

INTERNATIONAL COURT OF JUSTICE

Written Observations of

MALTA

3 July 2023

In the case of

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

(UKRAINE v. RUSSIAN FEDERATION)

I. INTRODUCTION

1. On the 24 November 2022, the Republic of Malta submitted its Declaration of Intervention and on 5 June 2023, the International Court of Justice (“the Court”) decided that the declarations of intervention under Article 63 of the Statute of the Court (“the Statute”) submitted by, among others, Malta (“Order on Admissibility of the Declarations of Intervention”) in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (“the Proceedings”) were admissible¹. The Court fixed 5 July 2023 as the time limit for the filing of the written observations referred to in Article 86, paragraph 1, of the Rules of the Court (“the Rules”)².

2. Malta’s intervention under Article 63 of the Statute involves the exercise of a right by a State party to a convention the construction of which is in question before the Court³. As determined by the Court in the Order on Admissibility of the Declarations of Intervention, the construction of Article IX and of other provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”)⁴ concerning the Court’s jurisdiction *ratione materiae* is in question at the present stage of the Proceedings⁵. In accordance with the Order on Admissibility of the Declarations of Intervention, the written observations will solely concern the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the Court’s jurisdiction *ratione materiae* in the Proceedings⁶. References to other rules and principles of international law outside the Genocide Convention in the written observations will only concern the construction of the Convention’s provisions, in accordance with the customary rule of interpretation reflected in Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (“Vienna Convention”)⁷. Malta will not address other matters, such as the dispute between the Parties, the evidence, the facts or the application of the Genocide Convention in the present case⁸.

3. Upon the Court’s invitation to coordinate with other intervening States, Malta has agreed the substance of its position with Belgium, Luxembourg, Ireland, Sweden, Denmark, Finland, Estonia and Croatia. Part II of the present written observation is therefore identical to the corresponding parts of the written observations of these interveners. However, in

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Order of 5 June 2023) <https://www.icj-cij.org/sites/default/files/case-related/182/182-20230605-ORD-01-00-EN.pdf>, paras 99 and 102(1).

² *Ibid*, para. 102(3).

³ *Ibid*, para. 26.

⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

⁵ Order on Admissibility of the Declarations of Intervention (n 1), p. 26.

⁶ *Ibid*, para. 99.

⁷ *Ibid*, para. 84.

⁸ *Ibid*, para. 84.

order to be able to meet the strict deadline set by the Court and for logistical reasons, Malta files the joint content separately in its national capacity.

In addition, Malta submits, in Part IV, complementary observations in connection with the significance of the link between a textual interpretation of the word “fulfilment” and the inherent nature of *jus cogens* norms.

II. CONSTRUCTION OF ARTICLE IX AND OTHER PROVISIONS OF THE GENOCIDE CONVENTION RELEVANT FOR JURISDICTION *RATIONE MATERIAE*

4. In its order of 16th March 2022 indicating provisional measures, the Court affirmed its jurisdiction *prima facie* on the basis of Article IX of the Genocide Convention⁹.
5. Malta wishes to make four observations on the construction of the Genocide Convention at the present stage of the proceedings.
6. First, applying the rules of treaty interpretation (Article 31 to 33 of the Vienna Convention that reflect rules of customary international law¹⁰), it is important to recall the broad scope of Article IX of the Genocide Convention, which includes disputes about the “fulfilment” of obligations under the Convention.
7. Second, Article IX of the Genocide Convention applies to disputes about abusive allegations of genocide under the Genocide Convention.
8. Third, Article IX of the Genocide Convention applies to disputes about unlawful action as a means for prevention and punishment of genocide under the Genocide Convention.
9. Fourth, any party to the dispute may seize the Court under Article IX, including the party which is the victim of an abusive allegation of genocide or any unlawful action as a means for prevention and punishment of genocide.

A. Article IX of the Genocide Convention is formulated in broad terms and covers disputes about the “fulfilment” of the Convention

10. Article IX of the Genocide Convention reads as follows:

“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.”

⁹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, paras. 28-49.

¹⁰ *Arbitral Award of 3 October 1899 (Guyana v. Venezuela)* [2023] ICJ Judgment of 6 April 2023 <https://www.icj-cij.org/sites/default/files/case-related/171/171-20230406-JUD-01-00-EN.pdf>, para. 87.

11. Malta contends that the notion of “dispute” is already well-established in the case law of the Court. It concurs with the meaning given to the word dispute as “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties¹¹. In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”¹². The two sides must “hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”¹³. Moreover, “in case the respondent has failed to reply to the applicant’s claims, it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists”¹⁴.
12. In that respect, the document communicated by the Russian Federation to the Court on 7 March 2022 seems to construe the notion of a dispute unduly narrowly by insisting that Article IX cannot be used to establish jurisdiction of the Court for disputes relating to the use of force or issues of self-defence under general international law¹⁵. However, it follows from the constant jurisprudence of the Court, that certain facts or omissions may give rise to a dispute that fall within the ambit of more than one treaty¹⁶. Hence, a parallel dispute arising out of the same facts about the use of force between two States does not create an obstacle to the jurisdiction of the Court under Article IX of the Genocide Convention, provided that its other conditions are fulfilled.
13. In particular, such dispute must be “relating to the interpretation, application or fulfilment of the present Convention”. Malta contends that Article IX is a broad jurisdictional clause, allowing the Court to adjudicate upon disputes concerning the fulfilment by a Contracting Party of its obligations under the Convention. The inclusion of the word “fulfilment” is “unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission of the International Court of such disputes between Contracting Parties as relate to the interpretation or application of the treaties in question”¹⁷.

¹¹ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

¹² *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, at p. 328.

¹³ *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 2018, p. 406, at p. 414, para. 18; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 3, at p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 27, para. 71.

¹⁵ Document of the Russian Federation of 7 March 2022, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220805-WRI-01-00-EN.pdf> [8-15].

¹⁶ *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 of 3 February 2021, para. 56.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Declaration of Judge Oda, I.C.J. Reports 1996 (II), p. 627, para. 5 (emphasis in the original).

14. The ordinary meaning of the phrase “relating to the interpretation, application or fulfilment of the Convention” may be divided in three sub-categories.

15. The first point (“relating to”) establishes a link between the dispute and the Convention.

16. The second point (“interpretation, application or fulfilment of the Convention”) encompasses three terms. While interpretation is typically understood as the process of ‘explaining the meaning’ of a legal norm, ‘application’ is the ‘action of putting something into operation’ in a given case¹⁸. The term ‘fulfilment’ partially overlaps with the latter, and it may be understood to refer to an application that ‘meets the requirements’ of a norm¹⁹. Nevertheless, the addition of the term ‘fulfilment’ supports a broad interpretation of Article IX²⁰. It appears that ‘by inserting all the three alternative terms, the drafters had sought to ‘give a coverage as exhaustive as possible to the compromissory clause’ and to ‘close down all possible loopholes’²¹.

17. The third point (“of the Convention”) makes clear that the compromissory clause refers back to all the provisions of the Convention. In other words, Article IX does not create further substantive rights or obligations for the parties; the substantive legal norms that are subject to the Court’s jurisdiction must be found elsewhere in the Convention. At the same time, the *renvoi* relates to the entire life of the Convention, including breaches thereof²².

18. For example, there can be a dispute about the interpretation, application or fulfilment of the Convention when one State alleges that another State has committed genocide²³. In that scenario, the Court verifies the factual basis for such allegation: if it is not satisfied that there were any acts of genocide actually being committed by the respondent State, it may decline its jurisdiction²⁴.

¹⁸ C. Tams, Article IX, note 45, in: Tams/Gerster/Schiffbauer, *Convention on the Prevention and Punishment of Genocide*, A Commentary (Beck 2014).

¹⁹ C. Tams (n 18), Article IX, note 45.

²⁰ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Joint Declaration of Intervention of the Governments of Canada and the Kingdom of the Netherlands of 7 December 2022, para. 29.

²¹ C. Tams (note 18), Article IX, note 45; R. Kolb, *Scope Ratione Materiae*, in: Paola Gaeta (ed), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 451.

²² R. Kolb, *Scope Ratione Materiae* (note 21), p. 453 with an account of the case law.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 75, para. 169.

²⁴ *Case Concerning Legality of Use of Force (Yugoslavia v. France)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 363, at pp. 372-373, paras. 24-31. Later, the ICJ declined its jurisdiction on the ground that Serbia and Montenegro did not have access to the Court, at the time of the institution of the proceedings, under Article 35 of the Statute (see e.g. ICJ, *Case Concerning Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004, p. 595).

19. While this scenario of (alleged) responsibility for acts of genocide constitutes an important type of dispute about the “interpretation, application or fulfilment” of the Convention, it is not the only one. In the case *Bosnia and Herzegovina v. Yugoslavia*, the applicant alleged several violations of the Convention by the respondent, including a failure to prevent and punish genocide under Article I²⁵, and the Court affirmed its jurisdiction *ratione materiae*²⁶. In the case *The Gambia v. Myanmar* (pending), the applicant claims that the respondent not only bears responsibility for prohibited acts under Article III, but also for violations of its obligations under the Convention by failing to prevent genocide in violation of Article I; and failing to punish genocide in violation of Articles I, IV and V²⁷. In these examples, one State alleges that another State is not honouring its commitment to “prevent” and “punish” genocide, because it grants impunity to acts of genocide committed on its territory. Therefore, there can also be disputes about “non-action” as a violation of the substantive obligations under Article I, IV and V.
20. The ordinary meaning of Article IX makes it clear that there is no need to establish genocidal acts as a basis to affirm the Court’s jurisdiction. Rather, the Court has jurisdiction over the question whether genocidal acts have been or are being committed or not²⁸.
21. The context of the phrase (“relating to ...”) further confirms this reading. In particular, the unusual feature of the words “including” in the intermediate sentence indicates a broader scope of Article IX of the Convention when compared to a standard compromissory clause²⁹. Disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III are therefore only one type of dispute covered by Article IX, which are “included” in the wider phrase of disputes “relating to the interpretation, application and fulfilment” of the Convention³⁰.
22. Hence, the context of the phrase (“relating to”) in Article IX confirms that the Court’s jurisdiction goes beyond disputes between States about the responsibility for alleged genocidal acts, but also covers disputes between States about the absence of genocide and the about the performance of treaty obligations by one or more State parties. In other words:

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, p. 595, at p. 614, para. 28 and p. 603, para. 4.

²⁶ *Ibid*, pp. 615-617, paras. 30-33.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 12, para. 24, Points (1) (c), d) and (e).

²⁸ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, p. 10, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, I.C.J. Reports 2020, p. 14, para. 30.

²⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 75, para. 169.

³⁰ See also the Written Observations of The Gambia on the Preliminary Objections raised by Myanmar, 20 April 2021, pp. 28-29, para. 3.22 (“The inclusion of disputes “relating to the responsibility of a State for genocide” among those that can be brought before the Court unmistakably means that responsibility for genocide can be the object of a dispute brought before the Court by any contracting party”).

“With a view to the question of positive fulfilment, the court has jurisdiction over the question whether a Contracting Party (...) has not violated its obligation to prevent and punish genocide. In a negative way, the Court can also adjudicate whether a Contracting Party has failed to fulfil these obligation”³¹.

23. Finally, the object and purpose of the Convention gives further support to the wide interpretation of Article IX. The Court noted that “[a]ll the States parties to the Genocide Convention [thus] have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention”³². The *erga omnes* nature of the obligations under the Convention also underpins the paramount significance of the text for the international community as a whole, entrusting the International Court of Justice in 1948 with a particularly important mission to enforce it in the interest of all States.

24. Famously, in its 1951 Advisory Opinion, the Court held³³:

“The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”

25. The Convention’s object to protect the “most elementary principles of morality” also requires that a State Party does not to abuse its provisions for other means. It also strongly supports a reading of Article IX, according to which disputes relating to the interpretation, application and fulfilment include disputes about the abuse of the Convention’s substantive provisions to justify a State’s action vis-à-vis another State party to the Convention. Such abuse can take two forms: abusive allegations and/or or abusive action, which will now be examined in the next two sections, being Sections B and C.

³¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of the Principality of Liechtenstein of 15 December 2022, para. 20.

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 36, para. 107.

³³ *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

B. Article IX of the Genocide Convention Applies to Disputes About Abusive Allegations of Genocide

26. Malta now wishes to turn to one of the scenarios of a dispute under Article IX more precisely, namely the abusive allegation of one State that another State has committed genocide.
27. In doing so, it has carefully reviewed the question of whether the Convention enables a State to seize the Court of a dispute concerning allegations of genocide made by another State.³⁴
28. Malta contends that Article IX of the Genocide Convention applies also to disputes relating to abusive allegations of genocide, as they raise the question of compliance with Article I of the Genocide Convention, which provides context for the construction of Article IX. Article I of the Genocide Convention reads:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

29. According to Article I of the Genocide Convention, all States Parties are obliged to prevent and punish genocide. As the Court already emphasised, in fulfilling their duty to prevent genocide, Contracting Parties must act within the limits permitted by international law³⁵. Moreover, carrying out the duty under Article I must be done in good faith (Article 26 of the Vienna Convention on the Law of Treaties and general international law³⁶). As the Court has observed, the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”³⁷. Good faith interpretation thus operates as a safeguard against misuse of the Genocide Convention. As “one of the basic principles governing the creation and performance of legal obligations”, good faith is also directly linked to the “trust and confidence [that] are inherent in international co-operation”³⁸.

³⁴ For a discussion of this question, see e.g. Order on Provisional Measures (n 9), Declaration of Judge Bennouna, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-02-EN.pdf>, para. 2.

³⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 57.

³⁶ *Land and Maritime Boundary between Cameroon and Nigeria, Preliminary Objections*, Judgment, I.C.J. Reports 1998, p. 275, 296, para. 38: “The Court observes that the principle of good faith is a well-established principle of international law. It is set forth in Article 2, paragraph 2, of the Charter of the United Nations; it is also embodied in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969.”

³⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

³⁸ *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

30. In Malta's view, the notion of "undertake to prevent" implies that each State Party must assess whether a genocide or a serious risk of genocide exist prior to taking action pursuant to Article I³⁹. Such an assessment must be based on substantial evidence.⁴⁰
31. Importantly, the UN Human Rights Council called upon all States, "in order to deter future occurrences of genocide, to cooperate, including through the United Nations system, in strengthening appropriate collaboration between existing mechanisms that contribute to the early detection and prevention of massive, serious and systematic violations of human rights that, if not halted, could lead to genocide".⁴¹
32. It constitutes good practice to rely on the results of independent investigations under UN auspices⁴² before qualifying a situation as genocide.
33. Moreover, the Genocide Convention provides guidance concerning the lawful means by which the Contracting Parties may prevent and punish genocide. While "Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation",⁴³ "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".⁴⁴ Rather than making an abusive allegation of genocide against another State without having discharged its due diligence obligations, a State may seize the United Nations' political or judicial organs⁴⁵.
34. It follows that an abusive allegation by one State against another State runs contrary to the former State's obligations to apply Article I of the Genocide Convention in good faith and distort the terms of the Genocide Convention. Accordingly, Article IX also covers such disputes.

C. Article IX of the Genocide Convention Applies to Disputes About Unlawful Action as Means for Prevention and Punishment of Genocide

35. Another important scenario of a dispute under Article IX of the Convention concerns disputes about otherwise unlawful action as a means for the prevention and punishment of

³⁹ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at pp. 221-222, paras. 430-431.

⁴⁰ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 90, para. 209.

⁴¹ UN Human Rights Council, Resolution 43/29: Prevention of Genocide (29 June 2020), UN Doc A/HRC/RES/43/29, para. 11.

⁴² See for example the reliance of The Gambia on the reports of the Independent International Fact-Finding Mission on Myanmar established by the UN Human Rights Council before bringing a case to the Court; for details see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, at pp. 25-27, paras. 65-69.

⁴³ Order on Provisional Measures (n 26), para. 56.

⁴⁴ *Ibid.*

⁴⁵ Order on Provisional Measures (n 26) Separate Opinion of Judge Robinson, para. 30.

genocide. As described in the previous section, the correct construction of Article I is that a State is under a due diligence obligation to gather evidence from independent sources before making any allegation of genocide against another State.

36. In the same vein, a State may not take unlawful action based on such abusive allegations.
37. Rather, the scope of the “undertaking to prevent” should be read in light of the final recital in the preamble, which emphasizes the need for “international co-operation”. Referring to the preamble is an accepted method of treaty interpretation, as stressed by the Court for example in the *Whaling* case⁴⁶. Moreover, under Article VIII States may call upon the competent organs of the UN to take action, and Article IX provides for judicial settlement. All this speaks in favour of a duty under the Convention to employ multilateral and peaceful means to prevent genocide. Such reading is in accordance with Chapter VI of the UN Charter on the peaceful settlement of disputes, the continuance of which is likely to endanger the maintenance of international peace and security. Article IX also gives effect to the parties’ pre-existing obligations under Article 2(3) of the UN Charter and customary international law to settle all their disputes peacefully⁴⁷. Malta emphasizes that all State Parties shall be engaged in preventing and punishing genocide worldwide for the benefit of humankind, and not in order to protect their own interests.
38. It follows from the obligation to carry out a good faith assessment of the existence of genocide or serious risk of genocide that, where a State has not carried out such an assessment, it cannot invoke the “undertak[ing] to prevent” genocide in Article I of the Convention as a justification for its conduct. This includes conduct which involves the threat or use of force, as underlined by the Court in the case *Oil Platforms*⁴⁸.
39. A State may not claim to enforce international law by violating international law. As the Court explained in the *Bosnian Genocide* case, already referred to in para. 29 above, “it is clear that every State may only act within the limits permitted by international law.”⁴⁹ In other words, Article I of the Genocide Convention imposes an obligation of State Parties “not only to act to prevent genocide, but to act within the limits permitted by international law to prevent genocide”⁵⁰.

⁴⁶ See e.g. *Australia v. Japan (New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, at p. 215, para. 56 (referring to the preamble of the International Convention on the Regulation of Whaling to discern its object and purpose).

⁴⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of New Zealand of 28 July 2022, para. 25.

⁴⁸ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 811-812, para. 21. See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of Australia of 30 September 2022, para. 41.

⁴⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430.

⁵⁰ Order on Provisional Measures (n 9), Separate Opinion of Judge Robinson, para. 27.

40. In conclusion, the jurisdiction of the Court extends to disputes concerning unlawful action for the stated purpose of preventing and punishing alleged genocide⁵¹.

D. Any party to the dispute may seize the Court under Article IX of the Genocide Convention

41. Finally, Malta wishes to comment on the view according to which a State cannot invoke the compromissory clause under Article IX of the Convention “only to have the Court confirm its own compliance”⁵².

42. As noted in Section B, the concepts of “dispute” and “fulfilment” in Article IX are sufficiently broad to allow the Court to issue a declaration that the applicant State bears no responsibility for a breach under the Genocide Convention, as alleged by another State. Moreover, the plain wording of Article IX confirms that “any of the parties” to the dispute may seize the Court. Thus, where there is a dispute concerning whether a State has engaged in conduct contrary to the Genocide Convention, the State accused of such conduct has the same right to submit the dispute to the Court as the State that has made the accusation with the effect that the Court will have jurisdiction over that dispute⁵³.

43. In addition, the already mentioned *erga omnes partes* character of the Genocide Convention speaks against a narrowly construed opportunity to seeking the “*judicial protection before the Court*”. On the contrary, such an interpretation would risk precluding a victim State from seeking relief from the Court in the face of abuses of the Convention. This would undermine the Convention’s credibility and efficiency as a universal instrument for the prevention of genocide, as well as the role of the Court as a critical avenue for redress against abuses of the law.

44. More generally, nothing prevents a requesting State from invoking the compromissory clause of a given Convention to ask the Court for a negative declaration that it has not breached its international obligations under the Convention in question. For example, in the Lockerbie case, Libya had requested several Court findings that it had complied with Articles 5, 6 and 7 of the of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation on the basis of Article 14 of the Convention⁵⁴. The United States objected and argued that none of the provisions quoted by the applicant concerned obligations binding upon it as respondent⁵⁵. The Court rejected the preliminary

⁵¹Order on Provisional Measures (n 9), p. 11, para. 45;

⁵² Order on Provisional Measures (n 9), Declaration of Vice-President Gevorgian para. 8.

⁵³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of the United Kingdom of 1 August 2022, para. 34; Declaration of Intervention of Australia of 30 September 2022, paras. 35-36; Declaration of Intervention of Norway of 10 November 2022, para. 21.

⁵⁴ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 115, at p. 123, para. 25.

⁵⁵ *Ibid*, p. 124, para. 26

objection. It held that there was a specific dispute before it on the interpretation and application of Article 7 – read in conjunction with Article 1, Article 5, Article 6, and Article 8 of the Montreal Convention –, which fell to be decided by the Court on the basis of Article 14⁵⁶. The Court thus assumed jurisdiction over the applicant’s request that it had not violated the Montreal Convention.

45. Moreover, Malta notes that it may not even be necessary for the Court to enter into a discussion, on whether Article IX also covers “non-violation complaints”. In its application, Ukraine respectfully requests the Court to:

“(a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined in by Article III of the Genocide Convention have been committed in the Luhansk and Donetsk oblasts of Ukraine”.

(b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(e) Require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.

(f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide.”

46. While it is for the Court to clarify the precise meaning of the requests, none of the reliefs sought expressly mention the question of “compliance” of Ukraine with the Genocide Convention. In particular, point (a) could also be understood as a request to the Court to declare that Russia’s allegation that genocide had been taken place in the oblasts of Donetsk and Luhansk were abusive. Under such reading, the jurisdiction of the Court would have to be ascertained in line with the interpretation of Article IX of the Genocide Convention advanced in Section C above.

⁵⁶ Ibid, p. 127, para. 28.

III. SYNTHESIS OF THE MAIN ARGUMENTS POSTULATED IN PART II.

47. Malta puts forward four observations on the construction of the Genocide Convention. First, Article IX thereof is formulated in broad terms to include disputes about the fulfilment of obligations under the Genocide Convention. Second, it applies to disputes relating to abusive allegations of genocide under the Genocide Convention. Third, it also applies to disputes about otherwise unlawful action as a means for prevention and punishment of genocide under the Genocide Convention. Fourth, any party to the dispute may seize the Court under Article IX, including the party who is the victim of an abusive allegation or unlawful action as a means for prevention and punishment of genocide.
48. Irrespective of any textual interpretation thereof, the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the entire Convention show that a dispute regarding acts carried out by one State against another State based on abusive claims of genocide falls under the notion of “dispute between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention”. Accordingly, the Court has jurisdiction to declare the absence of genocide and the violation of a good faith performance of the Genocide Convention. Moreover, the jurisdiction of the Court extends to disputes concerning unlawful action for the stated purpose of preventing and punishing alleged genocide. The fact that this case deals directly with genocide leads Malta to its next argument, postulated in Part IV here below.

IV. THE *NEXUS* BETWEEN A TEXTUAL INTERPRETATION OF THE WORD “FULFILMENT” AND THE INHERENT NATURE OF *JUS COGENS* NORMS.

49. At the outset of its additional argument, Malta wishes to recall that:

“In its Article 36, the ICJ Statute envisages three main forms of expressing consent: by virtue of a special agreement (*compromis*); by way of a unilateral declaration recognising the jurisdiction of the Court (so-called ‘optional clause declarations’); and through a treaty clause envisaging the submission of disputes to the Court (so-called ‘compromissory clauses’). Article IX belongs to the third category; it is one of the many compromissory clauses establishing (as Article 36 para. 1 of the ICJ Statute puts it) ‘the jurisdiction of the Court [over]...all matters specially provided for in ... treaties and conventions in force.’ Article 36 para. 1 of the ICJ Statute thus may be seen as an **‘enabling clause’ allowing States to rely on the Court as an agency of dispute resolution – and of course; it equally permits them to make the exercise of that jurisdiction subject to specific conditions.** Article IX makes use of that enabling clause and also clarifies the scope of the Court’s jurisdiction by describing the types of disputes that can be brought before the Court, viz. those concerning the ‘interpretation, application or fulfilment of the ... [Genocide] Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III.’ As will be shown below, compared to other compromissory clauses, it is a fairly

straight-forward jurisdictional clause that does not make that jurisdiction subject to further, special conditions.⁵⁷ (emphasis added)

50. Compromissory clauses in treaties habitually make use of the terms “interpretation” and “application”. The Genocide Convention deliberately inserts another word in its compromissory clause, namely the word “fulfilment”. The gist, import, and added value of this word must not be underestimated and is not coincidental.⁵⁸
51. The word “fulfilment” denotes a more holistic approach towards the very same application of the Convention since it mirrors the general tenet of *effet utile*. It construes the Convention in a homogenous manner in order to ensure that each and every provision thereof is not dealt with in isolation. This reasoning is embraced both by a literal (textual) interpretation of the Convention and a logical (purposive) interpretation of the Convention.
52. The insertion of the word “fulfilment” needs to be assessed in the light of general principles of international law which constitute a source of international law under Article 38 (1) (c) of the Statute of the International Court of Justice. Mention must be made of two important legal maxims which shed a light on the relevance and significance of the word ‘fulfilment’ in the context of the Convention, namely, *ubi lex voluit dixit*, and *ubi noluit tacuit*. The *travaux préparatoires* manifest that “the word ‘fulfilment’ referred to the **compliance or non-compliance** of a party with the provisions of the Convention. The word ‘fulfilment’ therefore had a much wider meaning than the word ‘application’⁵⁹. The *travaux préparatoires* reveal, in particular, “that the word ‘application’ included the study of circumstances in which the convention should or should not apply, while the word ‘fulfilment’ referred to the compliance or non-compliance of a party with the provisions of the Convention.”⁶⁰ The **elasticity of the word ‘fulfilment’** is unmasked not only when compared to the word ‘application’, but also when compared to the word ‘interpretation’. The latter term, ‘interpretation’, describes “the process of establishing the true meaning of a treaty”,⁶¹ whereas ‘fulfilment’ describes the extent to which the true meaning, scope and spirit of the treaty are executed, implemented, enforced and complied with by its signatories thereto.

⁵⁷ C. J. Tams, ‘Article IX’ in C.J. Tams/L. Berster/B.Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag C.H. Beck oHG, Hart Publishing and Nomos Verlagsgesellschaft mBH 2014), pp. 303-304.

⁵⁸ Vide also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Declaration of Judge Oda, I.C.J. Reports 1996 (II), p. 627, para. 5 (emphasis in the original).

⁵⁹ *Official records of the Third Session of the General Assembly, part I, Legal Questions, Sixth Committee, Summary Records of Meetings 21 September – 10 December 1948*, p. 437.

⁶⁰ *Official records of the Third Session of the General Assembly, part I, Legal Questions, Sixth Committee, Summary Records of Meetings 21 September – 10 December 1948*, p. 437, cited in R. Kolb, “The Scope *Ratione Materiae* of the Compulsory Jurisdiction of the ICJ”, in P. Gaeta (ed), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 452.

⁶¹ O. Dörr, “Article 31: General rule of interpretation”, in O. Dörr and K. Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary*, (Springer 2012), p. 522.

53. In Malta's view, **the emphasis on "compliance" within the concept of "fulfilment" induces and projects the interpretation of Article IX of the Genocide Convention on the rudimentary nature of the underlying legal provisions**, in particular on the fact that the prohibition of genocide enjoys the status of *jus cogens*.
54. The hierarchical supremacy of such prohibition over other norms of international law entails that this Honourable Court, entrusted to ensure the application, interpretation, and fulfilment of treaties in good faith, in terms of Article 36(1) of the Statute of the International Court of Justice, may adopt a more teleological approach in analysing the basis (grounding) of its own jurisdiction. This would be consonant with the assertion that "the fact of the matter is that in respect of its own procedures, and indeed of its own powers, the Court is free to develop the law."⁶² On the same vein, "the power of courts to determine their own jurisdiction is seen as inherent: and it is recognised in Article 36 para. 6 of the ICJ Statute,"⁶³ which establishes the *Kompetenz-Kompetenz* of the Court. To this effect, "the fact that tribunals have considered the making of such rulings to be within their jurisdiction suggests that tribunals should uphold their jurisdiction over claims seeking a declaration that some treaty provision is applicable."⁶⁴ In other words, any doubt as to the existence or otherwise of its jurisdiction should be quelled to allow this Honourable Court to exercise jurisdiction accordingly, particularly in view of the "cardinal importance of *jus cogens* for the international legal order."⁶⁵ To put it differently, the rejection of jurisdiction in this case could undermine **the special status attached to *jus cogens* norms within the international legal order**, as enshrined in Article 53 of the Vienna Convention on the Law of Treaties.
55. It follows that compromissory clauses which refer to provisions of a *jus cogens* nature, such as Article IX of the Genocide Convention, **should not be interpreted restrictively**.⁶⁶

⁶² H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume II, (OUP 2013), p. 1736.

⁶³ *Nottebohm* case (preliminary objections), ICJ Reports 1953, 111, 119, cited in C. J. Tams, 'Article IX' in C.J. Tams/L. Berster/B.Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag C.H. Beck oHG, Hart Publishing and Nomos Verlagsgesellschaft mBH 2014), p. 305.

⁶⁴ C. Harris, *Incidental Determinations by International Courts and Tribunals: Subject-Matter Jurisdiction and Applicable Law in Proceedings Under Compromissory Clauses*, Ph.D. thesis, (Sydney Law School, University of Sydney 2022), p. 56.

⁶⁵ M. E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, 'Article 53', (Martinus Nijhoff Publishers 2009), p. 678.

⁶⁶ J. I. Charney, *Compromissory Clauses and the Jurisdiction of the International Court of Justice*, *American Journal of International Law*, Vol. 81, No. 4, (American Society of International Law 1987), p. 870.

56. Moreover, the undisputed customary international law status of the prohibition of genocide should be taken into account when interpreting Article IX of the Convention. This status did not develop only recently. On the contrary, ‘...the prohibition of state genocide existed at customary international law at the time of the conclusion of the Genocide Convention.’⁶⁷ In fact, it has been stated, that:

*“Therefore, under the Genocide Convention, as it is with The Gambia v. Myanmar case, the jurisdictional link is found in Article IX of the Convention. With regard to the prohibition of genocide under general international law, as it has been argued, it would be possible to bring a dispute before the ICJ provided that the involved States are bound by a jurisdictional link broad enough so as to include disputes arising from customary international law.”*⁶⁸

57. In substantiation of the same, the International Court of Justice can take into account “international customary law in order to determine the precise scope of a treaty that it was asked to interpret and apply on the basis of a compromissory clause.”⁶⁹ The unique nature of the compromissory clause within the Genocide Convention,⁷⁰ coupled with its customary law status and the hierarchical superiority of its juxtaposition within the parameters of the relative *corpus juris*, being public international law, makes “it easier to bring a state before the ICJ to investigate potential breaches of the Genocide Convention than war crimes or crimes against humanity.”⁷¹

⁶⁷ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, [1951] ICJ Rep 15, 23, cited in K. N. Trapp, Holding States Responsible for Terrorism before the International Court of Justice, *Journal of International Dispute Settlement*, Vol. 3, No. 2, (OUP 2012), p. 290.

⁶⁸ R. F. Corrales, *In the Pursuit of High Purposes: The International Court of Justice, Obligations Erga Omnes and the Prohibition of Genocide*, *Law and Practice of International Courts and Tribunals*, Vol 22, (Koninklijke Brill, Leiden, 2023), p. 89.

⁶⁹ E. Cannizzaro and B. Bonafé, Fragmenting International Law through Compromissory clauses? Some remarks on the decision of the ICJ in the Oil Platforms case, *European Journal of International Law*, Vol 16, Issue number 3, (OUP 2005), p. 493.

⁷⁰ This has been aptly described as ‘an increasingly rare example of a straightforward compromissory clause’ (emphasis added) by C. J. Tams, ‘Article IX’ in C.J. Tams/L. Berster/B.Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag C.H. Beck oHG, Hart Publishing and Nomos Verlagsgesellschaft mBH 2014), p. 315.

⁷¹ C. J. Tams, ‘Article IX’ in C.J. Tams/L. Berster/B.Schiffbauer (eds.), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Verlag C.H. Beck oHG, Hart Publishing and Nomos Verlagsgesellschaft mBH 2014), p. 295.

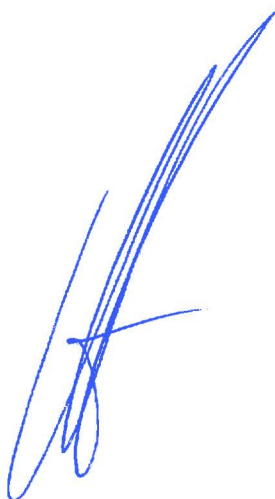
V. SYNTHESIS OF THE MAIN ARGUMENTS POSTULATED IN PART IV.

58. In a nutshell, Malta argues that the interpretation of Article IX of the Genocide Convention should reflect the peremptory character of the prohibition of genocide, which is also rooted in general international law. Given that disputes about the “fulfilment” of the Genocide Convention raise questions of “compliance” with other norms of the Convention, the interpretation of Article IX should take into account the *jus cogens* status attached to the norms deriving from the Genocide Convention itself. Therefore, in so far as ‘fulfilment’ refers to compliance, which hinges on the norm to be complied with, and inevitably also on the inherent nature of this norm, the peremptory dimension of the norm prohibiting genocide is certainly relevant for the purposes of the interpretation of the Genocide Convention itself.

VI. CONCLUSION.

59. Malta submits the present written observations for the kind attention and learned consideration of this Honourable Court.

Respectfully,



Christopher Soler
STATE ADVOCATE
AGENT OF THE GOVERNMENT OF MALTA