations and of customary law governing the use of force.” *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 1996*, p. 812, paras. 24–25. The Court did not accept this argument, holding that Article I did not “incorporat[e]” the international law concerning the use of force but rather

the Court rejected the suggestion that the Treaty of Amity effected a wholesale incorporation of the customary law of sovereign immunities.²⁵⁶ Ukraine, by contrast, does not argue that any use of force in violation of the U.N. Charter violates Article I of the Genocide Convention. Articles I and IV reflect the more modest, but critical, principle that when a State acts to prevent and punish genocide, it must respect the limits of international law.²⁵⁷

139. Russia’s comparison to *Immunities and Criminal Proceedings* is also misplaced. Equatorial Guinea had argued that Article 4(1) of the Palermo Convention, by obligating parties to carry out the Convention consistent with principles of sovereign equality, imposed an obligation to respect the immunities of States and State officials. The Court did not disagree that Article 4(1) imposes obligations on the manner in which a State carries out the Palermo Convention.²⁵⁸ Rather, it rejected the more specific incorporation argument advanced by Equatorial Guinea, explaining that “Article 4 does not refer to the customary

provided an “objective, in the light of which the other Treaty provisions are to be interpreted and applied.” *Ibid.*, para. 28.

²⁵⁶ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment, I.C.J. Reports 2019*, pp. 26–35, paras. 51–80.

²⁵⁷ In fact, the Court’s judgment on the merits in *Oil Platforms* counters Russia’s position. The Court concluded that the law governing the use of force — specifically the doctrine of self-defense — was relevant in determining what “measures” could permissibly be taken under the treaty’s security exception. See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, *Judgment, I.C.J. Reports 2003*, p. 182, paras. 41–43. *Oil Platforms* thus confirms that the categorical view underlying Russia’s position — that any claim involving violations of the use of force falls outside the Genocide Convention — is incorrect. See *ibid.*, para. 41 (“The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force, so as to be capable of being successfully invoked, even in the limited context of a claim for breach of the Treaty, in relation to an unlawful use of force.”).

²⁵⁸ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Preliminary Objections, Judgment, I.C.J. Reports 2018*, p. 321, para. 92 (explaining that Article 4(1) is mandatory, and “[i]ts purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States”).

international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself.”²⁵⁹ That narrow conclusion, focused on the particular wording of the treaty provision, has no bearing on whether Articles I and IV of the Genocide Convention impose an obligation not to take action to prevent and punish genocide in a manner that violates international law.²⁶⁰

140. Finally, the Court’s judgment in *Croatian Genocide* does not support Russia’s position. In a section of the judgment ignored by Russia, the Court observed that, although it lacked “power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict,” “[t]hat does not prevent the Court from considering, in its reasoning, whether a violation of

²⁵⁹ *Ibid.*, para. 93. See also Russia’s Objections, para. 197.

²⁶⁰ See *Immunities and Criminal Proceedings (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, pp. 321–323, paras. 91–103. To the contrary, the Court’s analysis supports Ukraine’s interpretation. The Court observed that the object and purpose of the Palermo Convention “is the promotion of co-operation to prevent and combat transnational organized crime more effectively,” which had little connection to the sovereign immunity rules invoked by Equatorial Guinea. *Ibid.*, para. 95. By contrast, the rules governing the use of force are substantially connected with the “humanitarian and civilizing purpose” for which the Genocide Convention was “manifestly adopted.” See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007*, p. 110, para. 161 (quoting *Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 23); *ibid.*, para. 167.

The *Legality of Use of Force* cases are also inapposite, as Ukraine only refers to the use of force in describing the requirement that a State acting to prevent and punish genocide act within the bounds of international law. Russia’s reliance on these cases appears to be based on extrapolations from the Court’s treatment of Yugoslavia’s argument that Belgium was committing acts of genocide in using force. See Russia’s Objections, para. 207. As Russia is compelled to acknowledge in a caveat that overtakes any comparison: “the Court approached the question before it from the point of view of Article II of the Genocide Convention and whether the acts of NATO Member States showed a genocidal intent.” See *ibid.*, para. 208 (emphasis added). Moreover, there is no merit in Russia’s suggestion that because Court did not *proprio motu* rely on a jurisdictional link between use of force and genocide in the *Legality of Use of Force* cases, any such link was implicitly rejected. See *ibid.*, para. 211. No inference can be drawn from a decision not to *proprio motu* assert a jurisdictional theory not invoked by the applicant.

international humanitarian law or international human rights law has occurred to the extent that this is relevant for the Court's determination of whether or not there has been a breach of an obligation under the Genocide Convention."²⁶¹

* * *

141. Russia's invitation for the Court to conduct a comprehensive interpretation of Articles I and IV of the Convention at this stage should be declined. Consistent with the Court's jurisprudence, the disagreement between the parties over the correct interpretation and application of these provisions is part of the merits of a dispute over which this Court has jurisdiction.

142. If the Court chooses to address the interpretive questions at the preliminary objections stage, it should find that it has jurisdiction because Ukraine's claims are capable of falling within the provisions of the Genocide Convention. The interpretations advanced by Russia are untenable and disregard the *erga omnes partes* character of the undertakings provided by Articles I and IV, the ordinary meaning of the terms of these articles read in their context, and the object and purpose of the Genocide Convention. Whichever path the Court follows, the Russian Federation's second preliminary objection should be rejected.

²⁶¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Judgment, I.C.J. Reports 2015*, pp. 45–46, para. 85. Russia instead attempts to rely on the Court's determination in *Croatian Genocide* that the Court's exercise of jurisdiction over alleged violations otherwise outside of the scope of the Convention depends on whether there is "discernible intention" in the Convention that the Court entertain such claims. See Russia's Objections, para. 214. However, the issue before the Court in that case was whether it could adjudicate claims related to Serbia's alleged genocide which occurred prior to the Convention entering into force for Serbia. That issue is simply not presented here.

CHAPTER 4: UKRAINE’S CLAIMS ARE ADMISSIBLE

143. In its third, fourth, fifth, and sixth objections, the Russian Federation argues that even if the Court has jurisdiction over the dispute, it should still dismiss Ukraine’s claims as inadmissible. Russia makes four admissibility objections: (1) Ukraine has purportedly included “new” claims in its Memorial; (2) an eventual judgment would be devoid of practical effect; (3) a so-called “reverse compliance” request is inadmissible; and (4) Ukraine’s Application is an abuse of process. In advancing these objections, Russia continues to mischaracterize Ukraine’s Application and Memorial, and re-packages many of its jurisdictional objections as also presenting issues of admissibility. Whether the Court treats these as questions of admissibility or jurisdiction, however, Russia’s arguments are both legally and factually incorrect and should be rejected.

A. Ukraine’s Claims in Its Memorial Fall Within the Subject-Matter of the Dispute Presented in Its Application.

144. Russia is simply wrong that “Ukraine’s submissions in the Application are manifestly different to those advanced in the Memorial,” or that Ukraine has “introduced multiple new claims in its Memorial.”²⁶² As noted in *The Statute of the International Court of Justice: A Commentary*, the “preliminary and tentative exposition of the subject of the dispute and the nature of the claim and the succinct statements of facts and legal grounds in the application . . . are provided for in such a manner under Article 40 and the provisions of the Rules with the expectation that they will be supplemented and elaborated in the further proceedings” — a common-sense point underscored by the fact that submissions may be

²⁶² Russia’s Objections, paras. 242–243.

amended until the end of oral proceedings.²⁶³ Since it is well established in the Court’s jurisprudence that a party is expected to develop and elaborate on its claims during the course of the proceedings, it follows that the submissions may evolve accordingly.²⁶⁴

145. The Court has explained that a claim should not be treated as new if it is “implicit in the application or [arose] directly out of the question which is the subject-matter of [the] Application.”²⁶⁵ Confirming the propriety of amending or adding claims as a case proceeds, the Court has recognized that “claims advanced . . . even subsequently to the application” may properly “clarify[] the scope of the dispute submitted,” even if “they cannot create a dispute *de novo*.”²⁶⁶ The Court’s jurisprudence thus emphasizes the subject-matter of the Application in relation to the modification or addition of claims. For example, in *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, the Court permitted a claim founded “on different legal grounds” than what was presented in the Application, since it related to the same subject-matter.²⁶⁷ Similarly, in *Territorial and Maritime Dispute (Nicaragua v. Honduras)*, the Court concluded that a claim was admissible on the basis that

²⁶³ Sienho Yee, *Article 40*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* (Zimmermann et al., eds., Oxford University Press 2019), p. 1077 (Ukraine’s Written Observations, Annex 12).

²⁶⁴ *See Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, pp. 318–319, para. 99.

²⁶⁵ *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67 (internal citations omitted).

²⁶⁶ *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 855, para. 54.

²⁶⁷ *Territorial and Maritime Dispute (Nicaragua v. Colombia), Judgment, I.C.J. Reports 2012*, p. 665, para. 111.

it was “inherent” in the original claim.²⁶⁸ And in *Diallo*, the Court found a claim was not implicit in the application when it related to events from a “different time and in different circumstances”²⁶⁹ — a situation quite different from the present dispute. In that case, five Members of the Court noted in a Joint Declaration that “what matters as regards the admissibility of a formally new claim is that it should fall within the subject of the dispute which has been brought before the Court.”²⁷⁰

146. All of Ukraine’s claims and submissions relate to the subject-matter of the dispute before the Court: Russia’s allegations that Ukraine is committing genocide in violation of the Genocide Convention and Russia’s reliance on these false allegations to take unilateral action in and against Ukraine. As noted in Chapter 2, Ukraine’s Memorial does not “transform the dispute.”²⁷¹ Ukraine’s claims fall within the subject-matter of its Application.²⁷²

147. The Russian Federation makes three principal arguments in support of this objection, each of which should be rejected. *First*, Russia perceives Ukraine’s Application as having been limited to a “request to confirm that the Russian Federation’s actions had no basis on the Convention,” and asserts that Ukraine’s Memorial asserted a new claim by seeking “to establish the responsibility of the Russian Federation for allegedly violating

²⁶⁸ *Territorial and Maritime Dispute Between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, *I.C.J. Reports 2007*, p. 697, para. 115.

²⁶⁹ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, *I.C.J. Reports 2010*, pp. 657–658, para. 43.

²⁷⁰ *Ibid.*, Joint Declaration of Judges Al-Khasawneh, Simma, Bennouna, Cançado Trindade, and Yusuf, p. 696, para. 4.

²⁷¹ See *supra*, Chapter 2, Section A.

²⁷² At a minimum, Ukraine’s claims were “implicit in the application.” See *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, *I.C.J. Reports 1992*, p. 266, para. 67.

Articles I and IV of the Convention.”²⁷³ Russia is simply mistaken, and appears to be making a point that is mere semantics rather than substance. In its Application, Ukraine alleged that Russia’s actions are “incompatible with the Genocide Convention and violate[] Ukraine’s rights.”²⁷⁴ The Court understood Ukraine’s claims as such, noting in its Provisional Measures Order that Ukraine’s allegations against Russia included that “the Russian Federation has acted inconsistently with its obligations and duties, as set out in Articles I and IV of the Convention,” and that “the Russian Federation has abused and misused the rights and duties stipulated in the Convention.”²⁷⁵

148. A claim that Russia’s actions are “incompatible” with the treaty, and violate Ukraine’s rights under the treaty, is a claim that Russia violated the treaty. It is simply not true that Ukraine’s Application was limited to establishing a lack of legal authorization in the Convention for Russia’s actions.

149. At a minimum, Ukraine’s claim that Russia’s abuse and misuse of the Convention constitutes a violation arises directly from, and is implicit in, the subject-matter of the dispute established in the Application: Russia’s allegations that Ukraine is committing genocide in violation of the Genocide Convention and Russia’s reliance on these false allegations to take unilateral action in and against Ukraine beginning in February 2022. A claim that Russia lacked legal justification for its actions under the Genocide Convention, and a claim that Russia violated the Genocide Convention by those actions, are two sides of the same coin. Under the Court’s jurisprudence, even if Ukraine’s Memorial were seen as

²⁷³ Russia’s Objections, para. 243.

²⁷⁴ Ukraine’s Application, para. 29; *see also ibid.*, para. 26 (outlining the legal grounds for Ukraine’s Application).

²⁷⁵ Provisional Measures Order of 16 March 2022, paras. 52–53.

advancing “different legal grounds” from its Application while addressing the same dispute, its claims would still be admissible.²⁷⁶ But in fact, Ukraine has advanced the same fundamental claims that were articulated in its Application. Ukraine’s Memorial simply clarifies those claims.

150. *Second*, Russia contends that “Ukraine has also changed the nature of its claims in respect of [the] acts of genocide” that the Russian Federation has alleged against Ukraine and its officials.²⁷⁷ Specifically, Russia argues that there has been a “shift in the relief sought” from the Application, which asked the Court to “declare that . . . no acts of genocide, as defined by Article III of the Genocide Convention, have been committed,” to the Memorial, which asked the Court to “declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention.”²⁷⁸ Again, Russia’s argument is one of semantics rather than substance. Ukraine has not transformed the dispute by requesting that the Court find there is no credible evidence Ukraine committed acts of genocide in Donbas. Ukraine simply added specificity to this particular submission, as is permitted and directly contemplated by the Court’s Rules.²⁷⁹

151. To decide the dispute that Ukraine has submitted to the Court, it will be necessary for the Court to determine whether there is credible evidence of Ukraine’s

²⁷⁶ See *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012*, p. 665, para. 111.

²⁷⁷ Russia’s Objections, para. 249.

²⁷⁸ *Ibid.*, paras. 249–251.

²⁷⁹ See Rules of the Court, art. 49(4) (“Every pleading shall set out the party’s submissions at the relevant stage of the case, distinctly from the arguments presented, or shall confirm the submissions previously made.”). A party’s submissions can be changed until the end of a hearing, when final submissions are due. *Ibid.*, art. 60(2) (“At the conclusion of the last statement made by a party at the hearing, its agent, without recapitulation of the arguments, shall read that party’s *final* submissions.” (emphasis added)).

responsibility for genocide. A declaration on this point will advance the resolution of the dispute. It is ultimately for the Court to decide the particular language of any declaration it makes after hearing the merits, and a declaration framed in terms of an absence of acts of genocide, or of an absence of credible evidence of such acts, would equally advance the resolution of the present dispute.²⁸⁰ Ukraine’s adjustment of the precise wording of the declaration it seeks comes nowhere close to transforming the nature of the dispute itself.

152. *Finally*, Russia argues that because Ukraine’s Application did not expressly mention Article IV of the Genocide Convention, claims regarding this article are “completely new and, for this reason alone, should be declared inadmissible.”²⁸¹ Ukraine’s Article IV claim, however, is related to its claim under Article I and arises from the same subject-matter. The Memorial (and, before that, Ukraine’s oral pleadings on provisional measures) clarified that the legal grounds of Ukraine’s claims implicate both Articles I and IV.²⁸² Article I establishes that the Contracting Parties undertake to both prevent and punish genocide, and Article IV focuses on a specific aspect of that undertaking in the form of individual punishment. The close relationship between Articles I and IV of the Genocide Convention stands in contrast to the new claim that was rejected in *M/V Louisa*, the only authority cited by Russia to support its argument, where the International Tribunal for the Law of the Sea

²⁸⁰ Russia also contends that, “by focusing exclusively on State responsibility for commission of acts of genocide, Ukraine leaves out its possible responsibility for failing to take the required measures to prevent and/or punish genocide.” Russia’s Objections, para. 251. This point again mischaracterizes what Ukraine is asking of the Court, and in any event, there is no credible evidence Ukraine committed acts of genocide.

²⁸¹ Russia’s Objections, para. 244.

²⁸² Ukraine explicitly raised Article IV during the hearing on Ukraine’s request for the indication of provisional measures. *See Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Verbatim Record of Oral Proceedings Held 7 March 2022, CR 2022/5 (corrected), pp. 38–39, 47, paras. 5–6, 33 (Cheek); *ibid.*, p. 61, para. 17 (Koh).

rejected the addition of a claim based on an entirely different section of UNCLOS than the previously advanced claims, and where the applicant advanced that additional claim only after the close of the written pleadings.²⁸³ Here, the Memorial’s invocation of Article IV in conjunction with Article I arises directly from the subject-matter of the Application.

B. A Judgment of this Court Upholding Ukraine’s Claims Would Have Practical Effect.

153. In its fourth preliminary objection, Russia argues that any judgment rendered by the Court would lack practical effect because, “instead of the Convention, other bodies of international law, namely, the UN Charter and customary international law, are the basis for the Russian Federation’s conduct that Ukraine has challenged before the Court.”²⁸⁴

154. This Court’s prior decisions do not support Russia’s admissibility objection. Contrary to Russia’s suggestion, the *Northern Cameroons* and *Nuclear Tests* cases do not establish that a judgment in this case would be without practical consequence. In *Northern Cameroons*, the Court noted a judgment “must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations.”²⁸⁵ The Court found in that case that no judgment on the merits would have a practical consequence because, as Cameroon recognized, the treaty at issue was no longer in force and “would not be revived and given new life by the judgment,” and the respondent, the United Kingdom, “would have no right or authority to take any action with a view to satisfying the underlying desires of the Republic of Cameroon.”²⁸⁶

155. Here, Ukraine is asking the Court to hold the Russian Federation accountable for its violations of the Genocide Convention, a convention still in force between Ukraine,

²⁸³ *The M/V “Louisa” Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment of 28 May 2013, paras. 140–142.

²⁸⁴ Russia’s Objections, para. 268.

²⁸⁵ *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 34.

²⁸⁶ *Ibid.*, p. 33.

Russia, and 150 other signatories and for which a judgment would “affect existing legal rights or obligations.” A judgment would establish that Russia has violated the Convention and has no legal right to invade Ukraine to prevent and punish an alleged genocide. A judgment also would establish that Russia has an obligation to perform its obligations under the Convention in good faith.

156. The *Nuclear Tests* cases can be similarly distinguished. There, the Court declined to proceed to the merits because, subsequent to the filing of the applications, the dispute before the Court was rendered moot. In their applications, Australia and New Zealand asked the Court to declare that France’s continued atmospheric nuclear testing violated their rights under international law, and during the proceedings, French authorities declared they would stop atmospheric testing and move to underground testing.²⁸⁷ The Court therefore concluded that “[t]he object of the claim having clearly disappeared, there is nothing on which to give judgment.”²⁸⁸ The present dispute is not moot. To this day, Russia continues its lethal military operations in Ukraine, just as it continues to allege that Ukraine is responsible for committing acts of genocide in Donbas. For example, on 8 December 2022, President Putin stated that the Russian Federation was targeting civilian infrastructure in Ukraine in response to alleged acts of genocide by Ukraine in Donbas: “There’s a lot of noise right now about our strikes against the energy infrastructure of the neighbouring country. Yes, we are doing it but who started it? . . . Who is not providing water to Donetsk? Not

²⁸⁷ *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, pp. 459–460, 471, paras. 11, 43; *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, pp. 256, 266, paras. 11, 40.

²⁸⁸ *Nuclear Tests (New Zealand v. France)*, Judgment, *I.C.J. Reports 1974*, p. 477, para. 62; *Nuclear Tests (Australia v. France)*, Judgment, *I.C.J. Reports 1974*, pp. 271–272, para. 59.

providing water to a city with 1 million population is an act of genocide.”²⁸⁹ Even if Russia had ceased its wrongful conduct, there would remain a live dispute concerning the reparation owed by Russia for its prior conduct in violation of the Convention. The “object” of Ukraine’s claims is thus very much still alive, and continuing these proceedings towards resolution is not “fruitless.”²⁹⁰

157. Unlike the *Nuclear Tests* cases, the basis of Russia’s objection is not genuinely a matter of admissibility. Rather, Russia seeks to prejudge the merits of the dispute. Ukraine claims that the Russian Federation abused, misused, and therefore violated the Genocide Convention by accusing Ukraine of committing genocide in violation of the Convention and relying on those false allegations to recognize the DPR and LPR and invade Ukraine on the pretext of preventing and punishing genocide.²⁹¹ Ukraine has supported that claim with extensive evidence, including statements by the President of the Russian Federation and other high-ranking Russian officials asserting that Russia’s actions were done for the purpose of preventing and punishing genocide. If Russia wishes to deny that the Convention played any role in its actions, notwithstanding its express reliance on allegations of genocide to justify its conduct, then Russia is free to present that alternative factual narrative as a defense on the merits.

158. If Ukraine is able to establish the facts that it has alleged in its Application and Memorial, then a judgment of this Court will necessarily have practical effect. Such a judgment will determine whether Russia had a basis under the Genocide Convention to use force against Ukraine, as Russia has claimed, or whether Russia’s actions violated the Genocide Convention, as Ukraine claims. Such a judgment from the Court will determine the

²⁸⁹ See Twitter Post of Dmitri (@wartranslated) (8 December 2022), accessed at <https://twitter.com/wartranslated/status/1600847388242894848>; George Wright, *Putin Vows to Continue Hitting Ukraine’s Power Grid*, BBC News (8 December 2022), accessed at <https://www.bbc.com/news/world-europe-63907803>.

²⁹⁰ See *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 477, para. 61; *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 271, para. 58.

²⁹¹ See Ukraine’s Memorial, Chapter 3.

rights and responsibilities of each party under the Genocide Convention, irrespective of whether or not Russia may assert some separate justification for its actions under Article 51 of the U.N. Charter. Ukraine also has claimed a violation of this Court's Provisional Measures Order. Any finding of such a violation would also have practical effect and result in reparation for the harm suffered due to Russia's non-compliance.

C. The Court May Declare that There Is No Credible Evidence that Ukraine Has Committed Genocide in Violation of the Genocide Convention.

159. The Russian Federation argues in its fifth preliminary objection that Ukraine's request that the Court "adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine" is inadmissible.²⁹²

160. By framing this as an objection to admissibility, Russia attempts to circumvent the indisputable point that the Court has jurisdiction over such a request under Article IX. Article IX provides that the jurisdiction of the Court reaches disputes "relating to the responsibility of a State for genocide," and that "any of the parties to the dispute" can submit the dispute to the Court. That is the case with respect to the declaratory request Russia alleges to be inadmissible: Ukraine and the Russian Federation have opposing views as to whether Ukraine is responsible for committing genocide in violation of the Convention and Ukraine, as a party to such a dispute, may seek its resolution by this Court. In light of Article IX's express instruction that "any of the parties" may submit such a dispute to the Court, there

²⁹² Russia's Objections, para. 274. As an initial matter, Ukraine notes that this dispute is not limited to a question about Ukraine's compliance with the Genocide Convention. This is not a standalone question; rather, it is part of the necessary findings the Court needs to make to assess Russia's violations of the Convention. Russia focuses on this to distract from Ukraine's request that the Court find that Russia has violated the Genocide Convention.

cannot be an objection grounded in the premise that only the State advancing an accusation of genocide may bring such a dispute.²⁹³

161. Ukraine’s request falls within the scope of Article IX for an additional reason: it is a dispute relating to the “fulfilment” of the Genocide Convention. As noted above, Article IX is a broadly drafted compromissory clause. The *travaux préparatoires* reflect that the Parties to the Convention viewed “fulfilment” as “referr[ing] to the compliance or non-compliance of a party with the provisions of the convention” and having “a much wider meaning” than the term “application” alone.²⁹⁴ Ukraine’s request that the Court find it has *not* committed genocide is a request regarding its compliance with the provisions of the Convention and therefore falls squarely within the Convention’s compromissory clause.

162. Even setting aside the dispositive text of Article IX, this Court has in other contexts admitted requests for what Russia describes as a declaration of “reverse compliance,” but which in this case is more accurately described as a declaration of conformity or compliance. For example, in *Rights of Nationals*, the Court admitted France’s request to find that its actions were “in conformity” with the relevant treaty.²⁹⁵ Russia attempts to distinguish this case by relying on irrelevant factual differences, which do not negate the fact that the Court entertained France’s request.²⁹⁶ Similarly, in the *Lockerbie*

²⁹³ See *supra* Chapter 3, Section A(3).

²⁹⁴ See *supra* Chapter 3, Section A(1); U.N. General Assembly Official Records, Third Session: Part I, Sixth Committee, U.N. Doc. No. A/C.6/SR.61-140 (21 September–10 December 1948), p. 437.

²⁹⁵ *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, *I.C.J. Reports 1952*, p. 182.

²⁹⁶ See Russia’s Objections, para. 287.

cases, which are not raised by Russia, the Court admitted Libya’s request that the Court find it had “fully complied” with the Montreal Convention.²⁹⁷

163. The Russian Federation is also incorrect in denying this Court’s capacity to make findings regarding an alleged genocide in eastern Ukraine. Russia argues first that the Court may not adjudicate whether or not “there is no credible evidence that Ukraine is responsible for committing genocide,” as such a finding would be “incompatible with the judicial function of the Court, which is tasked with settling legal disputes and not acting as a fact-finding body while criminal investigations on the commission of the crime of genocide are ongoing.”²⁹⁸ To the contrary, acting as a fact-finding body — in order to resolve a dispute in which facts are contested — is inherent in this Court’s function as a judicial body. Article IX of the Convention provides the Court with jurisdiction over disputes “relating to the responsibility of a State for genocide,” and it can only perform this function by engaging in “fact finding” — and it has previously exercised this function.²⁹⁹

164. Russia next argues that Ukraine’s claim is “premature” because it “may interfere with the right of the Russian Federation to invoke Ukraine’s responsibility in the future, should it decide to do so.”³⁰⁰ There is nothing “premature” about Ukraine’s request. It was *Russia* that not only leveled the serious accusation of genocide against Ukraine, but then used the pretext of that alleged genocide to recognize the DPR and LPR and to use force in and against Ukraine. Russia acted unilaterally to prevent and punish a genocide it claims

²⁹⁷ See *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, *I.C.J. Reports 1998*, p. 14, para. 13.

²⁹⁸ Russia’s Objections, para. 277.

²⁹⁹ See generally *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* (examining evidence presented by the applicants — including independent reporting by U.N. agencies, witness statements, and evidence collected in other adversarial proceedings — to determine if the respondents had violated the Genocide Convention); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *I.C.J. Reports 2015* (same).

³⁰⁰ Russia’s Objections, para. 277.

Ukraine is responsible for; Ukraine asserts that such action is a misuse, abuse, and therefore a violation of the Convention. Thus, a dispute exists between the Russian Federation and Ukraine that relates to, *inter alia*, the responsibility of a State for genocide, and “any of the parties to the dispute” — not just the State making the allegation of genocide — is entitled to seek resolution of that dispute in this Court, including through an adjudication of “the responsibility of a State for genocide.”

D. Ukraine’s Application Is Not an Abuse of Process.

165. Finally, as its sixth preliminary objection, Russia makes the outrageous argument that, by turning to this Court for peaceful resolution of a dispute relating to the Convention, as it is entitled to do as a Contracting Party to that treaty, Ukraine has committed an abuse of process.³⁰¹ The Court frequently rejects such objections to admissibility of a claim, and should do so here.³⁰² As the Court has observed, “[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process.”³⁰³ To make such a finding, there must be “clear evidence that the applicant’s conduct amounts to an abuse of process.”³⁰⁴ There is absolutely no evidence

³⁰¹ See *ibid.*, para. 289.

³⁰² See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, paras. 48–50; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 2021*, p. 37, para. 95; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 2019*, p. 43, paras. 114–115; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, *I.C.J. Reports 2018*, p. 337, para. 152; *Jadhav (India v. Pakistan)*, Judgment, *I.C.J. Reports 2019*, p. 433, paras. 49–50.

³⁰³ *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, *I.C.J. Reports 2018*, p. 336, para. 150.

³⁰⁴ *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, *I.C.J. Reports 2019*, p. 43, para. 113.

in this case that Ukraine’s conduct amounts to such an abuse; to the contrary, it is a lawful invocation of process.

166. Russia makes four arguments supporting its abuse of process allegation, which are largely just repackaged versions of its prior arguments. *First*, Russia argues that Ukraine is abusing the Convention’s dispute settlement mechanism by “creat[ing] an illusory jurisdictional link to make the Court examine matters outside the Convention.”³⁰⁵ The Convention’s compromissory clause was intentionally drafted broadly to “close down all possible loopholes weakening the jurisdictional reach of the Court.”³⁰⁶ It cannot possibly be an abuse of process to rely on the Convention’s broad compromissory clause for jurisdiction over a dispute that falls within the scope of the Convention.

167. *Second*, without citing any support, Russia argues that Ukraine is “abusively changing its legal case.”³⁰⁷ For the reasons explained above, Ukraine has not changed its legal case.³⁰⁸

168. *Third*, Russia argues that the timing of Ukraine’s Application is abusive.³⁰⁹ Ukraine notes in its Memorial that, since 2014, Russia has falsely accused Ukraine and its officials of genocide in Donbas in violation of the Genocide Convention. Russia asks why Ukraine did not lodge an application with this Court before 2022.³¹⁰ Of course, the dispute

³⁰⁵ Russia’s Objections, para. 301 (italics omitted); *see also ibid.*, Chapter V, Section D(i).

³⁰⁶ Robert Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, in *THE UN GENOCIDE CONVENTION: A COMMENTARY* (Paola Gaeta, ed., Oxford University Press 2009), p. 453 (Ukraine’s Memorial, Annex 26); *see supra* Chapter 3, Section A.

³⁰⁷ Russia’s Objections, Chapter V, Section D(ii).

³⁰⁸ *See supra* Chapter 4, Section A.

³⁰⁹ Russia’s Objections, Chapter V, Section D(iii).

³¹⁰ *Ibid.*, para. 310.

before the Court is not limited to the fact that Russia advanced these allegations, but includes Russia's use of those allegations as a pretext to recognize the DPR and LPR and to use force in and against Ukraine. The parties have had a disagreement over Ukraine's alleged responsibility for genocide since before 2022, but that disagreement took on new importance when Russia relied on its false allegations of genocide as a pretext for its recognition of the DPR and LPR and its invasion of Ukraine.

169. In any event, Ukraine's decision with regard to the timing of its application cannot amount to an abuse of process, as the Court has found that it "cannot concern itself with the political motivation which may lead a State *at a particular time*, or in particular circumstances, to choose judicial settlement."³¹¹

170. *Finally*, Russia argues that the significant number of interventions filed in this case amounts to abuse.³¹² Specifically, the Russian Federation argues that Ukraine has acted "in bad faith" to "obtain[] an illegitimate advantage to the detriment of the other Party to the proceedings."³¹³ To date, thirty-two declarations of intervention have been filed with the Court by parties to the Convention. This Court has recognized that an intervention under

³¹¹ *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52 (emphasis added); see also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 37, para. 95. Russia's reliance on *Nauru* as support for its argument that there was undue delay in this case is entirely misplaced. There, despite the fact that a dispute had existed for at least 20 years before *Nauru* filed its application, the Court still found the claim admissible. As noted by the Court in that case, "international law does not lay down any specific time-limit It is therefore for the Court to determine in the light of the circumstances of each case whether the passage of time renders an application inadmissible." *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, pp. 253–254, para. 32.

³¹² Russia's Objections, paras. 313–329.

³¹³ *Ibid.*, para. 329.

Article 63 “constitutes the exercise of a right.”³¹⁴ The exercise by third parties of a “right” conferred by the Statute of the Court cannot divest Ukraine of its own right under Article IX of the Convention to submit this dispute to the Court. Since interveners do not become parties to the case, the Court has noted that — contrary to Russia’s suggestion — “intervention cannot affect the equality of the Parties to the dispute.”³¹⁵ For the same reason, Russia’s suggestion of conflicts of interest for judges of the same nationality as certain interveners ignores the language of both the Statute and the Rules which focus on whether judges are of the nationality of the *parties*.³¹⁶

171. The significant number of interventions in this case is not an abuse by Ukraine. The interventions reflect the importance of the Genocide Convention, the *erga omnes* nature of the obligations at issue, and the magnitude of the concern presented by Russia’s distorted interpretation of the Convention, which would permit the Convention to be misused and abused to justify the use of force on the pretext of preventing and punishing genocide. Given these unique circumstances, it is understandable that so many Contracting Parties would wish to be heard on the construction of this Convention. That many States have exercised their right under Article 63 to be heard on matters of interpretation of the Convention is a testament to how blatantly Russia’s misinterpretation has abused the Convention, not any abuse of process by Ukraine.

³¹⁴ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 5, para. 7; see also *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 434, para. 36.

³¹⁵ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 9, para. 18 (emphasis added).

³¹⁶ Statute of the Court, art. 31 (emphasis added); Rules of the Court, arts. 1, 7–8.

172. As the Declaration of Intervention by the United Kingdom noted, for example, “intervening in this case enables Contracting Parties to the Genocide Convention to reaffirm their collective commitment to upholding the rights and obligations contained in the Convention, including by supporting the crucial role of the Court and emphasising that international co-operation is required to prevent, adjudicate on and punish acts of genocide.”³¹⁷ Similarly, Estonia “considers that the legal issues raised by this case touch on some of the most fundamental principles and obligations of international law. It is the understanding of the Republic of Estonia that the Genocide Convention is of utmost importance to prevent and punish genocide.”³¹⁸ As such, according to Estonia, Contracting Parties “ha[ve] a direct interest in the construction that might be placed upon provisions of the Convention by the Court in these proceedings.”³¹⁹ Where dozens of third-party States choose to exercise their right to intervene under Article 63, that signals a legitimate and broad interest in proper interpretation of the Convention. It makes no sense to argue that Ukraine has in any way abused the dispute resolution process before this Court based on the decision of other Contracting Parties to the Convention to intervene.

³¹⁷ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*, Declaration of Intervention Under Article 63 of the United Kingdom of Great Britain and Northern Ireland (5 August 2022), p. 6, para. 11. As the declarations of intervention have not yet been admitted, Ukraine relies on them for the discrete and limited purpose of noting what the declarants have said regarding their decision to exercise their right to intervene under Article 63.

³¹⁸ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*, Declaration of Intervention Under Article 63 of the Republic of Estonia (22 September 2022), p. 4, para. 13.

³¹⁹ *Ibid.*, para. 16.

CHAPTER 5: THE COURT HAS JURISDICTION OVER UKRAINE’S CLAIM THAT THE RUSSIAN FEDERATION IS RESPONSIBLE FOR VIOLATING THE COURT’S BINDING PROVISIONAL MEASURES ORDER

173. In its Memorial, Ukraine claimed that the Russian Federation has been in continuous violation of the Court’s Provisional Measures Order and presented evidence of Russia’s breach from the date of the Order’s issuance through the submission of the Memorial on 1 July 2022.³²⁰ Since 1 July 2022 to the date of this Written Statement, Russia has continued to defy the Court’s Provisional Measures Order. As explained in the Memorial, the Russian Federation’s blatant violation of a binding Provisional Measures Order of this Court constitutes an internationally wrongful act for which the Russian Federation is responsible and owes reparation.³²¹ The Russian Federation nowhere in its Preliminary Objections advances any argument that the Court lacks jurisdiction over Ukraine’s claim relating to Russia’s violation of the Order. In its submissions, however, Russia requests the Court to “declare that it lacks jurisdiction over the claims brought by Ukraine against the Russian Federation in its Application dated 26 February 2022 and Memorial dated 1 July 2022,” which would include Ukraine’s claim that Russia violated the Court’s Order.³²² For the avoidance of doubt, and as explained below, this Court has jurisdiction to adjudicate Ukraine’s claim that the Russian Federation breached the Court’s Provisional Measures

³²⁰ Ukraine’s Memorial, Chapter 4.

³²¹ *Ibid.*

³²² *See* Russia’s Objections, para. 331.

Order, regardless of how the Court may rule on matters on which Russia has interposed its Preliminary Objections.³²³

174. A State's obligation to comply with provisional measures is based on Article 41 of the Court's Statute and Article 94(1) of the U.N. Charter.³²⁴ As this Court explained in *LaGrand*, provisional measures orders issued pursuant to Article 41 of the Court's Statute "have binding effect."³²⁵ The jurisprudence of this Court since the *LaGrand* case confirms that any provisional measures ordered by the Court are binding.³²⁶ The Russian Federation

³²³ This Court emphasized in the *LaGrand* case that reparation in cases of non-compliance with provisional measures ordered by the Court can only be granted if a claim to this effect was made. *See LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 508, para. 116. Ukraine has accordingly made such a request.

³²⁴ Article 41 of the Court's Statute provides in its first paragraph that "[t]he Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party." Under Article 94(1) of the U.N. Charter, all U.N. Member States have accepted an obligation to comply with a decision of the Court. *See* U.N. Charter, art. 94(1). The term "decision" applies to judgments and any other decision rendered by the Court, including provisional measures. *See LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 108.

³²⁵ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 506, para. 109.

³²⁶ *See Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment, I.C.J. Reports 2005*, p. 258, para. 263; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports*, p. 433, para. 77; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America), Provisional Measures, Order of 3 October 2018, I.C.J. Reports 2018*, p. 652, para. 100; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008*, p. 397, para. 147; *Request for Interpretation of the Judgment of 15 June 1962 in the Case Concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011*, p. 554, para. 67; *see also* Karin Oellers-Frahm & Andreas Zimmermann, *Article 41*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* (Zimmermann et al., eds., Oxford University Press 2019), p. 1187 [hereinafter Zimmermann, *Article 41*] (Ukraine's Written Statement, Annex 11); Pierre d'Argent, *Preliminary Objections and Breaches of Provisional Measures*, *RIVISTA DI DIRITTO INTERNAZIONALE* (2021), p. 117 (Ukraine's Written Statement, Annex 13).

itself has recognized in other cases the binding and mandatory nature of this Court's provisional measures orders.³²⁷

175. Against this background, Russia's continued defiance of this Court is extraordinary. The day after the Court issued its Order, the spokesperson for the President of the Russian Federation unequivocally announced that Russia would "not be able to take this decision into account."³²⁸ Such disrespect is an affront to the judicial integrity of this Court and the U.N. system of which the Court is a part. In light of the flagrant and continuing nature of Russia's violation, Ukraine will briefly provide the Court with new information concerning Russia's violations since the filing of the Memorial on 1 July 2022 and address the Court's jurisdiction to adjudicate Russia's violation of the binding Order.

A. The Russian Federation Has Continued Its Violations of the Provisional Measures Order Since Ukraine Submitted Its Memorial.

176. On 16 March 2022, this Court indicated provisional measures pursuant to Article 41 of the Statute of the Court. The Court ordered the Russian Federation, first, to

³²⁷ See e.g., *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Verbatim Record of Oral Proceedings Held 10 September 2008, CR 2008/27 (uncorrected), p. 46, para. 36 (Kolodkin) ("Provisional measures as they were formulated by the Applicant in the Requests cannot be granted since they would impose on Russia obligations that it is not able to fulfil."); *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Verbatim Record of Oral Proceedings Held 7 March 2017, CR 2017/2 (corrected), p. 22, para. 3 (Wordsworth) ("[T]he Court cannot now make any determination on matters of fact, it is a necessary corollary of the mandatory nature of a provisional measures order that there must be something more than acceptance at face value of the facts as alleged by Ukraine."); *ibid.*, Verbatim Record of Oral Proceedings Held 9 March 2017, CR 2017/4 (translation), p. 54, para. 47 (Forteau) ("[T]he Court is to decide whether to impose binding obligations on a sovereign State in the form of provisional measures.").

³²⁸ Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022), accessed at <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine/>; see also Interfax, *Russia Can't Accept Int'l Court of Justice Order to Halt Operation in Ukraine – Peskov* (17 March 2022), accessed at <https://interfax.com/newsroom/top-stories/76917/>.

“immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine,” and second, to “ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations.”³²⁹ Third, the Court unanimously ordered both parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”³³⁰

177. As the world knows, Russia did not immediately suspend its military operations in the territory of Ukraine. To the contrary, it escalated them in a brutal campaign of aggression and atrocity. Nor did Russia refrain from aggravating and extending the dispute.

178. Since the filing of Ukraine’s Memorial on 1 July 2022, Russia has continued to act in open defiance of the Court’s binding order, violating every measure indicated. For example, as part of its continuation of military operations throughout the territory of Ukraine, the Russian Federation has continued to press an offensive aimed at capturing the eastern city Bakhmut using irregular armed units such as the Russian mercenary “Wagner Group.”³³¹ Russia has also escalated its systematic, intentional attacks on Ukraine’s energy and heating

³²⁹ See Provisional Measures Order of 16 March 2022, para. 86.

³³⁰ *Ibid.*

³³¹ Cassandra Vinograd, *More Than 60 Percent of Bakhmut Has Been Destroyed, a Ukrainian Official Says*, The New York Times (5 January 2023), accessed at <https://www.nytimes.com/2023/01/05/world/europe/bakhmut-ukraine-war.html>; CBS News, *Russia Begins New Assault on 2 Cities in Ukraine’s Donetsk Region* (6 August 2022), accessed at <https://www.cbsnews.com/news/russia-assault-2-cities-ukraine-donetsk-region-bakhmut-avdiivka/>; Peter Beaumont & Pjotr Sauer, *‘Every House a Fortress’: Wagner Leader Counts Cost as Russia Stalls in Bakhmut*, The Guardian (3 January 2023), accessed at <https://www.theguardian.com/world/2023/jan/03/ukraine-wagner-leader-counts-cost-as-russian-offensive-stalls-in-bakhmut>; EURACTIV, *Wagner Boss Says He Wants Bakhmut in Ukraine for its ‘Underground Cities’* (8 January 2023), accessed at <https://www.euractiv.com/section/global-europe/news/wagner-boss-says-he-wants-bakhmut-in-ukraine-for-its-underground-cities/>.

infrastructure, which has resulted in widespread blackouts as well as heat and power cuts to civilians across Ukraine.³³² These widespread, repeated, and heinous attacks by Russia on energy infrastructure have “weaponized winter,” depriving millions of civilians of “access to electricity, water, heat, and related vital services ahead of [and during] the cold winter months.”³³³ All these military actions and atrocities are in direct violation of the Court’s first and second provisional measures ordering the Russian Federation to “immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine,” and to “ensure that any military or irregular armed units which may be directed or supported by it . . . take no steps in furtherance of the[se] military operations.”³³⁴

179. In further direct contravention of that order, and as Ukraine informed the Court in a letter of 29 September 2022, Russia instituted a “partial mobilization” of approximately 300,000 troops in support of Russia’s invasion of Ukraine.³³⁵ Specifically, on

³³² See, e.g., U.N. General Assembly, U.N. Doc. A/77/533, *Report of the Independent International Commission of Inquiry on Ukraine* (18 October 2022), paras. 26, 33, 40, 50, 110; Courtney Austrian, *The Russian Federation’s Ongoing Aggression Against Ukraine*, U.S. Mission to the OSCE (22 December 2022), accessed at <https://osce.usmission.gov/the-russian-federations-ongoing-aggression-against-ukraine-36/>; OSCE Special Permanent Council 1393 Vienna, *EU Statement on the Russian Federation’s Ongoing Aggression Against Ukraine: Intensified, Indiscriminate and Asymmetrical Military Attacks on Ukraine’s Civilian Population*, EEAS (11 October 2022), accessed at https://www.eeas.europa.eu/delegations/vienna-international-organisations/osce-special-permanent-council-1393-vienna-11_en?s=66; Francesca Ebel, *Putin Admits Attacks on Civilian Infrastructure, Asking: ‘Who started it?’*, *The Washington Post* (8 December 2022), accessed at <https://www.washingtonpost.com/world/2022/12/08/russia-attacks-ukraine-infrastructure-putin/>; Nathan Rott et al., *How Russia is Weaponizing the Ukrainian Winter*, *NPR* (20 November 2022), accessed at <https://www.npr.org/2022/11/20/1137698269/russia-weaponizes-winter-ukraine-war>.

³³³ Human Rights Watch, *Ukraine: Russian Attacks on Energy Grid Threaten Civilians* (6 December 2022), accessed at <https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians>.

³³⁴ Provisional Measures Order of 16 March 2022, para. 86.

³³⁵ Letter from Anton Korynevych, Agent of Ukraine, to the Registrar of the International Court of Justice (dated 29 September 2022); see also President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 September 2022), accessed at <http://en.kremlin.ru/>

21 September 2022, President Putin announced that he had signed an Executive Order instituting a “partial mobilisation” in support of Russia’s use of force in Ukraine.³³⁶ On 28 October 2022, the Defense Minister of the Russian Federation confirmed that 300,000 people were mobilized, 82,000 of whom had already been deployed “to the area of the special military operation,” *i.e.*, to Ukrainian territory.³³⁷ These actions violate the Court’s first and second provisional measures.

180. Through its conduct since the filing of Ukraine’s Memorial, the Russian Federation has further continued to aggravate and extend the dispute to a new dangerous level, in violation of the Court’s third provisional measure to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.” Specifically, Russia continues to carry out brutal attacks on civilian infrastructure that have resulted in the unlawful loss of civilian lives and the destruction of hospitals, residential buildings, schools, and other civilian infrastructure.³³⁸

events/president/news/69390 (Ukraine’s Written Statement, Annex 5); Guy Faulconbridge, *Putin Escalates Ukraine War, Issues Nuclear Threat to West*, Reuters (21 September 2022), accessed at <https://www.reuters.com/world/europe/putin-signs-decree-mobilisation-says-west-wants-destroy-russia-2022-09-21/>.

³³⁶ See President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 September 2022), accessed at <http://en.kremlin.ru/events/president/news/69390> (Ukraine’s Written Statement, Annex 5).

³³⁷ TASS, *Shoigu Tells Putin Partial Mobilization Over in Russia* (28 October 2022), accessed at <https://tass.com/politics/1529415>; see also Emmanuel Grynszpan, *Russia’s Mobilized Soldiers Speak Out: ‘We Were Thrown on to the Frontline with No Support’*, Le Monde (10 November 2022), accessed at https://www.lemonde.fr/en/international/article/2022/11/10/russia-s-mobilized-soldiers-speak-we-were-thrown-onto-the-frontline-with-no-support_6003764_4.html; Mikhail Metzel, *Russia’s Partial Mobilisation is Complete, Shoigu Says*, Reuters (28 October 2022), accessed at <https://www.reuters.com/world/europe/russias-shoigu-says-partial-mobilisation-complete-82000-recruits-conflict-zone-2022-10-28/>.

³³⁸ See Clooney Foundation for Justice, *Ukraine: Investigating War Crimes During Conflict* (2 December 2022), accessed at <https://cfj.org/the-docket-projects/ukraine-investigating-war-crimes-during-conflict/>; Human Rights Watch, *Ukraine: Russian Attacks on Energy Grid Threaten Civilians*

181. Further, on 21 September 2022, following the physical occupation of parts of Ukraine (including territory occupied after the Court issued its Provisional Measures Order), President Putin announced “decisions to hold referendums” in the Donetsk, Luhansk, Kherson, and Zaporizhzhia oblasts of Ukraine.³³⁹ On 30 September 2022, Russia signed purported treaties on accession of these regions of Ukraine to the Russian Federation.³⁴⁰ The President of the Russian Federation even made nuclear threats regarding these territories, warning that he is ready to “make use of all weapon systems available” to defend the territories Russia has purportedly acquired, despite the reality that these territories remain part of Ukraine.³⁴¹ The dispute before this Court relates, in part, to Russia’s recognition of the independence of the so-called Donetsk People’s Republic and the Luhansk People’s

(6 December 2022), accessed at <https://www.hrw.org/news/2022/12/06/ukraine-russian-attacks-energy-grid-threaten-civilians>; U.N. Meetings Coverage, Security Council, *Senior Official Condemns Russian Federation’s Missile Strikes Against Ukraine’s Critical Infrastructure, as Security Council Holds Emergency Meetings on Attacks* (23 November 2022), accessed at <https://press.un.org/en/2022/sc15118.doc.htm>.

³³⁹ See President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 September 2022), accessed at <http://en.kremlin.ru/events/president/news/69390> (Ukraine’s Written Statement, Annex 5).

³⁴⁰ The Kremlin, *Signing of Treaties on Accession of Donetsk and Lugansk People’s Republics and Zaporozhye and Kherson Regions to Russia* (30 September 2022), accessed at <http://en.kremlin.ru/events/president/news/69465/photos> (Ukraine’s Written Statement, Annex 6); The State Duma, *The State Duma Ratified Treaties and Adopted Laws on Accession of DPR, LPR, Zaporozhye and Kherson Regions to Russia* (3 October 2022), accessed at <http://duma.gov.ru/en/news/55407/> (Ukraine’s Written Statement, Annex 7); TASS, *Treaties on Accession of Donbass and Other Liberated Territories to Russia Signed* (30 September 2022), accessed at <https://tass.com/politics/1516023>.

³⁴¹ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (21 September 2022), accessed at <http://en.kremlin.ru/events/president/news/69390> (Ukraine’s Written Statement, Annex 5). Public-source information has reported that Russian military leaders have discussed recently the use of nuclear weapons in Ukraine. Julian E. Barnes & Eric Schmitt, *Russian Military Leaders Discussed Use of Nuclear Weapons, U.S. Officials Say*, *The New York Times* (2 November 2022), accessed at <https://www.nytimes.com/2022/11/02/us/politics/russia-ukraine-nuclear-weapons.html>.

Republic, which Russia justified on the pretext of its false allegations of genocide.³⁴² Russia's annexation of the same, plus additional regions of Ukraine, constitutes a serious extension and aggravation of this dispute, in violation of Russia's obligation under the Court's Order to "refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve." Additionally, Russia carried out the purported referendums by threatening the use of force and intimidating the local population with armed soldiers — in some cases being deployed door-to-door to collect votes, and at times making residents vote "at gunpoint."³⁴³ These actions also violate the Court's first and second provisional measures.

B. This Court Has Jurisdiction Over the Russian Federation's Violations of the Provisional Measures Order.

182. The Court has two independent grounds on which it may exercise jurisdiction over Ukraine's claim that Russia violated its obligations under the Court's Order.

183. *First*, the Court has previously exercised jurisdiction over violations of a provisional measures order at the merits stage of a case. In *LaGrand*, the Court explained that where it "has jurisdiction to decide a case, it also has jurisdiction to deal with submissions requesting it to determine that an order indicating measures which seeks to preserve the

³⁴² See Ukraine's Memorial, paras. 153–159.

³⁴³ See Yulia Gorbunova, *Fictitious Annexation Follows 'Voting' at Gunpoint*, Human Rights Watch (30 September 2022), accessed at <https://www.hrw.org/news/2022/09/30/fictitious-annexation-follows-voting-gunpoint>; David L. Stern & Robyn Dixon, *With Kalashnikov Rifles, Russia Drives the Staged Vote in Ukraine*, The Washington Post (24 September 2022), accessed at <https://www.washingtonpost.com/world/2022/09/24/ukraine-putin-referendums/>; Jason Beaubien et al., *Occupied Regions of Ukraine Vote to Join Russia in Staged Referendums*, NPR (27 September 2022), accessed at <https://www.npr.org/2022/09/27/1125322026/russia-ukraine-referendums>; James Waterhouse et al., *Ukraine 'Referendums': Soldiers Go Door-to-Door for Votes in Polls*, BBC News (23 September 2022), accessed at <https://www.bbc.com/news/world-europe-63013356>.

rights of the Parties to this dispute has not been complied with.”³⁴⁴ As explained in this Written Statement, the Court has jurisdiction over the present dispute relating to the interpretation, application, or fulfilment of the Genocide Convention. It therefore also has jurisdiction over violations of its Provisional Measures Order.³⁴⁵

184. *Second*, independent of the Court’s jurisdiction under Article 36(1) of the Statute of the Court and Article IX of the Genocide Convention, Article 41 of the Statute provides a necessary and sufficient basis for jurisdiction over Russia’s non-compliance with the Court’s Provisional Measures Order.³⁴⁶

185. The Court’s jurisdiction to indicate provisional measures in the first instance is derived from Article 41 of the Statute, which confers on the Court the “power” to indicate such measures in order “to preserve the respective rights of either party.” By consenting to the Statute of the Court, a State consents to the Court’s exercise of this power. The Court considers on a *prima facie* basis whether it has jurisdiction over the merits, not as an independent source of its jurisdiction to indicate provisional measures, but in order to decide

³⁴⁴ *LaGrand (Germany v. United States of America)*, Judgment, *I.C.J. Reports 2001*, p. 484, para. 45 (citing *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, Merits, Judgment, *I.C.J. Reports 1974*, p. 175, para. 72).

³⁴⁵ See e.g., *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v. Costa Rica)*, Judgment, *I.C.J. Reports 2015*, p. 713, para. 127 (“Nicaragua breached its obligations under the Order of 8 March 2011 by excavating two *caños* and establishing a military presence in the disputed territory.”); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *I.C.J. Reports 2005*, p. 259, para. 264 (“Uganda did not comply with the Court’s Order on provisional measures of 1 July 2000.”); *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*, pp. 236, 238, paras. 469, 471(7) (“Serbia has violated its obligation to comply with the provisional measures ordered by the Court on 8 April and 13 September 1993 in this case, inasmuch as it failed to take all measures within its power to prevent genocide in Srebrenica in July 1995.”).

³⁴⁶ See Ukraine’s Memorial, para. 150.

whether it is appropriate to exercise the jurisdiction created by Article 41. As Judge Abraham explained in his Separate Opinion in *Qatar v. United Arab Emirates*:

The Court's jurisdiction to entertain a request for provisional measures, for its part, does not derive from the jurisdictional basis invoked in the proceedings on the merits It is based directly on Article 41 of the Court's Statute, which gives the Court the power, when seised of a case, to indicate any provisional measures which ought to be implemented to preserve the rights of either party. This basis of jurisdiction is entirely independent of that relied on, by the applicant or by both parties, in the context of the principal proceedings.

What, then, is the *raison d'être* of the concept of "prima facie jurisdiction"? It is not intended to found the Court's jurisdiction to rule on a request for provisional measures (for which Article 41 of the Statute is sufficient). Rather, it is one of the cumulative conditions that must be met for a provisional measure to be indicated³⁴⁷

186. For similar reasons, the Court's jurisdiction to address compliance with its Provisional Measures Order derives from Article 41 of the Statute; it is not derivative of jurisdiction over the merits of the dispute. Article 41 makes plain that the purpose of provisional measures is "to preserve the respective rights of either party" while a case is pending before the Court. A restriction on the Court's ability to address violations of obligations under a provisional measures order would be inconsistent with the object and purpose of the Statute to ensure the peaceful settlement of disputes and the effective administration of justice.³⁴⁸

³⁴⁷ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 14 June 2019, I.C.J. Reports 2019*, Separate Opinion of Judge Abraham, pp. 379–380, paras. 9–10; see also Zimmermann, *Article 41*, p. 1191 (Ukraine's Written Statement, Annex 11); Pierre d'Argent, *Preliminary Objections and Breaches of Provisional Measures*, *RIVISTA DI DIRITTO INTERNAZIONALE* (2021), p. 118 (Ukraine's Written Statement, Annex 13).

³⁴⁸ See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Judgment, I.C.J. Reports 1980*, p. 43, para. 93 ("The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to

187. The Court’s power to indicate measures “to preserve the respective rights of either party” necessarily entails the power to address the responsibility of a State that violates such measures. By the same token, where a State consents to the Statute of the Court, and thus to the Court’s power to indicate provisional measures, it necessarily consents to the Court’s jurisdiction over any proceedings relating to that indication of provisional measures. Inherent in the jurisdiction conferred under Article 41 of the Statute is the power not only to indicate binding provisional measures, and to monitor compliance, but also to adjudicate alleged breaches of such measures.³⁴⁹ A contention to the contrary would defeat the purpose of the Court’s Article 41 authority in the first place, *i.e.*, to preserve the respective rights of the parties in a case.

188. The Court’s jurisprudence further supports the Court’s jurisdiction to determine non-compliance with provisional measures independent of the question of its jurisdiction over the merits. In *Request for Interpretation of the Avena Judgment*, Mexico sought to invoke the Court’s jurisdiction under Article 60 of the Statute, and requested provisional measures. The Court indicated provisional measures, ordering that several identified Mexican nationals not be executed “pending judgment on the Request for

undermine respect for the judicial process in international relations ; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.”).

³⁴⁹ See Zimmermann, *Article 41*, p. 1191 (Ukraine’s Written Statement, Annex 11); Pierre d’Argent, *Preliminary Objections and Breaches of Provisional Measures*, RIVISTA DI DIRITTO INTERNAZIONALE (2021), p. 136 (Ukraine’s Written Statement, Annex 13); Paolo Palchetti, *Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function*, RIVISTA DI DIRITTO INTERNAZIONALE (2017), p. 12 (Ukraine’s Written Statement, Annex 10).

interpretation submitted by the United Mexican States.”³⁵⁰ Ultimately, the Court decided that “the question underlying Mexico’s Request for interpretation is outside the jurisdiction specifically conferred upon the Court by Article 60.”³⁵¹ Nonetheless, the Court concluded that it had “incidental jurisdiction to make findings about alleged breaches of the Order indicating provisional measures,” and that jurisdiction exists “even when the Court decides, upon examination of the Request for interpretation, as it has done in the present case, not to exercise its jurisdiction to proceed under Article 60.”³⁵² As summarized in *The Statute of the International Court of Justice: A Commentary*, the judgment in *Request for Interpretation of the Avena Judgment* “stands in line with the Court’s inherent jurisdiction under Article 41 which implies the possibility of a finding on non-compliance even in a judgment establishing the lack of jurisdiction.”³⁵³

189. Scholars have likewise observed that the Court has jurisdiction to address non-compliance with an order on provisional measures, independent of the Court’s basis for jurisdiction over the merits.³⁵⁴ As explained by Professor Pierre d’Argent:

³⁵⁰ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Provisional Measures, Order of 16 July 2008, I.C.J. Reports 2008*, p. 331, para. 80.

³⁵¹ *Request for Interpretation of the Judgment of 31 March 2004 in the Case Concerning Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2009*, p. 17, para. 45.

³⁵² *Ibid.*, para. 51.

³⁵³ Zimmermann, *Article 41*, p. 1191 (Ukraine’s Written Statement, Annex 11).

³⁵⁴ See *ibid.*; Pierre d’Argent, *Preliminary Objections and Breaches of Provisional Measures*, RIVISTA DI DIRITTO INTERNAZIONALE (2021), p. 136 (Ukraine’s Written Statement, Annex 13); Paolo Palchetti, *Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function*, RIVISTA DI DIRITTO INTERNAZIONALE (2017), pp. 10–13 (Ukraine’s Written Statement, Annex 10).

While the function of the Court is to settle disputes, it would be paradoxical that it be deprived of the power to adjudicate upon the violation of obligations it has itself created — thereby adding to the dispute grievances resulting from its own intervention — for the reason that it finally decides not to address the merits of the case. It would also be quite paradoxical that the hope of prevailing on preliminary objections could lead the respondent to disregard the provisional measures it is bound to respect.³⁵⁵

190. As similarly noted in *The Statute of the International Court of Justice: A Commentary*, “as provisional measures are binding upon the parties until the judgment has been delivered, non-compliance with such measures entails the responsibility of the non-complying party even if *ex post facto* the Court finds that it lacks subject-matter jurisdiction.”³⁵⁶

191. Exercise of this Court’s jurisdiction to address non-compliance with a provisional measures order is particularly critical under the extraordinary circumstances of this case. As noted above, there is no possibility that Russia may have misunderstood its precise obligations under the Order, nor is there any evidence that Russia attempted in good faith to comply with the Order but fell short in its efforts. Rather, the Russian Federation declared the day after the Court issued its Order that it would “not be able to take this decision into account.”³⁵⁷ The record before this Court therefore conclusively establishes that Russia has not complied, and has never intended to comply with the Court’s Order.

³⁵⁵ Pierre d’Argent, *Preliminary Objections and Breaches of Provisional Measures*, RIVISTA DI DIRITTO INTERNAZIONALE (2021), p. 136 (Ukraine’s Written Statement, Annex 13).

³⁵⁶ Zimmermann, *Article 41*, p. 1191 (Ukraine’s Written Statement, Annex 11); see also Paolo Palchetti, *Responsibility for Breach of Provisional Measures of the ICJ: Between Protection of the Rights of the Parties and Respect for the Judicial Function*, RIVISTA DI DIRITTO INTERNAZIONALE (2017), pp. 10–13 (Ukraine’s Written Statement, Annex 10).

³⁵⁷ Sofia Stuart Leeson, *Russia Rejects International Court Ruling to Stop Invasion of Ukraine*, EURACTIV (17 March 2022), accessed at <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine/>.

192. In the same statement, the Russian Federation also questioned its consent to the Court’s powers to issue provisional measures in the first place, stating “[t]he International Court of Justice has such a concept such as the consent of the parties. There can be no consent here.”³⁵⁸ But to the contrary, there is consent, under the Statute of the Court — an instrument to which the Russian Federation is a party, and through which it unmistakably has given its consent to the Court’s exercise of jurisdiction to indicate binding provisional measures. To treat provisional measures as optional and non-binding despite Russia’s consent through the Statute of the Court is a defiant challenge to the Court as an institution and to its overall competence to indicate provisional measures. It would deprive Article 41 of its effectiveness should the Court not have jurisdiction to answer such a challenge.

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193. Accordingly, the Court has jurisdiction over Ukraine’s claim that the Russian Federation breached the Court’s binding Provisional Measures Order, jurisdiction which it may exercise in connection with its jurisdiction over the merits of this case, as well as on the basis of its stand-alone jurisdiction under Article 41 of the Statute. However the Court rules on the Preliminary Objections Russia has interposed, the Court undeniably has jurisdiction over, and must adjudicate in any event, Ukraine’s claim for Russia’s breach of the Court’s Provisional Measures Order.

³⁵⁸ *Ibid.*

CONCLUSION AND SUBMISSIONS

194. Ukraine submits this Written Statement to the Court almost one year after the Russian Federation commenced its full-scale invasion. As of January 2023, the U.N. Office of the High Commissioner for Human Rights has confirmed thousands of innocent Ukrainian lives lost.³⁵⁹ The residents of Bucha have been massacred. On the day of this Court's Provisional Measures Order, Russia murdered children sheltering at a drama theater in Mariupol and, in the ensuing months, flattened that city. The residents of Kherson endured long months of brutal occupation before being liberated. Ordinary people across Ukraine have been terrorized by indiscriminate attacks from missiles and Iranian drones. Russia has deliberately targeted civilian infrastructure in an effort to freeze the Ukrainian people in the depths of winter. Russia has gravely wounded Ukraine's economy, and triggered a food insecurity crisis around the world.

195. Russia has done all of this for one stated reason. According to its president, the "purpose" of Russia's actions has been "to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kyiv regime."³⁶⁰ These actions are the culmination of almost a decade of Russian allegations that Ukraine is responsible for acts of genocide that "actually fall under the UN Convention On the Prevention of Genocide."³⁶¹ Russia's allegations and actions have created a dispute that relates to the interpretation, application, or fulfilment of the Genocide Convention. This Court has jurisdiction to resolve that dispute, and to deliver justice to a country and its people who have suffered from Russia's abuse, misuse, and violation of the Genocide Convention.

³⁵⁹ OHCHR, *Ukraine: Civilian Casualty Update* (23 January 2023), accessed at <https://www.ohchr.org/en/news/2023/01/ukraine-civilian-casualty-update-23-january-2023>.

³⁶⁰ President of Russia Vladimir Putin, *Address by the President of the Russian Federation* (24 February 2022), accessed at <http://en.kremlin.ru/events/president/news/67843> (Ukraine's Memorial, Annex 6).

³⁶¹ See Ukraine's Memorial, para. 38.

196. Accordingly, for the reasons set out in this Written Statement, Ukraine makes the following submissions, respectfully requesting the Court to:

a. Dismiss the Preliminary Objections filed by the Russian Federation on 3 October 2022;

b. Adjudge and declare that the Court has jurisdiction to hear the claims presented by Ukraine as set forth in its Application and Memorial, and that those claims are admissible; and

c. Proceed to hear those claims on the merits.

3 February 2023

Mr. Anton Korynevych

Agent of Ukraine

Ms. Oksana Zolotaryova

Co-Agent of Ukraine

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

3 February 2023

Mr. Anton Korynevych

Agent of Ukraine

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