

**INTERNATIONAL COURT OF JUSTICE**

**Written Observations of the**

**KINGDOM OF SPAIN**

In the case of

**ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE  
PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKRAINE v.  
RUSSIAN FEDERATION)**

28 June 2023

## I. OBJECT AND PURPOSE OF THE INTERVENTION

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, Spain (“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 of the written observations referred to in Article 86, paragraph 1, of the Rules of the Court (“the Rules”)<sup>2</sup>.
2. Spain’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, the written observations will solely concern the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the Court’s jurisdiction *ratione materiae* in the 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 Convention’s provisions, in accordance with the customary rule of interpretation reflected in

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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>, paras 99 and 102(1).

<sup>2</sup> *Ibid.*, para. 102(3).

<sup>3</sup> *Ibid.*, para. 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), p. 26.

<sup>6</sup> *Ibid.*, para. 99.

Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties (“Vienna Convention”)<sup>7</sup>.

3. Upon the Court’s invitation to coordinate with other intervening States, Spain has reached a large substantive convergence with the position of other interveners. However, in order to be able to meet the strict deadline set by the Court and for logistical reasons, Spain files its own content in the present observations.
4. As indicated in its Declaration of intervention, Spain will limit its observations to Article IX of the Genocide Convention. Thus, in its written observations, it will focus on the analysis of the key elements included in Article IX, namely: i) the concept of “disputes between the Contracting Parties”; ii) the scope and nature of a dispute to be submitted to the Court (“relating to”): a) interpretation, application or fulfilment of the Convention; b) any dispute “relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III of the Convention”; and iii) the States entitled to submit a dispute (“at the request of any of the parties to the dispute”).
5. However, before addressing the above-mentioned issues, Spain would like to make some general comments on the meaning of the Genocide Convention in the International Legal Order, insofar as they are relevant for a coherent understanding of the Spanish observations, in particular with regard to the principles of interpretation we have applied.

## **II. THE GENOCIDE CONVENTION IN THE INTERNATIONAL LEGAL ORDER.**

6. The Genocide Convention is the main legal instrument adopted by the community of States to prevent and punish genocide, right after the Second World War and in the earliest days of the United Nations. It is based on the assessment that genocide is a crime under international law, and on the recognition of the fight against genocide, both at national and international level, as an unavoidable ethical and legal duty for States.

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<sup>7</sup> Ibid, para. 84.

7. The relevant role accorded to the fight against genocide after the Second World War has been reflected in the Genocide Convention<sup>8</sup> and confirmed later by the adoption of a great number of instruments, among which The Code of Offences Against the Peace and Security of Mankind, adopted by the ILC in 1996<sup>9</sup>, and the Rome Statute of the International Criminal Court <sup>10</sup> must be mentioned. On the other hand, the relevance of the Genocide Convention in the international legal system is well reflected in the ICJ case-law, from 1951 until now<sup>11</sup>.
8. The meaning and purpose of the Genocide Convention has been highlighted by the Court in its famous 1951 Advisory Opinion, which reads as follows:

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

*The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles*

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<sup>8</sup> As indicated in the third paragraph of the Preamble, the Convention was adopted "in order to liberate mankind from such an odious scourge [genocide]".

<sup>9</sup> See, article 17 and paragraph (3) of the commentary to this article. *Yearbook of the International Law Commission*, 1996, vol. II, Part II, para. 50, p. 44.

<sup>10</sup> See article 6 of the Rome Statute.

<sup>11</sup> *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), Application for Revision of the Judgment of 11 July 1996 in the Case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), and Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening).*

*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.*"<sup>12</sup>

9. Those statements have been reiterated by the Court every time it has had to deal with disputes related to the crime of genocide and the Genocide Convention. As a result, in the recent case *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the Court held that "[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"<sup>13</sup>. For the determination of this "common interest", Spain would like to recall that the Court stated in its 1951 Advisory Opinion that "[t]he objects of such a convention must also be considered", having emphasised the "raison d'être" of the Convention as a relevant basis for its reasoning.<sup>14</sup>
10. In addition to that, and as a consequence of it, the ICJ has held that the rights and obligations enshrined in the Convention are rights and obligations *erga omnes*<sup>15</sup> and that the prohibition of genocide constitutes an *erga omnes* obligation, affirming expressly and unreservedly, that it is a norm of *jus cogens*.<sup>16</sup> This view has also

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<sup>12</sup> *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 23.

<sup>13</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.

<sup>14</sup> *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 9.

<sup>15</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Bosnia and Herzegovina v. Yugoslavia)*, Preliminary Objections, Judgment, I. C. J. Reports 1996, para. 31.

<sup>16</sup> *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction and Admissibility, I.C.J. Reports 2006, p. 6, at pp. 31–32, para. 64. See also *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, I.C.J. Reports 2007, p. 43, at pp. 110–111, para. 161, where the Court, having quoted the 1951 advisory opinion, states that it, in the 2006 judgment, had "reaffirmed the 1951 ... statement[] ... when it added that the norm prohibiting genocide was assuredly a peremptory norm of international law (*jus cogens*)". *Armed Activities on the Territory of the Congo*, pp. 31–32, para. 64 ("the fact that a dispute relates to compliance with a norm having such a character [of *jus cogens*], which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a

been supported in many dissenting and separate opinions of the judges of the Court.<sup>17</sup> The prohibition of genocide has also been recognized as jus cogens by the International Tribunal for the Former Yugoslavia and by the International Tribunal for Rwanda.<sup>18</sup> The same conclusion has been reached recently by the International Law Commission in its work on “Peremptory norms of International Law (jus cogens)”.<sup>19</sup>

11. On the other hand, it must be recalled that the Court has described the structure and nature of the Genocide Convention in broad and complex terms. According to the construction of the Genocide Convention set up by the Court, the Convention not only declares genocide to be a heinous crime under international law and imposes upon States parties some specific duties in order to prevent and prosecute the crime of genocide at national level, but also obliges States parties to act (both at national and international level) in order to prevent and punish genocide bearing in mind the “raison d’être” of the Convention, in accordance with its object and purpose.<sup>20</sup>

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basis for the jurisdiction of the Court”). *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, para. 162; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, I.C.J. Reports 2015, p. 3, at pp. 47–48, para. 88.

<sup>17</sup> First among these was the separate opinion of Judge ad hoc Lauterpacht in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993*, I.C.J. Reports 1993, p. 325, at p. 440, para. 100 (“the prohibition of genocide has long been regarded as one of the few undoubted examples of jus cogens”). See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, dissenting opinion of Judge Cançado Trindade, pp. 234 and 238, paras. 83 and 92; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, dissenting opinion of Judge Weeramantry, at p. 496.

<sup>18</sup> See, e.g., *Prosecutor v. Zoran Kupreškić et al.*, IT-95-16-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, para. 520; *Prosecutor v. Radislav Krstić*, IT-98-33-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 2 August 2001, para. 541; *Prosecutor v. Milomir Stakić*, IT-97-24-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia, 31 July 2003; *Prosecutor v. Vidoje Blagojević and Dragan Jokić*, IT-02-60-T, Judgment, Trial Chamber, International Tribunal for the Former Yugoslavia (), 17 January 2005. For decisions of the International Tribunal for Rwanda see, for example, *Prosecutor v. Clément Kayishema and Obed Ruzindana*, ICTR-95-1-T, Judgment, International Tribunal for Rwanda, 21 May 1999, *Reports of Orders, Decisions and Judgements 1999, vol. II*, para. 88 (“The Genocide Convention became widely accepted as an international human rights instrument. Furthermore, the crime of genocide is considered part of international customary law and, moreover, a norm of jus cogens.”)

<sup>19</sup> See *Draft conclusions on identification and legal consequences of peremptory norms of general international law (ius cogens)*, Annex, alinea (b). Report of the International Law Commission, 2022, A/77/10, p. 16.

<sup>20</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*. *Provisional Measures*, para 52.

12. Under this construction, the Genocide Convention is not exclusively a criminal law treaty. It contains elements clearly linked to the protection and safeguard of fundamental values and principles of international law, including the protection of human dignity and the principle of accountability. Therefore, it is not possible to analyse the Genocide Convention as an isolated instrument that is unrelated to other relevant rules and principles of international law, including the maintenance of international peace and security and the international protection of human rights.
13. It is in that context that Article IX must be construed, having in mind that Article IX in itself is an expression of the relevance of the Genocide Convention in the international law system. As will be explained hereafter, Spain considers that the special nature and role attributed by States to the Genocide Convention has to be taken into account in the construction of Article IX, in order not to undermine the object and purpose of the Convention.

### **III. ARTICLE IX OF THE GENOCIDE CONVENTION: NATURE AND CRITERIA FOR INTERPRETATION**

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

*“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”*

#### *A) Article IX as a compromissory clause*

15. As the ICJ has reiterated, Article IX is a compromissory clause which can function as the sole legal basis for the exercise of its jurisdiction with regard to the Genocide Convention. This provision must be distinguished from Article VIII as a political means to deal with genocide<sup>21</sup>.

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<sup>21</sup> *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar). Provisional Measures*, Order of 23 January 2020, para. 35; *Preliminary Objections*, para 88.

16. The great significance that States have attached to this compromissory clause is reflected in the fact that some States that once reserved Article IX have subsequently withdrawn their reservations.
17. Article IX is one of the first examples of a “compromissory clause” included in multilateral treaties adopted under the auspices of the United Nations. Even though it responds to the same nature and purpose of similar provisions included in other multilateral treaties adopted in the same framework, its wording contains several distinctive features. In particular, the reference to the word “fulfilment” besides “interpretation” and “application” of the Convention, on the one hand; and the phrase “including (...) the responsibility of a State for genocide or for any of the other acts enumerated in article III”, on the other hand. Finally, it must be underlined that Article IX gives the possibility to file an application to “any of the parties to the dispute”.
18. In addition to that, mention must be made to the direct recognition by Article IX of the potential jurisdiction of the Court without any precondition, neither relating to the fulfilment of several conditions linked to the so called “diplomatic protection” or “nationality of the claim”<sup>22</sup>, nor to the need for a previous recourse to other means of peaceful settlement of disputes before filing an application under Article IX. As the Court has held, Article IX establishes a legal procedure for the settlement of disputes relating to the Genocide Convention based on law, and it is different to Article VIII which relates to actions to be adopted at the political level.<sup>23</sup>
19. Thus, under Article IX, the International Court of Justice is identified as the privileged means and locus for the peaceful settlement of any dispute related to the Convention. A qualification which is fully consistent with the relevant role attributed to the Genocide Convention in the international legal order.
20. The content of Article IX, in particular the distinctive features it presents, calls for a cautious analysis of Article IX in order to construe or interpret it. The Court has

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<sup>22</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary objections, Judgment of 22 July 2022, paras. 109 and 110.

<sup>23</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, paras. 33 and 35.



undertaken such a task in some of its judgments and orders adopted in previous genocide cases.

21. However, some issues remain open and must be clarified in the present case. Through this intervention, Spain intends to cooperate with the Court in the construction of the key elements of Article IX that are relevant at the present stage of the procedure. For that purpose, Spain will present its observations to these key elements in Part IV of its submission. But, prior to that, Spain considers it useful to put forward some comments about the principles of interpretation to be applied.

*B) The applicable principles of interpretation*

22. As the Court has repeatedly pointed out, for the interpretation of a treaty, recourse must be had to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969,<sup>24</sup> as well as in the reiterated jurisprudence of the Court, especially when it has interpreted the Genocide Convention.<sup>25</sup>

23. Pursuant to customary international law, as reflected in Article 31 of the Vienna Convention (*General rule of interpretation*),

*“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*

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<sup>24</sup> See *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (II), p. 598, para. 106; *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), pp. 109-110, para. 160; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia V. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022, para. 87.

<sup>25</sup> *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; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2008; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia V. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022

*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.”*

24. Even if Spain concurs that, as the Court has held, the interpretation of treaties is a complex and unique exercise through which all the rules enumerated in article 31 must be applied, it would like to make a special reference to the rules or criteria which, in its view, are more relevant in order to determine the scope of the *ratione materiae* and *ratione personae* jurisdiction under Article IX.

25. Those criteria are, in a first approach, the following:

- i) The duty to take into account, first and foremost, “the ordinary meaning of the terms
- ii) The duty to interpret the terms “in their context”;

26. The rules mentioned above have been underlined by the Court as basic interpretative principles to be applied in cases relating to the Genocide Convention. The application of these rules is particularly relevant to construe the meaning of the word “fulfilment” and the phrase “any party to the dispute”.

27. Together with those rules, Spain considers that the construction of Article IX has to take into account the object and purpose of the Convention, which has been a crucial interpretative criterion applied by the Court since 1951. The respect of the object and purpose is an “umbrella” interpretative rule compelling to take into account other provisions of the Convention, in particular Article I insofar as it declares genocide to be a crime under international law in any circumstance, thereby connecting the Genocide Convention with the highest values of the international community and the real purpose of the Convention: to prevent and

punish genocide in a broad sense non limited to the adoption of national legislative measures and practices.

28. In any case, Spain would like to recall that all the criteria mentioned above must be applied in good faith. Reference to good faith is continuously present in the decisions adopted by the Court for interpretative purposes, including the orders and judgments issued in relation with disputes related to the Genocide Convention. For Spain, the principle of good faith must play a central role in the construction of Article IX, leading to the conclusion that the ICJ jurisdiction *ratione materiae* includes any dispute based on bad faith fulfilment of the Convention by a State party with a purpose other than the true object and purpose of the Genocide Convention as declared by the Court.
29. Finally, Spain would like to draw the attention to paragraph 3, point (c) of article 31 of the Viena Convention on the Law of the Treaties, according to which, in the interpretation of a treaty “[t]here shall be taken into account, together with the context: (c) any relevant rules of international law applicable in the relations between the parties.”
30. Spain is aware of the warning contained in the ICJ Order on 5 June with regard to the other rules and principles of international law<sup>26</sup> and concurs with it. For that reason, it is not the intention of Spain to resort, in this intervention, to other rules and principles of international law, beyond the Genocide Convention, with the only exception of rules that are relevant to the interpretation of Article IX thereto.
31. However, it must be stated, at least, that for Spain, resorting to other rules and principles of international law is the logical consequence of the construction of the international law as a coherent system. From that perspective, it must be recalled that, as the Court has held with regard to cases relating to the Genocide Convention, a State party has to fulfil its obligations under the Convention in conformity with international law.<sup>27</sup>

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<sup>26</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), para. 84.

<sup>27</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at p. 221, para. 430; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 57.

32. Thus, Spain considers that other rules and principles of international law could be taken into account in order to identify the content and scope of a dispute relating to the fulfilment of the Convention. This would be appropriate, in particular, when determining if the obligation to prevent and punish genocide could be fulfilled by certain acts that could be contrary to a fundamental principle of international law, as is the prohibition of the use of force. In this regard, the norms establishing the prohibition to use force [i.e., the United Nations Charter and the General Assembly Resolution 2625(XXV)] or the international protection of human rights are relevant for the interpretation of Article IX of the Genocide Convention, insofar as they are relevant for determining the existence of a dispute regarding the interpretation, application or fulfilment of the Convention.

#### IV. THE KEY ELEMENTS OF ARTICLE IX

##### *A) Disputes between the Contracting Parties*

33. The existence of a dispute between the Parties is a requirement for the Court's jurisdiction under Article IX of the Genocide Convention. The Court's determination of the existence of a dispute is a matter of substance and not a question of form or procedure.<sup>28</sup>

34. The Court has consistently held that a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties.<sup>29</sup> For a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other".<sup>30</sup> According to well-established jurisprudence, there is a difference from the moment that there is "a situation in which the two sides hold clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations".<sup>31</sup> The two sides must have clearly opposing views

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<sup>28</sup> *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 (I)*, p. 84, para. 30

<sup>29</sup> *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11

<sup>30</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328

<sup>31</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I. C. J. Reports 1950*, p. 74.

on the question of the performance or non-performance of certain international obligations.<sup>32</sup>

35. However, the conclusion that the parties hold clearly opposite views concerning the performance or non-performance of legal obligations does not require that the respondent must expressly oppose the claims of the applicant. If that were the case, a respondent could prevent a finding that a dispute exists by remaining silent in the face of an applicant's legal claims. Such a consequence would be unacceptable.<sup>33</sup> As the Court has pointed out, in certain circumstances, silence may also reveal the existence of a difference.<sup>34</sup>

36. In the same vein, as was previously held by the Court, "the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis* . . . the position or the attitude of a party can be established by inference, whatever the professed view of that party".<sup>35</sup> In particular, "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".<sup>36</sup> The question whether such an inference may be drawn depends on the particular circumstances of each case.<sup>37</sup>

37. In relation to the time at which the dispute arises, the date for determining the existence of a dispute is the date on which the application is submitted to the Court.<sup>38</sup> However, the conduct of the parties subsequent to the filing of the

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<sup>32</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 270, para. 34; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50

<sup>33</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia V. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, para. 71

<sup>34</sup> *Ibidem*

<sup>35</sup> *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 315, para. 89

<sup>36</sup> *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 (I)*, p. 84, para. 30

<sup>37</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gambia V. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, para. 75

<sup>38</sup> *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52

application may be relevant for various purposes, in particular to confirm the existence of a dispute.<sup>39</sup>

38. As the Court has pointed out, for a dispute to exist in relation to a given treaty, it is not required that the treaty or its provisions have been expressly cited.<sup>40</sup> As the Court has affirmed, “[w]hile it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court... the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter”.<sup>41</sup>

39. As the Court has observed, applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between the parties.<sup>42</sup> The fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met.<sup>43</sup>

40. Finally, it should be emphasized that certain acts may fall within the ambit of more than one instrument, and a dispute relating to those acts may relate to the “interpretation or application” of more than one treaty or another instrument<sup>44</sup>. In

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<sup>39</sup> *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, *Jurisdiction and Admissibility, Judgment*, I.C.J. Reports 2016 (I), p. 272, para. 40

<sup>40</sup> *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 (I), pp. 94-95, para. 72

<sup>41</sup> *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 (I), p. 85, para. 30

<sup>42</sup> *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2019, p. 23, para. 36; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, *Preliminary Objection, Judgment*, I.C.J. Reports 2015 (II), p. 604, para. 32

<sup>43</sup> *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, *Preliminary Objections, Judgment*, I.C.J. Reports 2019 (II), p. 22, para. 28

<sup>44</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, *Preliminary Objections, Judgment* of 3 February 2021, para. 56.

any case, to found its jurisdiction, the Court must still ensure that the dispute in question does indeed fall within the provisions of Article IX of the Genocide Convention.<sup>45</sup>

*B) relating to the interpretation, application or fulfilment of the present Convention*

a) relating to... of the present Convention

41. The first point (“relating to”) establishes a link between the dispute and the Convention. The end of the sentence (“of the present Convention”) makes it clear that the compromissory clause refers back to all the provisions of the Convention. The ordinary meaning of the terms implies that disputes in respect of which Article IX attributes jurisdiction to the Court must refer to the Convention. The phrase makes no specific reference to a particular article of the Convention, but to the Convention as a whole. In other words, Article IX confers jurisdiction on the Court to hear any dispute concerning the interpretation, application or fulfilment of any provision of the Convention, including its object and purpose. But this does not mean that the Genocide Convention must be the only international norm to be taken into account by the Court when exercising its jurisdiction in a specific case. On the contrary, as has been explained in paragraph 32, under article 31.3.(c) of the Vienna Convention on the Law of the Treaties, the Court “[s]hall take into account... any relevant rules of international law applicable in the relations between the parties”.

b) the interpretation

42. Article IX deals, in the first place, with disputes concerning the *interpretation*. This is a common formula in many compromissory clauses of international treaties.

43. As has been repeatedly stated, the purpose of *interpretation* is to clarify the exact meaning and content of the treaty. In the opinion of the PCIJ, “the Court is of the opinion that the expression “to construe” must be understood as meaning to give

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<sup>45</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections, Judgment, I. C. J. Reports 1996*, para. 30.

a precise definition of the meaning and scope” of the text<sup>46</sup>. The ICJ's position is identical: interpretation “signifies that its object must be solely to obtain clarification of the meaning and the scope ...”.<sup>47</sup> In any event, it must be understood that the Court's competence under Article IX extends to disputes relating to the interpretation of the entire Convention.

c) application

44. The term *application* of the Convention is also peaceful. Disputes concerning the application of a treaty relate to whether or not the provisions of the treaty have been respected and are usually linked to the principle of *pacta sunt servanda*, the formulation of which is contained in Article 26 of the Vienna Convention on the Law of Treaties: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith”. In this sense, as with interpretation, the principle of application in good faith is at the origin of many of the disputes between States and should guide the resolution<sup>48</sup>

d) or fulfilment

45. Finally, Article IX includes a third term that is not usually found in arbitration clauses: *fulfilment* of the Convention. As Judge Oda noted, the inclusion of the word “fulfilment” is “unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission to the International Court of such disputes between Contracting Parties as relate to the interpretation or application of the treaties in question”<sup>49</sup>.

46. Article IX refers to “fulfilment” after mentioning the words “interpretation” and “application”. The three words are listed autonomously, followed by commas, without establishing any relationship of coordination or dependence between them.

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<sup>46</sup> *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, PCIJ, Series A N° 13, December 16th, 1927, p. 10

<sup>47</sup> *Demande d'interprétation de l'arrêt du 20 novembre 1950 en l'affaire du droit d'asile (Colombie c. Pérou)*, CIJ, Recueil, 1950, p. 402

<sup>48</sup> Poner aquí citas sobre la buena fe.

<sup>49</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Declaration of Judge Oda, I.C.J. Reports 1996 (II), p. 627, para. 5 (emphasis in the original).



47. One of the general principles of treaty interpretation is that of *effet utile*, according to which the inclusion of this term must be understood as adding something to the Court's jurisdiction under Article IX. As noted by the Court, "It would indeed be incompatible with the generally accepted rules of interpretation to admit that a provision of this sort occurring in a special agreement should be devoid of purport or effect".<sup>50</sup> To these arguments, it should be added that it is clear from the *travaux préparatoires* of the Convention that, during the drafting process, there was a debate on the inclusion or not of the word "fulfilment", which ended with its retention in the text finally adopted<sup>51</sup>. Therefore, the determination of the meaning of the word "fulfilment" in Article IX of the Genocide Convention requires special attention, in order to determine which elements make it possible to differentiate it from the terms "interpretation" and - above all - "application".
48. As the Court remarked in 1951, "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"<sup>52</sup>. In this sense, the Genocide Convention is a treaty of particular importance in the context of international human rights law. And it is precisely in the framework of international human rights law that the meaning of the term "fulfilment" has been particularly developed. It is generally accepted that, by becoming parties to human rights treaties, States assume obligations and duties under international law to respect, to protect and to fulfil human rights<sup>53</sup>. In this context, the obligation to

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<sup>50</sup> Corfu Channel case, Judgment of April 9th, 1949, I.C. J. Reports 1949, p. 24. See also *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, CIJ, *recueil*, 1994, p. 23.

<sup>51</sup> Official Records of the Third Session of the General Assembly, Part I, Sixth Committee, Summary Records of Meetings 21 September–10 December 1948, U.N. Doc. No. A/C.6/SR.61-140, pp. 428, 437 and 447. Vide: Written statement of observations and submissions on the Preliminary objections of the Russian Federation submitted by Ukraine, 3 February 2023, par. 95.

<sup>52</sup> *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, ICJ Reports 1951, p. 23.

<sup>53</sup> Among the many references, see the definition of international human rights law of the Office of the United Nations High Commissioner for Human Rights (<https://www.ohchr.org/en/instruments-and-mechanisms/international-human-rights-law>). The Human Rights Committee (ad ex.: General comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, CCPR/C/21/Rev.1/Add. 13, par. 7), the Committee on Economic, Social and Cultural Rights (ad ex.: General comment 12 on The right to adequate food, E/C.12/1999/5, par. 15), the CEDAW (ad ex.: General recommendation No. 24: Article 12 of the Convention: women and health, 1999, par. 13) or the Committee on the Rights of the Child (ad ex.: General comment No. 4 on Adolescent health and development in the

fulfil is interpreted as meaning “to take positive measures to ensure the realization of the convention”<sup>54</sup>, “to take steps to ensure the convention in practice”<sup>55</sup> or “to adopt appropriate measures towards the full realization of the convention”<sup>56</sup>. This was expressed by the Court when it pointed out that under Article I of the Convention “the obligation of States parties is to employ all means reasonably available to them, so as to prevent genocide so far as possible”<sup>57</sup>.

49. In conclusion, the fulfilment of the Convention refers to the obligation of all States Parties to take all measures within their power to prevent and punish any act of genocide or any other act covered by the Convention.

50. The obligation to adopt these measures is imposed on all States Parties to the Convention and not only on the State on whose territory or under whose jurisdiction the genocide is (or may be) committed. In accordance with the nature of the Genocide Convention, described in Part II, this obligation applies whether or not such acts are committed on their territory, whether or not they affect their nationals, whether or not they have a direct interest in them, because “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.”<sup>58</sup> The Court thus concluded that “the obligation each State thus has

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context of the Convention on the Rights of the Child, CRC/GC/2003/4, introduction) have also made similar pronouncements.

<sup>54</sup> For example, General comment No. 14 of Committee on Economic, Social and Cultural Rights on *The right to the highest attainable standard of health (art. 12)*, E/C.12/2000/4, par. 52.

<sup>55</sup> For example, General comment No. 16 of Committee on Economic, Social and Cultural Rights on *The equal right of men and women to the enjoyment of all economic, social and cultural rights (art. 3)*, E/C.12/2005/4, par. 21,

<sup>56</sup> For example, General comment No. 15 of Committee on Economic, Social and Cultural Rights on *The right to water*, E/C.12/2002/11, par. 26.

<sup>57</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at p. 221, para. 430.

<sup>58</sup> *Reservations to the Genocide Convention*, Advisory Opinion of 28 May 1951, *ICJ Reports 1951*, p. 23.

to prevent and to punish the crime of genocide is not territorially limited by the Convention”<sup>59</sup>. In this sense, the Court has referred to the obligation to prevent genocide by States geographically distant from the place of the events, and even to the combined efforts of several States Parties to prevent genocide<sup>60</sup>.

51. However, as the Court has clearly stated, in fulfilling the obligation to prevent that all States are under, “it is clear that every State may only act within the limits permitted by international law”<sup>61</sup>. In this regard, the Court has already pointed out several conditions required by international law for the adoption of preventive measures by any State. Among them are that the State Party assess whether a genocide or a serious risk of genocide exists prior to taking action pursuant to Article I<sup>62</sup>, and that such an assessment must be justified by substantial evidence “that is fully conclusive”<sup>63</sup>. To these conditions one must add, logically, that the measures be in conformity with the basic principles of international law as formulated in the Charter of the United Nations and in General Assembly Resolution 2625 (XXV), including the principles of good faith, prohibition of the use of force and non-intervention in internal affairs.

52. As indicated in paragraph 28, the Court has stated that the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”<sup>64</sup>. Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Genocide Convention. As “one of the basic principles governing the creation and

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<sup>59</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, *I. C. J. Reports 1996*, p. 595, para. 31.

<sup>60</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at p. 221, para. 430.

<sup>61</sup> *Ibidem*, 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.

<sup>62</sup> *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *I.C.J. Reports 2007*, p. 43, at p. 90, para. 209.

<sup>63</sup> *Ibidem*.

<sup>64</sup> *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7, at p. 79, para. 142.

performance of legal obligations”, good faith is also directly linked to the “trust and confidence [that] are inherent in international co-operation”<sup>65</sup>.

53. Moreover, the Genocide Convention provides guidance concerning the lawful means by which the Contracting Parties may prevent and punish genocide. While “Article I does not specify the kind of measures that a Contracting Party may take to fulfil this obligation”,<sup>66</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>67</sup>

54. Thus, not only the failure to adopt preventive measures constitutes a violation of the obligation to prevent, but also the adoption of measures that exceed the limits permitted by international law impedes the fulfilment of the Convention, especially if such measures imply an abuse of rights or have been adopted contrary to the principle of good faith.

55. In conclusion, Spain considers that the term “fulfilment” should be interpreted as an autonomous reference to one of the types or categories of disputes between States Parties that may be submitted to the ICJ under Article IX. The content of such a dispute is to be determined by the Court, taking into account the specific circumstances of the case. In Spain's view, however, the inclusion of the term “fulfilment” would refer to the power to submit to the Court a dispute that does not relate exclusively to the determination of the meaning and scope of a specific provision of the Convention (interpretation) or to the application of one of the specific obligations defined therein (application), but to take all measures within the means of any State Party to prevent and punish any act of genocide or any other act referred to in Article III of the Convention, understood as a whole, including any form of action clearly contrary to the object and purpose of the Convention (fulfilment).

56. This interpretation of the term " fulfilment" is consistent with the importance that the international community attaches to the fight against genocide, which requires States not only to take concrete measures to prevent and punish acts of genocide

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<sup>65</sup> *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 7, at p. 142.

<sup>66</sup> Order on Provisional Measures (n 26), para. 56.

<sup>67</sup> *Ibid.*

on their own territory, but also to act in good faith to achieve the ultimate objective of the Convention which, as stated in its preamble, is none other than "to liberate mankind from" genocide which "is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world".<sup>68</sup>

57. In accordance with this interpretation of the term "fulfilment", it would be possible to submit to the consideration of the ICJ acts or omissions of a State Party which, without being directly linked to a specific obligation formally set forth in the Convention, constitute acts or omissions which, by reason of the manner in which they are performed, by reason of their lack of good faith, or by reason of their manifest abuse, are in themselves contrary to the object and purpose of the Convention. Whether or not such acts or omissions are contrary to the object and purpose of the Convention; or whether or not recourse to the Convention is abusive; or whether or not they are in bad faith, could constitute a dispute concerning "fulfilment" with respect to the Convention as a whole.

*C) including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III*

58. Spain considers that, according to the ordinary meaning of the terms, the expression "including those relating to" refers only to a type of disputes that fall under the Court's jurisdiction *rationae materiae*. Thus, the word "including" refers to disputes "relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III", as a specific category of disputes contained in a larger set of categories covered by Article IX of the Genocide Convention.

59. In other words, disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III are but one of the types of disputes concerning the interpretation, application or fulfilment of the Convention. The express mention of disputes relating to responsibility is justified because the drafters of the Convention decided to make it clear that the expression "relating to the interpretation, application or fulfilment of the present Convention" also

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<sup>68</sup> See above paras. 8-11

includes this type of dispute. Any other interpretation would go against the ordinary meaning of the terms used.

60. Therefore, Article IX confers to the Court a broad jurisdiction *rationae materiae* covering all matters “relating to the interpretation, application or fulfilment” of the Convention, of which the questions relating to responsibility are a part, but not the only one.

*D) shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.*

61. The last sentence of Article IX refers to the standing to submit a dispute to the Court. The terms used are broad: “any of the parties to the dispute”.

62. As Spain has argued in this intervention, the disputes may concern various issues: the determination of the meaning and scope of a specific provision of the Convention (interpretation), the application of one of the specific obligations defined therein (application), or the adoption of appropriate measures to prevent and punish any act of genocide or any other act covered by the Convention understood as a whole, including any form of action clearly contrary to the object and purpose of the Convention (fulfilment).

63. Under the text of the Convention, any State Party that is in disagreement with any other State Party “on a point of law or fact, a conflict of legal views or of interests”, concerning the interpretation, application or fulfilment of the Genocide Convention may submit the dispute to the International Court of Justice. The text of Article IX does not establish any other requirement.

## **V. CONCLUSION**

64. Spain submits to the Court the following conclusions regarding the interpretation of Article IX of the Genocide Convention:

- Article IX is formulated in broad terms to include disputes over the determination of the meaning and scope of a specific provision of the Convention (interpretation), the application of one of the specific obligations defined therein (application), and the adoption of appropriate measures towards the full

realization of the convention understood as a whole, including any form of action clearly contrary to the object and purpose of the Convention (fulfilment). Such a broad conception of Article IX corresponds to the nature and purposes of the convention, linked to the protection and safeguard of fundamental values and principles of international law.

- Article IX allows disputes to be brought before the Court not only on whether the failure to take preventive measures constitutes a breach of the obligation to prevent, but also disputes on the adoption of preventive measures that exceed the limits permitted by international law, especially if they involve an abuse of law, have been taken contrary to the principle of good faith, or involve violations of basic principles of international law such as the prohibition of the use of force or non-intervention in internal affairs.

- In accordance with this interpretation of the term "fulfilment", it would be possible to submit to the consideration of the ICJ acts or omissions of a State Party which, without being directly linked to a specific obligation formally set forth in the Convention, constitute acts or omissions which, by reason of the manner in which they are performed, by reason of their lack of good faith, or by reason of their manifest abuse, are in themselves contrary to the object and purpose of the Convention. Whether or not such acts or omissions are contrary to the object and purpose of the Convention; or whether or not recourse to the Convention is abusive; or whether or not they are in bad faith, could constitute a dispute concerning "fulfilment" with respect to the Convention as a whole.

- Any party to the dispute may bring a case under Article IX, including the party which is the victim of preventive measures which are abusive, have not been taken in good faith, or involve violations of basic principles of international law.



(Signed) CONSUELO FEMENÍA

Co-Agent of the Kingdom of Spain