

**INTERNATIONAL COURT OF JUSTICE**

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

**(UKRAINE v. RUSSIAN FEDERATION: 32 STATES INTERVENING)**

**WRITTEN OBSERVATIONS OF THE REPUBLIC OF LATVIA**

**5 JULY 2023**

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## I. INTRODUCTION

1. 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, Latvia (“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 admissible.<sup>1</sup> The Court fixed 5 July 2023 as the time limit for the filing by Latvia of the written observations referred to in Article 86, paragraph 1, of the Rules of Court (“the Rules”).<sup>2</sup>
2. Latvia’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 Court.<sup>3</sup> 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”)<sup>4</sup> concerning the Court’s jurisdiction *ratione materiae* is in question at the present stage of the Proceedings.<sup>5</sup> In accordance with the Order on Admissibility of the Declarations of Intervention, Latvia’s 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 Proceedings.<sup>6</sup> References to other rules and principles of international law outside the Genocide Convention in the written observations will only concern the construction of the Genocide 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

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<sup>1</sup> *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>> [99], [102(1)].

<sup>2</sup> *Ibid* [102(3)].

<sup>3</sup> *Ibid* [26].

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

<sup>5</sup> Order on Admissibility of the Declarations of Intervention (n 1) [26].

<sup>6</sup> *Ibid* [99].

Convention”).<sup>7</sup> Latvia will not address other matters, such as the existence of a dispute between the Parties, the evidence, the facts or the application of the Convention in the present case.<sup>8</sup>

3. Latvia has taken into account in the preparation of written observations the Court’s encouragement to present joint observations, to the extent possible.<sup>9</sup>

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

4. As outlined in its declaration of intervention filed in the Registry of the Court on 21 July 2022,<sup>10</sup> Latvia makes three submissions on construction of the Genocide Convention at the present stage of the Proceedings. Latvia applies the rules of treaty interpretation to be found in Articles 31 to 33 of the Vienna Convention that reflect rules of customary international law.<sup>11</sup> First, Article IX of the Genocide Convention is formulated in broad terms to include “disputes” concerning the “fulfilment” of obligations under the Convention and applies to claims that have been described as non-violation complaints. Secondly, Article IX of the Genocide Convention applies to “disputes” concerning the prohibition of abusive allegations of genocide under other provisions of the Genocide Convention. Thirdly, Article IX of the Genocide Convention applies to “disputes” concerning otherwise unlawful use of force as a means for prevention and punishment of genocide under other provisions of the Genocide Convention. These written observations further elaborate the reasoning and authority for the submissions of construction, which will be addressed in turn.

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<sup>7</sup> Ibid [84].

<sup>8</sup> Ibid [84].

<sup>9</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)* (Letter from the Registrar of the Court to the Agent of Latvia of 23 June 2023).

<sup>10</sup> Order on Admissibility of the Declarations of Intervention (n 1) [13]; *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 Republic of Latvia of 19 July 2022) <<https://www.icj-cij.org/public/files/case-related/182/182-20220719-WRI-01-00-EN.pdf>> Section F.

<sup>11</sup> *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>> [87].

**A. ARTICLE IX OF THE GENOCIDE CONVENTION IS FORMULATED IN BROAD TERMS AND COVERS NON-VIOLATION COMPLAINTS**

5. Latvia contends that Article IX of the Genocide Convention is formulated in broad terms and covers claims that have been described as “non-violation complaints”.<sup>12</sup> Latvia will make two points concerning the construction of Article IX: (1) Article IX is formulated in broad terms; (2) Article IX covers non-violation complaints.
6. First, Article IX of the Genocide Convention is formulated in broad terms:

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.<sup>13</sup>

7. There is a twofold difference between Article IX and the standard dispute settlement provision commonly considered in the judicial practice of the Court to grant jurisdiction over interpretation and application of the relevant treaties.<sup>14</sup> Article IX “add[s] the word ‘fulfilment’ to the provision conferring on the Court jurisdiction over disputes as to the ‘interpretation and application’ of the Convention”.<sup>15</sup> Article IX also has “[t]he unusual feature [of] the phrase ‘including those [disputes] relating to responsibility of a State for genocide or any of the other acts enumerated in Article III’”, which has been applied by the Court in supporting a broad construction of the Convention.<sup>16</sup> Taken together, the effect of these drafting choices is “to close down all possible loopholes weakening the

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<sup>12</sup> *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) <<https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>> Declaration of Vice-President Gevorgian [8].

<sup>13</sup> Genocide Convention (n 4) art IX.

<sup>14</sup> See *Immunities and Criminal Proceedings (Equatorial Guinea v. France)* (Preliminary Objections) [2018] ICJ Rep 292 [44]-[45]; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)* (Preliminary Objections) [2019] ICJ Rep 7 [29]; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) [2019] ICJ Rep 558 [34]; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Preliminary Objections) [2021] ICJ Rep 71 [72].

<sup>15</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43 [168].

<sup>16</sup> *Ibid* [169].

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 in denying jurisdiction on account of an insufficient link with that Convention”.<sup>17</sup>

8. Secondly, the broad formulation of Article IX of the Genocide Convention covers “disputes” concerning non-violation of the treaty. The jurisdiction granted to the Court by Article IX includes disputes in which a State alleges that another State has committed genocide.<sup>18</sup> It also, and necessarily, includes disputes in which a State, having been subjected to allegations of genocide by another State, brings a case against the latter State, seeking a “negative” declaration from the Court that these allegations are without legal and factual foundation. Such a claim plainly raises questions of “interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State” that can be the subject of a “dispute” in the broad technical sense of international law.<sup>19</sup> The construction is further supported by “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”<sup>20</sup> and the atypical addition of “fulfilment” to categories of “disputes” covered by Article IX noted in the previous paragraph. The construction advanced by Latvia would enable the Court to perform an important judicial function in confirming whether or not a State has complied with its obligations.
9. Non-violation complaints are known in the Court’s practice. For example, in the case concerning *Rights of Nationals of the United States of America in Morocco (France v. United States of America)*, France commenced proceedings before the Court seeking a

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<sup>17</sup> 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) 442, 453.

<sup>18</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Preliminary Objections) [2022] ICJ Judgment of 22 July 2022 <<https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>> [63]-[77].

<sup>19</sup> Ibid [63]-[64]; ILC, ‘Draft conclusions on settlement of international disputes to which international organizations are parties’ (15 May 2023) UN Doc A/CN.4/L.983 draft conclusion 2(b); Asier Garrido Muñoz, ‘Al filo de su competencia *ratione materiae*: la providencia de la Corte Internacional de Justicia en el asunto Alegaciones de Genocidio en Virtud de la Convención para la Prevención y la Sanción del Crimen de Genocidio (Ucrania c. Federación Rusa)’ (2022) 74 *Revista española de derecho internacional* 77, 99–100.

<sup>20</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* Preliminary Objections (n 18) [111] (emphasis added).

declaration that the license control system in question “is in conformity with the economic system which is applicable to Morocco, according to the conventions which bind France and the United States”.<sup>21</sup> The Court unanimously rejected France’s submission on the merits but there was no suggestion by either the Court or Judges writing individually (or indeed the United States) that the non-violation framing of the claim was legally problematic for jurisdiction.<sup>22</sup> Had it been otherwise, “according to well-established jurisprudence” requiring the Court “to always be satisfied it has jurisdiction”, it would have “go[ne] into the matter *proprio motu*”.<sup>23</sup> Importantly, the Court engaged in the same type of analysis of interpretation and application of treaties as in other cases considered under standard dispute settlement provisions, in line with the construction contended for above. Another example is provided by the cases concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*, where the Court decided that it had jurisdiction over Libya’s claims that partially related to its compliance with the Montreal Convention.<sup>24</sup>

10. The result of Latvia’s construction of Article IX of the Genocide Convention is that where a State has accused another State of genocide such that a dispute has arisen, the Court will have jurisdiction over any claim by the latter State seeking a declaration that the former State’s accusations are without legal and factual foundation.

**B. ARTICLE IX OF THE GENOCIDE CONVENTION APPLIES TO “DISPUTES”  
CONCERNING THE PROHIBITION OF ABUSIVE ALLEGATIONS OF GENOCIDE**

11. Latvia contends that Article IX of the Genocide Convention applies to “disputes” concerning prohibition of abusive allegations of genocide under other provisions of the

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<sup>21</sup> *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* [1952] ICJ Rep 176, 182.

<sup>22</sup> *Ibid* 182-184.

<sup>23</sup> *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)* [2012] ICJ Rep 99 [40].

<sup>24</sup> *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)* (Preliminary Objections) [1998] ICJ Rep 9 [14], [26]; *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) [1998] ICJ Rep 115 [12], [13], [25].

Genocide Convention, which fall within the scope of the Court's jurisdiction *ratione materiae*. These provisions include, among others, Articles I and IV,<sup>25</sup> which provide context for the construction of Article IX. Latvia submits that no Party to the Genocide Convention is permitted to make abusive allegations of genocide. Such allegations risk undermining the character of genocide as a crime of exceptional gravity and the stigma that attaches to it as an affront to the "most elementary principles of morality".<sup>26</sup> This would be contrary to the object and purpose of the Genocide Convention. Latvia will make three points concerning the construction of Article IX, read in the context of Articles I, IV, and other relevant provisions of the Genocide Convention: (1) the obligations under the Genocide Convention shall be performed and interpreted in good faith; (2) a unilateral and unfounded determination that a situation constitutes genocide is abusive and contrary to the letter and the spirit of the Genocide Convention; (3) the Genocide Convention provides guidance concerning the means by which the Parties may act lawfully to prevent and punish genocide.

12. First, obligations to prevent and punish genocide, set out in Article I and further in Article IV, must be performed and interpreted "in a reasonable way and in such a manner that [the Genocide Convention's] purpose can be realized".<sup>27</sup> The obligation to "abstain from acts calculated to frustrate the object and purpose of the treaty" is "clearly implicit in the obligation to perform the treaty in good faith".<sup>28</sup> It would be unreasonable to allow a Contracting Party to make abusive allegations of genocide and thus distort the terms of the Genocide Convention. Indeed, this would be contrary to the basic moral and humanitarian objectives that the Genocide Convention seeks to protect.

13. Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Genocide Convention. Good faith is also directly linked to the "[t]rust

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<sup>25</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Memorial of Ukraine of 1 July 2022) [78]; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Preliminary Objections of the Russian Federation of 1 October 2022) [163].

<sup>26</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23.

<sup>27</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* [1997] ICJ Rep 7 [142].

<sup>28</sup> ILC, 'Draft Articles on the Law of Treaties with Commentaries' (1966) II Yearbook of the International Law Commission 211 Draft article 23 Commentary 4; also R Kolb, *La bonne foi en droit international public* (PUF 2000) 284-85.



and confidence [that] are inherent in international co-operation”.<sup>29</sup> This is particularly important in the context of the Genocide Convention, given that it is an instrument in relation to which the Contracting 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”.<sup>30</sup>

14. Secondly, a unilateral and unfounded allegation that a situation constitutes genocide is abusive and contrary to the letter and the spirit of the Genocide Convention. According to the Court, “proof at a high level of certainty [is] appropriate to the seriousness of the allegation”, namely that concerning a failure to prevent and punish genocide.<sup>31</sup> Unless supported by plausible evidence, based on independent and impartial sources of information, and verified and corroborated in consultation with the Parties, the United Nations organs, and other international mechanisms, such allegations are abusive.<sup>32</sup> Given the content of these obligations, Contracting Parties to the Genocide Convention often rely on the results of independent investigations<sup>33</sup> and information exchanged through international<sup>34</sup> and regional cooperation mechanisms before qualifying a situation as genocide and taking any further action pursuant to Article I.<sup>35</sup> Best practices for implementation of the Genocide Convention prioritise cooperation through existing and further-enhanced international mechanisms.<sup>36</sup>

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<sup>29</sup> *Nuclear Tests (Australia v. France)* [1974] ICJ Rep 253 [46].

<sup>30</sup> *Reservations to the Genocide Convention* (n 26) 23.

<sup>31</sup> *Application of the Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) [210].

<sup>32</sup> *Ibid* [211].

<sup>33</sup> For example, the unilateral determination by the United States of alleged genocide in Darfur was based on the findings of the Darfur Atrocities Documentation Project (DADP), an investigation conducted by independent experts, see the declaration before the Senate Foreign Relations Committee by Colin Powell, ‘The Crisis in Darfur’ (9 September 2004), <<https://2001-2009.state.gov/secretary/former/powell/remarks/36042.htm>>.

<sup>34</sup> For example, The Gambia communicated its allegations to Myanmar prior to commencing proceedings before the Court and relied *inter alia* on the reports of the Independent International Fact-Finding Mission on Myanmar, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Order of 23 January 2020) [2020] ICJ Rep 3 [28].

<sup>35</sup> ‘Report of the Secretary-General: Advancing Atrocity Prevention: Work of the Office on Genocide Prevention and the Responsibility to Prevent’ (3 May 2021) UN Doc A/75/863–S/2021/424 [21]-[27].

<sup>36</sup> UN Human Rights Council, ‘Resolution 43/29: Prevention of Genocide’ (29 June 2020) UN Doc A/HRC/RES/43/29 [10]-[11].

15. Thirdly, 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”,<sup>37</sup> “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”.<sup>38</sup> Articles VIII and IX are “means for the resolution of disputes that the Convention provides. These means would of course have been open to Russia as alternatives to the military action that it commenced in Ukraine on 24 February 2022”.<sup>39</sup> In Latvia’s view, Articles IV, VI, VII, VIII and IX provide context for construction of the content and scope of the obligations to prevent and punish genocide in Article I:

- Articles IV, VI and VII: The Contracting Parties undertake to punish genocide regardless of the personal status of the offenders.<sup>40</sup> While every Contracting Party has an interest in the performance of that obligation, the Convention reserves a particular role to the territorial State. Thus, the obligation to prosecute genocide or other acts enumerated in Article III “is subject to an express territorial limit”.<sup>41</sup> To the extent that the territorial State is unwilling or unable to prosecute, Article VII provides for the duty to extradite.<sup>42</sup> Thus, any Contracting Party, which has reason to believe that the territorial State is unwilling or unable to prosecute alleged offenders, may engage in bilateral exchanges with the territorial State and request extradition. This “makes up a vital part within the conventional duties to international cooperation”.<sup>43</sup>
- Article VI: A Contracting Party may discharge its obligation to punish alleged perpetrators of genocide by having recourse to domestic or international penal

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<sup>37</sup> Order on Provisional Measures (n 12) [56].

<sup>38</sup> Ibid.

<sup>39</sup> Order (n 12) Separate Opinion of Judge Robinson <<https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf>> [30].

<sup>40</sup> Genocide Convention (n 4) Article IV.

<sup>41</sup> Genocide Convention (n 4) Article VI; also *Application of the Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) [184], [442].

<sup>42</sup> Genocide Convention (n 4) Article VI.

<sup>43</sup> B Schiffbauer, “Article VII” in CJ Tams, L Berster and B Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide* (Beck/Hart/Nomos 2014) 268.

tribunals.<sup>44</sup> For example, the International Criminal Court (“ICC”) is well equipped to investigate, prosecute, and punish the crime of genocide. States Parties to the Rome Statute of the ICC may refer situations in which genocide or other acts enumerated in Article III are alleged to have been committed to the attention of the ICC Prosecutor.<sup>45</sup> Even if they are not parties to the Rome Statute, they may recognize its competence over specific crimes, including genocide, alleged to have occurred in their own territory.<sup>46</sup>

- Article VIII: A Contracting Party with reason to believe that genocide or other acts enumerated in Article III have occurred or that there is a risk that such acts may occur, may call upon the competent United Nations organs to undertake necessary enforcement actions.<sup>47</sup> Article VIII sets out a basic framework of cooperation within which the obligations to prevent and to punish may be performed and provides a reference point for the actions that States Parties should resort to in the discharge of those obligations.<sup>48</sup> Article VIII does not exhaust the scope of the obligation to prevent genocide,<sup>49</sup> and the Contracting Parties may fulfil their Article I obligations through “bilateral engagement or exchanges within a regional organization”.<sup>50</sup> However, it does significantly reduce the risk of abusive allegations as the competent United Nations organs would be well-placed to independently verify and corroborate any such allegations before undertaking any enforcement actions. If Article I were to be interpreted in a way that permits a Contracting Party to make an abusive unilateral characterisation of a situation as genocide and act upon it, Article VIII would be

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<sup>44</sup> Genocide Convention (n 4) Article VI.

<sup>45</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3 Article 14(1).

<sup>46</sup> Ibid Article 12(3).

<sup>47</sup> Genocide Convention (n 4) Article VIII.

<sup>48</sup> *Application of the Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) Separate Opinion of Judge Tomka 310 [66]; also L Pezzano, ‘Rescatando una norma del olvido: el art. VIII de la Convención contra el genocidio y la responsabilidad de proteger’ (2021) 73 *Revista española de derecho internacional* 207, 215-225.

<sup>49</sup> *Application of the Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) [427].

<sup>50</sup> Order on Provisional Measures (n 12) [57].

redundant (*effet utile*). This would be contrary to “the well-established principle in treaty interpretation that words ought to be given appropriate effect”.<sup>51</sup>

- Article IX: As discussed in the previous section, a Contracting Party may submit to the Court a dispute relating to the performance or non-performance of Convention obligations, including under Article I.<sup>52</sup> The Court is well placed to make determinations as to the occurrence of genocide or other acts enumerated in Article III and has the power to order provisional measures. Accordingly, a Contracting Party which knows or has reason to suspect that genocide or other acts set out in Article III have occurred or are about to occur may institute judicial proceedings against the alleged perpetrator. Importantly, beyond the usual requirement of the dispute there are no procedural preconditions in the Genocide Convention, such as the obligation to negotiate or the obligation to resort first to other means of dispute settlement. Considerations of *effet utile*, similar to those noted earlier in respect of Article VIII, also apply when interpreting Article I in light of Article IX.

16. The means for the prevention and punishment of genocide described above are consistent with “the spirit and aims of the United Nations” and the need for “international co-operation”, two elements that are expressly reflected in the Preamble of the Convention.<sup>53</sup> Conversely, it would be inconsistent with the rationale of the Convention to allow a Contracting Party to make abusive allegations of genocide and employ means to prevent and to punish it that are not themselves in accordance with the aims and purposes of the United Nations. Finally, the construction contended for is also confirmed by the *travaux préparatoires* of the Convention.<sup>54</sup>

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<sup>51</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70 [133]; also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)* [1994] ICJ Rep 6 [51] (with further references).

<sup>52</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)* (Preliminary Objections) [1996] ICJ Rep 595 [32].

<sup>53</sup> Genocide Convention (n 4) Preamble.

<sup>54</sup> See UN Economic and Social Council, ‘Prevention and Punishment of Genocide: Comments by Governments on the Draft Convention Prepared by the Secretariat’ (30 January 1948) UN Doc E/623 (statement by Venezuela); UN Economic and Social Council, Ad Hoc Committee on Genocide, ‘Summary Record of the Seventh Meeting held on 12 April 1948’ (20 April 1948) UN Doc E/AC.25/SR.7 (statement by Poland); Official Records of the Third Session of the General Assembly, Sixth Committee, Summary Records of Meetings (21 September-10 December 1948), in particular UN Doc A/C.6/SR.96 (statement by the Union of Soviet Socialist

**C. ARTICLE IX APPLIES TO “DISPUTES” CONCERNING OTHERWISE UNLAWFUL  
USE OF FORCE AS A MEANS FOR PREVENTION AND PUNISHMENT OF GENOCIDE**

17. Latvia contends that Article IX of the Genocide Convention applies to “disputes” concerning otherwise unlawful use of force as a means for prevention and punishment of genocide. Latvia will make four points of construction: (1) the Convention does not authorize use of force that would otherwise be unlawful under applicable international law; (2) the means of fulfilling the obligation to prevent and punish genocide not provided for in the Convention cannot include the unlawful use of force; (3) the Convention prohibits the otherwise unlawful unilateral use of force as a means for prevention and punishment of genocide; (4) the content of the rule prohibiting unlawful unilateral use of force as a means of prevention and punishment of genocide is to be determined by taking into account other relevant rules of international law.

18. First, the Convention does not authorize a use of force that would otherwise be unlawful under applicable international law. The Genocide Convention contains no explicit authorization of the use of force. This textual silence stands in contrast with the detailed provisions employed when the Convention does authorize particular conduct by the Parties; for example regarding trial of persons charged with genocide,<sup>55</sup> their extradition,<sup>56</sup> and submission of disputes to the Court.<sup>57</sup> Nor is a rule dispensing with such an important principle of international law as the prohibition of unlawful use of force tacitly provided for in the Convention.<sup>58</sup> The Court has stated that “every State may only act within the limits permitted by international law” in discharging its duty to prevent genocide under the Convention,<sup>59</sup> which is accepted to signify that the Convention does

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Republics); UN Doc A/C.6/SR.98 (statement by the Union of Soviet Socialist Republics); UN Doc A/C.6/SR.109 (statement by the United States of America); UN Doc A/C.6/SR.109 (statement by Uruguay).

<sup>55</sup> Genocide Convention (n 4) Article VI.

<sup>56</sup> *Ibid* Article VII.

<sup>57</sup> *Ibid* Article IX.

<sup>58</sup> *Eletronica Sicula SpA (ELSI) (United States of America v. Italy)* [1989] ICJ Rep 15 [50]; *Oil Platforms (Islamic Republic of Iran v. United States of America)* [2003] ICJ Rep [41].

<sup>59</sup> *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) [430]; Order on Provisional Measures (n 12) [57].

not authorize an otherwise unlawful use of force.<sup>60</sup> Latvia agrees with the point made in the Order that “it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.”<sup>61</sup>

19. Secondly, any means of fulfilling the obligation to prevent and punish genocide not provided for in the Convention cannot include a use of force that would otherwise be unlawful under applicable international law.<sup>62</sup> The Court notes in the Order that “Article I does not specify the kinds of measures that a Contracting State may take to fulfil this obligation”,<sup>63</sup> and further identifies the engagement with the competent organs of the United Nations<sup>64</sup> and submission of disputes to the Court as measures authorized to prevent and punish genocide.<sup>65</sup> The Court also refers to “other means ... such as bilateral engagement or exchanges within a regional organization”.<sup>66</sup> In Latvia’s view, these rules of the Charter of the United Nations on peaceful means for the settlement of international disputes are legally relevant to the construction of the Convention by way of Article 31, paragraph 3, sub-paragraph (c), of the Vienna Convention.<sup>67</sup> The principles of

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<sup>60</sup> CJ Tams, L Berster, and B Schiffbauer (eds), *Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* (Beck/Hart/Nomos 2014) 51; A de Hoogh, ‘Jus Cogens and the Use of Armed Force’ in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (OUP 2015) 1161, 1185 (“absence of a justification for the use of armed force laid down in the Genocide Convention”); R O’Keefe, *International Criminal Law* (OUP 2015) 344-5; G Mettraux, *International Crimes: Law and Practice* (Volume I: Genocide, OUP 2019) 96 (“the duty to prevent [genocide] does not purport to provide an exception to ... the general principles regulating the lawful use force”).

<sup>61</sup> Order on Provisional Measures (n 12) [59].

<sup>62</sup> If the obligation is breached, States may rely on applicable customary secondary rules to implement State responsibility, *Application of the Genocide Convention Order (The Gambia v. Myanmar)* Order (n 34) [41]; International Law Commission, ‘Articles on responsibility of States for internationally wrongful acts’ *Yearbook of the International Law Commission 2001: Volume II Part 2* UN Doc A/CN.4/SER.A/2001/Add.1 (Part 2) 26 Articles 48, 54. These rules do not authorize otherwise unlawful use of force either, *ibid* Article 50(1)(a).

<sup>63</sup> Order on Provisional Measures (n 12) [56].

<sup>64</sup> Genocide Convention (n 4) Article VIII.

<sup>65</sup> *Ibid* Article IX.

<sup>66</sup> Order on Provisional Measures (n 12) [57].

<sup>67</sup> *Ibid* [58]; Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS XVI Articles 1, 33(1). See also *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory Opinion) [1971] ICJ Rep 16 [53] (“an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing at the time of the interpretation”).

effectiveness and good faith in treaty interpretation require that the (for its time) innovatory and far-reaching regime of measures set out in the Convention and the Charter of the United Nations cannot be supplemented by unlawful use of force.

20. Thirdly, the Convention prohibits an otherwise unlawful use of force as a means for prevention and punishment of genocide. Latvia fully agrees with the proposition that “Article I of the Genocide Convention imposes an obligation on Russia not only to act to prevent genocide, but to act *within the limits permitted by international law* to prevent genocide.”<sup>68</sup> The balance struck between the means for prevention and punishment of genocide in the Convention, demonstrated above, is consistent with a positive prohibition of those other means not in conformity with the spirit and aims of the United Nations Charter (such as “the suppression of acts of aggression or other breaches of the peace”).<sup>69</sup> This construction is supported by the ordinary meaning of Article I (“genocide ... is a crime under international law which they undertake to prevent and to punish”), which interpreted in good faith entails the prohibition of “the supreme international crime”<sup>70</sup> as a means for implementing the Convention.<sup>71</sup> It is further supported by interpretation of “measures that a Contracting State may take to fulfil this obligation” in Article I<sup>72</sup> consistently with the relevant rules of international law on the use of force<sup>73</sup> of *jus cogens* character.<sup>74</sup> The construction put forward is not contradicted by the Court’s rejection of arguments regarding external rules in the very different circumstances where such rules were “unrelated to the stated object and purpose”<sup>75</sup> or “simply not germane to the

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<sup>68</sup> Order on Provisional Measures Separate Opinion of Judge Robinson (n 39) [27] (emphasis in the original).

<sup>69</sup> Order on Provisional Measures (n 12) [58].

<sup>70</sup> ‘Judgment of the International Military Tribunal for the Trial of German Major War Criminals, Nuremberg, 30 September and 1 October 1946 (Reproduced)’ (1947) 41 AJIL 172, 186.

<sup>71</sup> *Application of the Genocide Convention (Bosnia and Herzegovina v. Serbia and Montenegro)* (n 15) [163].

<sup>72</sup> Order on Provisional Measures (n 12) [56].

<sup>73</sup> *Oil Platforms* (n 58) [41]-[42].

<sup>74</sup> 2022 ILC Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*) in *Report of the International Law Commission (Seventy-third session)* UN Doc A/77/10 11 Draft conclusion 20, Draft annex (a).

<sup>75</sup> *Immunities and Criminal Proceedings* (n 14) [95].

concerns underlying the drafting of” the treaties being interpreted.<sup>76</sup> Unlike those cases, the Genocide Convention’s rules, institutions, and teleology are closely related to the modern international regulation of the use of force, both in principle and in practice. Consequently, the Court’s jurisdiction under Article IX of the Convention extends, where appropriate, to the determination of whether action alleged to be taken as a means for prevention and punishment of the crime of genocide was or was not unlawful use of force.<sup>77</sup>

21. Fourthly, the scope of the prohibition of unlawful use of force as a means of prevention and punishment of genocide is to be determined by taking into account other relevant rules of international law. Consistently with Article 31, paragraph 3, sub-paragraph (c), of the Vienna Convention, the determination of whether action alleged to be taken as a means for prevention and punishment of genocide was or was not unlawful use of force is to be carried out by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law on the use of force.<sup>78</sup> Latvia’s proposed construction is in line with the approach taken in the Order,<sup>79</sup> which Latvia regards as correct.

### III. CONCLUSION

22. Latvia has made three submissions on construction of the Genocide Convention. First, Article IX of the Genocide Convention is formulated in broad terms to include “disputes” concerning the “fulfilment” of obligations under the Convention and applies to claims that have been described as “non-violation complaints”. Secondly, Article IX of the Genocide Convention applies to “disputes” concerning the prohibition of abusive allegations of genocide under other provisions of the Genocide Convention. Thirdly, Article IX of the Genocide Convention applies to “disputes” concerning otherwise

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<sup>76</sup> *Certain Iranian Assets* (n 14) [65], also [58] (“these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities.”).

<sup>77</sup> To paraphrase the Court in *Oil Platforms* (n 58) [42].

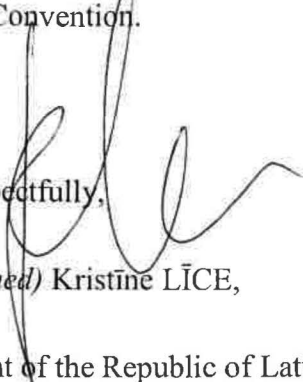
<sup>78</sup> To again paraphrase the Court in *ibid.*

<sup>79</sup> Order on Provisional Measures (n 12) [58].



a means for prevention and punishment of genocide under other provisions of the Genocide Convention.

Respectfully,



*(Signed)* Kristīne LICE,

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