

INTERNATIONAL COURT OF JUSTICE

WRITTEN OBSERVATIONS
ON ARTICLE IX AND OTHER PROVISIONS OF THE
CONVENTION ON THE PREVENTION AND
PUNISHMENT OF THE CRIME OF GENOCIDE
RELEVANT FOR THE DETERMINATION OF THE
JURISDICTION OF THE COURT

(Article 86, paragraph 1, of the Rules of Court)

OF THE GOVERNMENT OF ITALY

28 June 2023

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

(UKRAINE V. RUSSIAN FEDERATION)

COUR INTERNATIONALE DE JUSTICE

OBSERVATIONS ECRITES
SUR L'ARTICLE IX ET D'AUTRES DISPOSITIONS
DE LA CONVENTION POUR LA PREVENTION ET
LA REPRESSION DU CRIME DE GENOCIDE
PERTINENTES AUX FINS DE LA DETERMINATION
DE LA COMPETENCE DE LA COUR

(Article 86, paragraphe 1, du Règlement de la Cour)

DU GOUVERNEMENT DE L'ITALIE

28 juin 2023

ALLEGATIONS DE GENOCIDE AU TITRE DE LA CONVENTION POUR LA
PREVENTION ET LA REPRESSION DU CRIME DE GENOCIDE

(UKRAINE C. FEDERATION DE RUSSIE)

Table of Contents

| | |
|--|----|
| Introduction | 3 |
| I. Principles of treaty interpretation | 4 |
| II. Provisions of the Convention in question in the case | 7 |
| A. <i>Article IX</i> | 7 |
| 1. The notion of “dispute” | 8 |
| 2. The notion of “interpretation, application or fulfilment” | 9 |
| 3. The notion of “the present Convention” | 12 |
| 4. The notion of “any Party” | 13 |
| 5. Conclusion | 15 |
| B. <i>Other provisions of the Conventions relevant for assessing the jurisdiction of the Court</i> | 15 |
| III. Conclusion | 20 |

INTRODUCTION

1. On 15 September 2022, Italy filed a Declaration 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)* pursuant to Article 63, paragraph 2, of the Statute of the Court.

2. The present Written Observations are submitted to the Court based on its Order of 5 June 2023 (“the Order”) in which the Court decided that the Declaration of Intervention filed by Italy is admissible, amongst others. The Court also fixed 5 July 2023 as the time-limit for the filing of the Written Observations, in accordance with Article 86, paragraph 1, of the Rules of Court.

3. The present Written Observations illustrate Italy’s views, as requested by the Court, on

[T]he construction of Article IX and other provisions of the Convention on the Prevention and Punishment of the Crime of Genocide that are relevant for the determination of the jurisdiction of the Court.¹

4. As outlined in Italy’s Declaration of Intervention² and specified in its Written Observations on the admissibility of its intervention (“Written Observations on admissibility”), Italy deems that reference to the substantive provisions of the Convention, with special regard to Articles I-III, is necessary for the proper construction of Article IX in any given case.³

5. In its Declaration of Intervention, Italy summarised its position on the construction of Articles I-III of the Convention as follows:

For the reasons explained above, Italy contends that:

¹ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russian Federation)*, Order, 5 June 2023, para. 102(1) (“Order”).

² *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 Government of Italy, 15 September 2022, paras. 42-52 (“Italian Declaration of Intervention”).

³ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russian Federation)*, Written Observations of the Government of Italy on the Admissibility of the Italian Declaration of Intervention, 13 February 2023, para. 46 (“Italy’s Written Observations on Admissibility”).

- a. Article IX of the Genocide Convention is formulated so as to address issues concerning the abuse of the terms of the Convention and complaints of non-violation.
- b. Article I of the Genocide Convention, interpreted in conjunction with Article II and III, requires Contracting Parties to substantiate their claim of a breach of the Convention by way of “fully conclusive” evidence before adopting measures aimed at preventing or punishing acts of genocide.⁴

6. The present Written Observations further support and elaborate the above construction in three parts. First, few preliminary observations are made on the basic principles of treaty interpretation (**Part I – Principles of interpretation**). Second, based on the application of such principles, Italy’s construction of the relevant provisions of the Convention is provided (**Part II – Provisions of the Convention in question in the case**). Last, Italy provides some concluding remarks (**Part III – Conclusion**).

I. PRINCIPLES OF TREATY INTERPRETATION

7. The interpretation of the Convention is governed by the general principles of treaty interpretation codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (“VCLT”).⁵

8. Article 31 provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”.⁶ The context includes the text of the treaty as a whole, including its preamble and any annexes.⁷

9. Under the same provision, together with the context, the interpretation of a treaty should also consider “any relevant rules of international law applicable in the relations between the parties”. Such rules include, *inter alia*, the customary rules on the law of State responsibility.

⁴ Italian Declaration of Intervention, para. 53.

⁵ *Arbitral Award of 31 July 1989*, Judgment, I.C.J. Reports 1991, p. 53, para. 48.

⁶ VCLT, Article 31.

⁷ VCLT, Article 31(2).

10. As to the “object and purpose” of a treaty, it usually emerges from a consideration of the aims of the treaty as may be reflected, for example, in its preamble.⁸ Having specific regard to the Genocide Convention, the Court, in one of its first advisory opinions, assessed its object and purpose as follows:

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.⁹

11. The Court has later emphasized in any case it was requested to adjudicate on the Genocide Convention that “the most elementary principles of morality” are an integral part of the object and purpose of such treaty.¹⁰ The Parties to the present dispute, too, have both referred to the above passage with approval.¹¹

12. Accordingly, and in line with general international law as codified in Article 31 VCLT, Italy deems that any provision of the Convention has to be interpreted on the basis of the “elementary principles of morality” which are at the basis of the Convention.

13. In light of the above principles of treaty interpretation as applied by the Court in relation to the Convention as a whole, when interpreting Article IX of the Convention, the ordinary meaning of its wording is to be considered in the context of the Convention as a

⁸ See, *inter alia*, *Certain Iranian Assets (Islamic Republic of Iran v United States of America)*, Judgment, 30 March 2023, para. 214.

⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23.

¹⁰ *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. 4, para. 161; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 87; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment, 22 July 2022, para. 113.

¹¹ *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, (Ukraine v. Russian Federation)*, Preliminary objections submitted by the Russian Federation, 1 October 2022, paras. 186-187 (“Russia’s Preliminary objections”); *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, para. 115 (“Ukraine’s Written statement of observations”).

whole, including the substantive provisions defining the act of genocide and in light of the object and purpose of the Convention.

14. At the same time, in treaty interpretation, due consideration is also to be given to the paramount importance of the principle of good faith, which, as highlighted by the Court, is “one of the basic principles governing the creation and performance of legal obligations”,¹²

15. The fact that good faith may not be a self-standing ground for a claim, but requires to be linked to a specific treaty provision, implies that an interpretation or application of a given provision in contrast with good faith amounts to a breach of that provision.

16. This is particularly relevant in the case of the Genocide Convention, whose purpose, as alluded above,¹³ is essential “to confirm and endorse the most elementary principles of morality” and to civilize the international society.¹⁴

17. As observed by the Court, the principle of good faith requires States “to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”.¹⁵ Good faith interpretation and application of international obligations is essential to building “trust and confidence [that] are inherent in international co-operation”.¹⁶

18. Consequently, good faith is a bulwark against the abusive interpretation of any given convention.¹⁷ As observed in the 1986 Award in the *Filleting within the Gulf of St Lawrence* case between Canada and France:

¹² *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 69, p. 105, para. 94, quoting *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 457, p. 473, para. 49. Also, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 392, p. 418, para. 60; *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 275, p. 297, para. 39; *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14, p. 67, para. 145.

¹³ Above, para. 10.

¹⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 23.

¹⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

¹⁶ *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

¹⁷ Robert Kolb, *La bonne foi en droit international public* (PUF 2000) 439-442.

le principe de bonne foi qui, selon l'article 26 de la Convention de Vienne sur le droit des traités, préside nécessairement à l'exécution des traités, *comme formant une garantie suffisante contre tout risque d'exercice abusif de ses droits*.¹⁸

19. Based on the above, Italy contends that an interpretation of a provision of the Convention which is in contrast with good faith, or which is relied upon with a view to justifying an abuse of right constitutes in and of itself a breach of the Convention, and a dispute about it squarely falls within the scope of Article IX.

II. PROVISIONS OF THE CONVENTION IN QUESTION IN THE CASE

20. Pursuant to the Order of the Court dated 5 June 2023, this Section provides Italy's construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the jurisdiction of the Court.¹⁹ First, Italy will address the construction of Article IX in general terms (**Sub-section A**); secondly, it will deal with the construction of Articles I-III in terms exclusively relevant, at this stage, for the proper interpretation of Article IX, thus, necessary for the determination of the jurisdiction of the Court (**Section B**).

A. ARTICLE IX

21. Article IX of the Genocide Convention provides 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.

¹⁸ *Dispute concerning Filletting within the Gulf of St. Lawrence between Canada and France* (2006) XIX UNRIAA 225, para. 27; emphasis added.

¹⁹ Order, para. 102(1).

22. As observed by the Court, the wording of Article IX, with special regard to its reference to disputes on the “interpretation, application or fulfilment” of the Convention, is “unique as compared with the compromissory clauses found in other multilateral treaties”.²⁰

23. Indeed, by “add[ing] the word ‘fulfilment’ to the ‘interpretation and application’ of the Convention”, such clause clearly widens the scope of potential disputes upon which the Court may have jurisdiction under this compromissory clause.²¹

24. While Italy is well aware that it is not for a State intervening under Article 63 of the Statute to provide arguments and factual elements supporting the existence of a given dispute, it submits that it is appropriate for it to provide general arguments bearing on the interpretation of the provisions under consideration.

25. With regard to Article IX, Italy will address four discrete portions of this provision. Namely the notion of “dispute” (**Subsection 1**), the notion of “interpretation, application or fulfilment” (**Subsection 2**), the notion of “the present Convention” (**Subsection 3**) and the notion of “any Party” (**Subsection 4**). It will then provide a summary conclusion on the interpretation of Article IX (**Subsection 5**).

1. *The notion of “dispute”*

26. It is established under consistent international case law that a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties.²² Accordingly, in order to prove the existence of a dispute as a jurisdictional requirement, “[i]t must be shown that the claim of one party is positively opposed by the other”²³ and that the disputing parties

²⁰ *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.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 168.

²² *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

²³ *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 328.

“hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”.²⁴

27. It is also established by the Court and generally recognised that a dispute may arise even if a State does not invoke a specific treaty or its provisions in terms contested by another State. It is sufficient that the Respondent is aware of the fact that the Applicant alleges that its conduct is in breach of international obligations.²⁵

28. Italy contends that Article IX confers jurisdictional competence to the Court on any situation in which Parties to the Genocide Convention hold clearly opposite views on a point of law or fact which bear on the “interpretation, application or fulfilment” of the Convention, even had the Applicant not explicitly referred to any given provision of the Convention.

2. *The notion of “interpretation, application or fulfilment”*

29. The definition of the word “interpretation” is clear, and it refers to “[t]he process of determining the true meaning of a written document”²⁶ or “determining the meaning of a rule”.²⁷ In the authoritative words of a former Judge and President of the Court, Sir Arnold McNair, the aim of treaty interpretation is that of “giving effect to the expressed intention of the parties, that is, their intention as expressed in the words used by them in the light of the surrounding circumstances”.²⁸ This understanding of the interpretive function in international law is regulated, as indicated above, by Articles 31 and 32 VCLT.²⁹

²⁴ *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, 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, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74

²⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 391, at pp. 428-429, para. 83; *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. 70, para. 30.

²⁶ Jonathan Law, *A Dictionary of Law* (OUP 2018) “interpretation” entry.

²⁷ *Case concerning the Factory at Chorzow (Jurisdiction)*, Dissenting Opinion of Judge Ehrlich, PCIJ Reports Series A No 9 (1927), p. 39.

²⁸ Arnold D McNair, *The Law of Treaties* (OUP 1961) 365.

²⁹ Above, paras. 7-12.

30. The term “application” is well defined, too. As observed by Judge Ehrlich, “application is the action of bringing about the consequences which, according to a rule, should follow a fact”. The Permanent Court of International Justice further held that a dispute on the application of a given provision

include[s] not only those relating to the question 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 articles.³⁰

31. Lastly on this point, the ordinary meaning of the word “fulfilment” in Article IX can well be considered to correspond to “the meeting of a requirement, condition, or need” or “the performance of a duty or role as required, pledged, or expected”.³¹ As it is apparent, the scope of the meaning of the term “fulfilment” is wider than that of the word “application”.

32. This is supported by the *travaux* of the Convention. In particular, the Indian delegate in his endorsement of the joint proposal put forward by the Belgian and UK delegations to add the term “fulfilment” to the “interpretation and application” formula,³² observed 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. The word “fulfilment” therefore had a much wider meaning.³³

33. On the basis of this understanding, the proposal to delete the word “fulfilment” in Article IX was put to vote and rejected,³⁴ thus, showing the prevailing intent of the negotiating States

³⁰ *Case concerning the Factory at Chorzow (Jurisdiction)*, Judgment of 26 July 1927, PCIJ Reports Series A No 9 (1927), pp. 20-21.

³¹ Angus Stevenson, *Oxford Dictionary of English* (3rd edn; OUP 2015) “fulfilment entry”. See also Christian Tams, ‘Article IX’ in Tams, Berster, Schiffbauer (eds), *Convention on Prevention and Punishment of the Crime of Genocide: A Commentary* (Hart-Nomos 2014) 293, at 313, para. 45).

³² UN Doc. A/C.6/SR.103, reproduced in Hiram Abtahi, Philippa Webb (eds), *The Genocide Convention. The Travaux Préparatoires*, Volume 2 (Brill-Nijhoff 2008) 1759, p. 1765.

³³ *Ibid.*, p. 1771.

³⁴ UN Doc. UN Doc. A/C.6/SR.103, reproduced in Abtahi, Webb (fn 32) 1775, p. 1784.

towards the extensive approach to the jurisdiction of the Court under Article IX of the Convention. As stressed in the legal literature

the reason for inserting all the three alternative terms, as does the Genocide Convention, was to give a coverage as exhaustive as possible to the compromissory clause. The aim was thus 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.³⁵

34. The especially broad approach to jurisdiction under Article IX is further confirmed by the wording of its second part, according to which the notion of dispute concerning interpretation, application or fulfilment “includ[es] those relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III”. As highlighted by the Court,

[t]he unusual feature of Article IX is the phrase “including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III”. The 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*.³⁶

35. Accordingly, Italy considers that the proper construction of Article IX confers jurisdiction on the Court over any situation in which Parties to the Convention hold clearly opposite views on the actual meaning of its provisions, or on the legal consequences of conduct relevant to the obligations of the Convention, also in the light of other rules of international law.

³⁵ Robert Kolb, ‘The Scope *Ratione Materiae* of the Compulsory Jurisdiction of the ICJ’ in P Gaeta (eds), *The UN Genocide Convention: a commentary* (OUP 2009) 442, 453.

³⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 169; emphasis added.

3. *The notion of “the present Convention”*

36. Italy is well aware that the Court has already expressed in its case law that its jurisdiction under Article IX of the Genocide Convention is “confined to obligations arising under the Convention itself”.³⁷ In particular, Italy acknowledges that Article IX cannot be construed as attributing jurisdiction to the Court with regard to breaches of rules of international law different from those laid down in the Convention, with special regard to human rights and humanitarian law.³⁸

37. However, Italy recalls that the Court has emphasised that Contracting Parties must act within the limits imposed by international law in fulfilling their obligations under the Genocide Convention.³⁹ This flows, *inter alia*, from the general rule of interpretation according to which, under VCLT Article 31(3)(c) of the VCLT, a treaty is to be interpreted taking into account, next to its context, “any relevant rules of international law applicable in the relations between the parties”.

38. To that purpose, having special regard to the Genocide Convention, the Court has stressed that “[t]he acts undertaken by the Contracting Parties ‘to prevent and to punish’ genocide must be in conformity with the spirit and aims of the United Nations”.⁴⁰

39. On the same score, and for the purposes of the instant dispute, the Court’s has also observed that

The statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its

³⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 88.

³⁸ *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, paras. 147-148.

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, 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 (“Provisional measures order”).

⁴⁰ Provisional measures order, para. 58.

obligations under the Genocide Convention, as well as *whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention.*⁴¹

40. In the light of the above, Italy contends that – in line with the interpretation of any international treaty and, all the more so, of the Convention under consideration, given its *erga omnes* nature – the proper interpretation of Article IX must fully conform to the principle of interpretation in good faith.

41. Under such terms, Article IX unquestionably confers on the Court jurisdiction over a dispute concerning conduct carried out by one State Party against another State Party allegedly based on the Convention, given that the conduct in question were grounded on claims of genocide which the latter State argues that were unsubstantiated.

42. Based on the case law of the Court, Italy is of the view that that disputed conduct with respect to which the Court has jurisdictional competence to interpret the Convention may include unilateral conduct allegedly in breach of the basic principles of the Charter of the United Nations for the stated purpose of preventing and punishing alleged genocide.

4. *The notion of “any Party”*

43. Article IX provides that the Court may be seised “at the request of *any of the parties to the dispute*” (emphasis added). Such language is broad, and attributes *locus standi* to the widest possible range of States Parties. As the Court stressed in its judgment on preliminary objections in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*:

the terms of Article IX providing that disputes are to be submitted to the Court “at the request of any of the parties to the dispute”, as opposed to any of the Contracting Parties, do not limit the category of Contracting Parties entitled to bring claims for alleged breaches of obligations *erga omnes partes* under the Convention. This phrase clarifies that only a party to the dispute may bring it

⁴¹ Provisional measures order, para. 45; emphasis added.

before the Court, but it does not indicate that such a dispute may only arise between a State party allegedly violating the Convention and a State “specially affected” by such an alleged violation [...]. It follows that any State party to the Genocide Convention may invoke the responsibility of another State party, including through the institution of proceedings before the Court, 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.⁴²

44. Given the broad reference to “any of the parties to the dispute” and in the light of the special nature of the object and purpose of the Convention in combination with principle of good faith, Italy contends, as anticipated in its Declaration,⁴³ that the proper interpretation of Article IX attributes to the ICJ jurisdiction also on cases concerning disputes relating to “reverse compliance claims” or “non-violation claims”. That is to say that Article IX affords legal standing to States parties which have been accused by another State party of having committed breaches of the Convention, thus, allowing it to claim that it has not committed such breaches with a view to attain judicial ascertainment to that effect by the principal judicial organ of the UN.

45. The admissibility of standing for filing reverse compliance claims finds support in the case law of the Court. In the *Rights of Nationals of the United States of America in Morocco* case between France and the United States, where the applicant asked the Court to declare that its conduct was in “conformity with the economic system which is applicable to Morocco, according to the conventions which bind France and the United States”,⁴⁴ the Court did not object to the framing of the claim as a non-violation one, and not even the defendant did.⁴⁵ In the same vein, in the *Lockerbie* case, the Court found that it had jurisdiction over the Libyan Application claiming that it had fully complied with its obligations under the Montreal Convention.⁴⁶

⁴² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, paras. 111-112.

⁴³ Italian Declaration of Intervention, para. 38.

⁴⁴ *Case concerning rights of nationals of the United States of America in Morocco*, Judgment of August 27th, 1952; I.C.J. Reports 1952, p. 176, at p. 182.

⁴⁵ *Ibid.*, pp. 182-184.

⁴⁶ *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, paras. 12 and 53.

46. In the light of the above, it is apparent that the proper construction of Article IX of the Convention affords the Court jurisdiction to entertain claims on the conformity of the claimant's conduct with the Convention, when such conformity is contested by the defendant State.

47. A different construction of the term "any party" in Article IX of the Convention might encourage States Parties to the Convention to try to justify conduct in breach of international law on the basis of abusive allegations of genocide, without the accused Party having the possibility to counter such allegations before the Court.

5. Conclusion

48. On the basis of the above, Italy contends that a disagreement between a Party to the Convention objecting to the allegations by another Party which argues that the former is responsible for acts of genocide, or for breach of the obligation to prevent or punish acts of genocide, squarely falls within the scope of the term "dispute on the interpretation, application or fulfilment" under Article IX of the Convention.

B. OTHER PROVISIONS OF THE CONVENTIONS RELEVANT FOR ASSESSING THE JURISDICTION OF THE COURT

49. For a dispute to fall within the scope of Article IX of the Convention, the clearly opposite views of the parties must inevitably concern issues of compliance with another rule, or other rules, of the Convention, having substantive nature, as anticipated above,⁴⁷ and in line with the case law of the Court.

50. Suffice to recall that in the *Legality of the Use of Force* decision on the request for provisional measures, the Court highlighted that its task was to

ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a

⁴⁷ Above, paras. 36-42.

consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.⁴⁸

51. For the purpose of properly interpreting the jurisdiction of the Court according to Article IX, Italy contends that the interpretation of Articles I-III is also relevant in the instant case, insofar as they represent the main provisions on whose interpretation, application or fulfilment Ukraine and the Russian Federation hold opposite views.

52. As emphasized by Judge Higgins in her separate opinion in the 1996 Judgment on Preliminary Objection in the *Oil Platforms* case, the only way for the Court to ascertain whether the disputed facts of a case fall within the scope of a given convention and, thus, whether it can entertain its jurisdiction *ratione materiae* over them, is “to accept *pro term* the facts as alleged [...] to be true”.⁴⁹ Further on in the proceedings over the same case, commenting with approval the Judgment on preliminary objections, Judge Higgins added that the test to assess whether a given issue comes within the jurisdiction of the Court consists of the ascertainment

whether the facts as claimed by the applicant might give to a violation of a specified provision (whether the facts are in fact correct, whether they do constitute a violation, and if there is a defence, are then all matters for the merits).⁵⁰

53. Against the above considerations, Italy will now submit its interpretation of Articles I-III to the limited extent necessary to show that conduct of the kind now before the Court falls within their scope, thus, within the jurisdiction of the Court under Article IX of the Convention. Italy, thus, reserves the right to elaborate further its interpretation of Articles I-III in and of themselves at the merits stage, if necessary.

54. Article I-III of the Convention read as follows:

Article I

⁴⁸ *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 124, para. 38.

⁴⁹ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996, p. 847, para. 32.

⁵⁰ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Counter-Claim, Order of 10 March 1998, Separate opinion by Judge Higgins, I.C.J. Reports 1998, p. 217, at 219.

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.

Article II

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

- (a) Genocide;
- (b) Conspiracy to commit genocide;
- (c) Direct and public incitement to commit genocide;
- (d) Attempt to commit genocide;
- (e) Complicity in genocide.

55. The main obligation under Article I of the Genocide Convention is that of preventing and punishing genocide. As observed by the Court in relation to the Convention in the *Bosnia v Serbia* Judgment, “the obligation to prevent is one of conduct not of result in the sense that a state cannot be under an obligation to succeed”.⁵¹ That is to say that the obligation of prevention in question is of a due diligence nature, to the effect that States will incur responsibility only if they “manifestly failed to take all measures to prevent that were within its power”.⁵²

⁵¹ *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, para. 430.

⁵² *Ibid.*

56. Italy wishes to recall that the Court has importantly observed that the interpretation and application of the obligation of prevention in question “must be in conformity with the spirit and aims of the United Nations”.⁵³

57. Turning to the obligation “to punish” under Article I of the Convention, Italy contends that the obligation in question is limited to punitive measures of a criminal law character directed against individuals, thereby excluding other type of measures, in particular forcible or military measures to “punish” a State or a people. In line with the case law of the Court⁵⁴ and the views of publicists,⁵⁵ this interpretation is confirmed by a contextual reading of Article I together with Articles IV-VI of the Convention, as well as by a systemic construction of the Genocide Convention and the Charter of the United Nations.

58. According to the case law of the Court, the due diligence obligation to prevent genocide implies that each State Party must assess whether a genocide or a serious risk of genocide exists prior to taking action pursuant to Article I of the Convention.⁵⁶

59. Having regard to Article II, it is apparent from the ordinary meaning of its wording that in order to qualify as “genocide” a given conduct, or a series of conducts, such conducts must correspond with one listed in that article and are characterised by “genocidal intent”. Namely “the intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.⁵⁷

60. Genocidal intent is the characterising element of genocide which distinguishes it from other human rights violations. Accordingly and in line with the Court’s case law, Italy contends that the notion of genocide may be interpreted as applicable to the occurrence of civilian casualties

⁵³ Provisional measures order, para. 58.

⁵⁴ *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, paras. 439-450.

⁵⁵ Christian Tams, ‘Article I’ in Tams, Berster, Schiffbauer (fn 31) 33, 43-45-

⁵⁶ *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, paras. 430-431.

⁵⁷ *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 (I), p. 43, at pp. 121-122, paras. 186-189.

in a situation of international and non-international armed conflict, only if genocidal intent is proven.⁵⁸

61. Given that an allegation of genocide constitutes a “charge of exceptional gravity”, as stressed by the Court,⁵⁹ it requires a standard of proof characterized by “a high level of certainty appropriate to the seriousness of the allegation”.⁶⁰ Such a high standard of proof is usually referred to in the case law of the Court as evidence being “fully conclusive”,⁶¹ such conclusiveness applying to evidence of the occurrence of conducts of the kind listed under Article II or III of the Convention, or of a serious risk thereof, as well as to the genocidal intent.

62. Furthermore, having special regard to the genocidal intent, again in the 2007 *Bosnia v Serbia* Judgment, the Court has stressed that

[t]he *dolus specialis*, the specific intent to destroy the group in whole or in part, has to be convincingly shown by reference to particular circumstances, unless a general plan to that end can be convincingly demonstrated to exist; and for a pattern of conduct to be accepted as evidence of its existence, it would have to be such that it could only point to the existence of such intent.⁶²

63. In 2015, the Court has reverted to the requirement in point in *Croatia v Serbia* by observing that

⁵⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, paras. 472-475.

⁵⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, para. 209; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 178.

⁶⁰ *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, para. 210.

⁶¹ *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, para. 209.

⁶² *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, para. 373.

in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question.⁶³

64. Italy contends that the general principle of good faith governs the assessment, in fully conclusive terms, not only of the occurrence of acts of genocide, or risk thereof, but also the allegation that a State is internationally responsible for an act of genocide, as defined under Article II of the Convention, or for any act listed under Article III. Conduct to the contrary would amount to an abusive interpretation of the Convention, with special regard to Articles I-III, over which the Court has jurisdiction under Article IX, when their “interpretation, application or fulfilment” are disputed.

III. CONCLUSION

65. The Genocide Convention represents a major attempt at preventing that the atrocities of the Second World War would repeat themselves. In the words of the ICJ:

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.⁶⁴

⁶³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 148.

⁶⁴ *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

66. As such, all States have an interest in the proper construction of the Convention, including to the effect that no interpretation be allowed according to which its provisions would lend themselves to abusive reliance on right and duties stemming therefrom in order to justify actions in contrast with international law.

67. Such a proper construction may be achieved by applying principles of interpretation as codified in the VCLT, including the general principle of good faith which requires parties to a treaty to interpret and apply it “in a reasonable way and in such a manner that its purpose can be realised”⁶⁵.

68. Good faith, which is instrumental to building trust among States, is all the more of importance for interpreting and applying the Genocide Convention, which is a peculiar agreement in respect to which Parties 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”.⁶⁶

69. In line with its Declaration of Intervention, Italy maintains that good faith interpretation of any treaty provisions which bestows rights and duties upon its contracting parties requires that a State acquire and show evidence that a breach of treaty is at least likely to have occurred before invoking the international responsibility of another contracting State and, especially, before taking otherwise consequential unilateral conduct.

70. Accordingly, Italy contends that under a proper construction of the compromissory clause contained in Article IX, the Court is conferred jurisdictional competence to entertain a case between two Contracting Parties having opposite views concerning allegations of genocide, relied upon by one of them in taking action of the kind provided for in Article I of the Convention, which are deemed unsubstantiated by another Contracting Party. Italy considers that such circumstances clearly amount to a “dispute on the interpretation, application or fulfilment” of the Convention as envisaged by Article IX.

⁶⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7, para. 142.

⁶⁶ *Reservations to the Convention on Genocide*, Advisory Opinion: I.C.J. Reports 1951, p. 15, at p. 23.

71. In light of the wording of Article IX and of the case law of the Court, Italy also considers that the possibility of triggering the jurisdictional clause under Article IX is not limited to the State especially affected by alleged acts of genocide, or to any other State not directly injured by an action of genocide. Italy submits that also the Contracting Party to the Convention which has been the addressee of an allegedly unsubstantiated allegation of genocide can validly address the Court with a view to attaining an assessment confirming that the Convention has been correctly applied by such State.

72. The general principles of treaty interpretation prevent States parties from abusively constructing and invoking any treaty provision. This is all the more so with regard to a Convention, like the one under consideration, which provides for legal protection to collective interests of all contracting parties. In the light of the above and, more specifically of the object and purpose of the Convention, the proper construction of Article IX well affords the Court jurisdictional competence to entertain disputes between Contracting Parties over alleged abusive interpretations of the Convention, especially when such interpretations are relied upon to justify serious breaches of international law.

Respectfully,



Stefano Zanini

Agent of the Government of Italy