

INTERNATIONAL COURT OF JUSTICE

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

(UKRAINE v. RUSSIAN FEDERATION)

WRITTEN OBSERVATIONS OF ROMANIA

5 July 2023

I. INTRODUCTION

1. This written statement is submitted by Romania following the Order of the International Court of Justice of 5 June 2023¹ by which it declared admissible the declaration of intervention submitted by the Government of Romania in the case concerning the *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.
2. According to the mentioned ICJ Order, the declarations of intervention filed in this case (including that of Romania) *"are admissible at the preliminary objection state in so far as they 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 present case."*²
3. Romania recalls that its intervention submitted on the basis of Article 63, paragraph 2 of the Statute of the International Court of Justice concerns issues pertaining to the construction of the Convention arising in the context of the present case.³ Specifically, it contended that

the situation under scrutiny requires a proper interpretation of the scope of the following obligations under the Genocide Convention:

- a) *The obligation under Article IX of the Convention to submit to the Court disputes relating to the interpretation, application or fulfilment of the Convention.*
- b) *The obligation under Article I of the Convention to prevent and punish the crime of genocide, which entails also the interpretation of Articles II, III and VIII of the Convention.*⁴

¹ Notified to the Agent of Romania on 6 June 2023.

² Paragraph 99.

³ Paragraph 13 of the Declaration of Intervention of Romania.

⁴ Idem paragraph 15.

4. In light of the Order of the Court, Romania will develop in this written statement its arguments concerning the proper construction of Article IX of the Genocide Convention in support of the determination of the Court's jurisdiction *ratione materiae* in this case. In line with the suggested approach by the Court, these observations reflect the coordination with other intervening States sharing a common view.
5. Romania recalls, at the same time, that by intervening in this case it does not seek to interfere with the positions of the Parties in the proceedings, but to contribute to clarifying the proper interpretation of the Genocide Convention.

II. INTERPRETATION OF ARTICLE IX OF THE GENOCIDE CONVENTION

General remarks

6. The Genocide Convention is a landmark treaty that includes not only the definition of the crime of genocide, but also certain obligations for Contracting Parties to prevent and punish genocide, wherever committed, including by enacting relevant legislation and punishing perpetrators.
7. As confirmed by the Court in its Opinion of 28 May 1951,⁵

[t]he origins of the Convention show that it was the intention of the United Nations to condemn and punish genocide as 'a crime under international law' involving a denial of the right of existence of entire human groups, a denial which shocks the conscience of mankind and results in great losses to humanity, and which is contrary to moral law and to the spirit and aims of the United Nations (Resolution 96 (I) of the General Assembly, December 11th 1946). The first consequence arising from this conception is that the principles underlying the Convention are principles which are recognized by civilized nations as binding on

⁵ *Reservations to the Convention on Genocide*, Advisory Opinion: I.C. J. Reports 1951, p. 15 at p. 23.

States, even without any conventional obligation. A second consequence is the universal character both of the condemnation of genocide and of the cooperation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention)."

8. Therefore, the Convention sets forth *erga omnes* rights and obligations,⁶ the prohibition to commit genocide having a peremptory nature. In the accomplishment of the high purposes which define the object and purpose of the Convention (as above emphasized), the Contracting States must act in good faith and in compliance with the UN Charter and other principles and rules of international law.⁷
9. The legal relationship established between the Contracting Parties by virtue of their participation to the Genocide Convention includes the acceptance of the jurisdiction of the Court over disputes that might occur between them in relation to the Convention, unless a reservation has been introduced blocking the exercise of jurisdiction.
10. According to Article IX, the compromissory clause which constitutes the legal basis for the proceedings instituted by Ukraine against the Russian Federation,

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.

11. In order to determine the *ratione materiae* jurisdiction of the Court in this case, an interpretation of this compromissory clause is required, which thereafter should be placed in the context of the case.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, I. C. J. Reports 1996, p. 595, at p. 616, paragraph 31.

⁷ *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, paragraph 430.

12. The interpretation of Article IX of the Genocide Convention should be done against the general rules of treaty interpretation enunciated in Art. 31 of the Vienna Convention on the Law of Treaties which codifies customary international law:

1. 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.

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

(a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;

(b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

(c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

13. Article 32 of the Vienna Convention on the Law of Treaties is also of assistance in determining the correct construction of the provisions of the Genocide Convention.

14. The principle of *good faith*, which is part of the core obligations of a State party to a treaty, is stated in Article 26 of the Vienna Convention:

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

15. A *good faith* application of the Genocide Convention implies that the Contracting States apply the treaty in a reasonable way and in such a manner that its purpose can be realized.⁸ This implies both that (1). the provisions of Article IX cannot be interpreted as a pretext and misused for the sole purpose of triggering the jurisdiction of the Court over disputes the subject-matter of which do not relate to the Genocide Convention, and that (2). the provisions of the Genocide Convention cannot be misused / cannot serve as a basis for abusive allegations in order to justify conduct which represents a violation of international law.
16. Hence, the *bad faith* conduct in the application of the Genocide Convention cannot be invoked to reject a *good faith* interpretation of the provisions of the same treaty (including of Article IX) that would bring the dispute generated by the *bad faith* conduct within the jurisdiction of the Court.
17. *Good faith* interpretation thus operates as a safeguard against the misuse of the Genocide Convention.

*“One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation[...].”*⁹

18. As also stated in leading doctrine,

[t]he reasonable and bona fide exercise of a right implies an exercise which is genuinely in pursuit of those interests which the right is destined to protect and which is not calculated to cause any unfair prejudice to the legitimate interests of

⁸ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, paragraph 142.

⁹ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 253, at p. 268 paragraph 46.

*another State, whether these interests be secured by treaty or by general international law.*¹⁰

19. An immediate conclusion that can be drawn from a good faith interpretation of the terms of Article IX of the Convention, in light of its object and purpose, implies that the Court has jurisdiction to interpret the provisions of the Convention and to determine the proper application and fulfilment of the Convention *in all circumstances* when there is a dispute between the Contracting Parties over such questions.

20. Thus, in order to have *ratione materiae* jurisdiction, two conditions must be verified under Article IX of the Convention:

- there must be a *dispute* between Contracting Parties to the Convention;
- the dispute must relate to the *interpretation, application or fulfilment of the Convention, or to the responsibility of a State for genocide.*

21. As the Court observed in *The Gambia v. Myanmar* case,

*“[t]he Genocide Convention does not attach additional conditions to the invocation of responsibility or admissibility of claims submitted to the Court. The use of the expression “the Contracting Parties” in article IX is explained by the fact that the Court’s jurisdiction under Article IX requires the existence of a dispute between two or more Contracting Parties.”*¹¹

22. Further, there is nothing in Article IX that could be interpreted as limiting the jurisdiction of the Court to those situations when the applicant is the Contracting Party formulating accusations of genocide against another Contracting Party or other Contracting Parties. Quite to the contrary, the correct construction of Article IX implies that the only two-folded element to be proven in order to trigger the jurisdiction of the Court is the existence of a

¹⁰ Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Stevens and Sons Ltd. 1953, pp. 131-132.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 37, paragraph 110.

dispute between the Contracting Parties on the interpretation, application or fulfilment of the Convention.

There must be a dispute

23. The notion of “dispute” has been extensively analyzed in the jurisprudence of the Court, being established that it implies “*a disagreement on a point of law or fact, a conflict of legal views or of interests*”¹² between the Parties, provided that it is “*shown that the claim of one party is positively opposed by the other*”.¹³
24. Furthermore, in making a determination on the existence of a dispute and in isolating the real issue in the case and identifying the object of the claim,¹⁴ the Court refers to the date on which the application was submitted to the Court, but also to the conduct of the Parties subsequent to the application, paying special attention to the author of the statement or document, their intended or actual addressee and their content.¹⁵
25. It can also be that a dispute falls within the scope of more than one treaty, in which case the dispute can be entertained if it falls in at least the ambit of one treaty in relation to which jurisdiction *ratione materiae* can be established.¹⁶

The dispute must relate with the interpretation, application or fulfilment of the Convention, or to the responsibility of a State for genocide

26. It should be noted that the language of the compromissory clause is wider than the specific clauses of similar nature, by not limiting the jurisdiction of the Court only to disputes on the

¹² *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.*

¹³ *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.*

¹⁴ *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 466, paragraph 30.*

¹⁵ *Id.* p. 25, paragraph 64 and the jurisprudence cited therein.

¹⁶ See for instance the *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 at p. 120, paragraph 113.*

interpretation or application of the Convention, but adding disputes relating to the fulfilment of the Convention.

27. The rationale for the use of this language was to ensure the widest possible exercise of jurisdiction by the Court in connection with its provisions:

*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.*¹⁷

28. The term *fulfilment* partially overlaps with the term application, and it is understood to refer, in its regular meaning, to an application that ‘meets the requirements’ of a norm,¹⁸ therefore going beyond the mere application of the norm, into the area of compliance.

29. A dispute may concern the fulfilment of the Convention when either there is no action on the part of a Contracting State that meets the requirements of the norm, or there is a certain action that is not suitable for such purpose. In *The Gambia v. Myanmar* case, the dispute concerned *inter alia* the non-action of the Myanmar authorities in sanctioning the perpetrators of genocide; thus, Myanmar failed to fulfil the provisions of the Convention precisely because they did not act.¹⁹

30. Improper or no action may concern the fulfilment of any provision of the Convention be it the prevention or the punishment of genocide. In general, actions taken to punish genocide and further prevent the perpetration of genocide require a proper determination of the actual occurrence of genocide. Such determination for purposes of punishment and further prevention cannot be done but based on solid and reliable information, reports and evidence.

¹⁷ Robert Kolb, *The scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, in *The UN Genocide Convention: a Commentary*, edited by Paola Gaeta, Oxford University Press 2009, p. 453.

¹⁸ C. Tams, *Article IX in Convention on the Prevention and Punishment of the Crime of Genocide: A Commentary* by Christian J. Tams, Lars Berster and Bjorn Schiffbauer, C.H. BECK Hart Nomos 2014, p. 313.

¹⁹ *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, paragraph 24, Points (1) (c), d) and (e).

It cannot be done in an arbitrary manner. Otherwise, it may lead to an improper fulfilment of the Convention.

31. Indeed “[a]ll the States parties to the Genocide Convention have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention”.²⁰ However, the *good faith* fulfillment of the obligations under the Convention requires that this duty is discharged in accordance with the provisions of the Convention (see for instance Article VIII on the basis of which the UN competent organs may take action or Article IX which provides for a judicial settlement), and general principles of international law, including through international co-operation (as stated in the Preamble of the Convention).
32. Moreover, the use of these means provided for under the Convention voices the general obligation that States have to settle disputes by peaceful means.
33. Thus, within the scope of the *duty to prevent and punish* cannot be included making abusive allegations or unsubstantiated claims of perpetration of genocidal acts on the basis of which a Contracting State would perform its duty to suppress and punish against the State accused, especially if actions taken to that effect are unlawful under international law. Such conduct distorts the scope of Article I and generally the object and purpose of the Convention.
34. As the Court explained in the *Bosnian Genocide case*, “it is clear that every State may only act within the limits permitted by international law.”²¹ 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”.²²

²⁰ Id. p. 36, paragraph 107.

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, at p. 221, paragraph 430.

²² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order on Provisional Measures of 16 March 2022, Separate Opinion of Judge Robinson, paragraph 27.

35. It would be even more restrictive to argue that a dispute concerning the improper conduct of a Contracting Party in the fulfilment of obligations under Article I is left outside the scope of Article IX.
36. Further, Article IX specifies that the Court has *ratione materiae* jurisdiction over disputes relating to the responsibility of a State for genocide.
37. It would frustrate the ordinary meaning of the terms of Article IX to read this specific language of the compromissory clause as including only those disputes brought before the Court by Contracting States claiming the responsibility of another State for genocide, while restricting the right of the State whose responsibility for genocide has been claimed by other Contracting State/States to defeat those allegations and verify whether actions taken against it (especially actions with severe consequences, as deprivation of sovereignty over parts of its territory or use of force) are within what is permitted by international law for purposes of punishing the alleged perpetration of genocide.
38. The objective of the Convention to protect the most elementary principles of morality and humanity fully endorses such an interpretation of Article IX.
39. In conclusion, the object and purpose of the Convention, its terms and context testify to the fact that, by virtue of Article IX, the Court was endowed with the widest possible jurisdiction to assess the perpetration or not of the crime of genocide and the appropriateness of the measures taken to prevent and punish genocide in fulfillment of the Convention, whenever there is a dispute between the Contracting Parties in relation to such matters, irrespective of which of the parties brings such dispute before it.

III. CONCLUSION

40. Following these considerations, Romania submits that disputes concerning the following fall within the *ratione materiae jurisdiction* of the Court:

- the fulfilment or not by a Contracting Party of its duty to prevent and punish genocide within the meaning of Article I of the Convention, including the defeat of abusive allegations regarding the responsibility of a Contracting State for genocide;
- the measures and actions the Contracting Parties to the Convention may take in the *good faith* fulfilment of the Convention in response to genocidal acts committed by another Contracting Party on its territory.

41. The correct construction of Article IX supports the exercise of the jurisdiction of the Court in its widest possible expression, as only in this way the Court would be able to assist the Contracting Parties in the realization of the Convention's humanitarian objective of preventing and punishing genocide.

Respectfully,



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