

**Before the
International Court of Justice**

Written Observations

Pursuant to Article 63 of the Statute of the Court

By the Governments of Canada and the Kingdom of the Netherlands

Filed in the Registry of the Court

In the case of

**Allegations of Genocide under the Convention on the Prevention and Punishment of the
Crime of Genocide (Ukraine v. Russian Federation)**

**WRITTEN OBSERVATIONS UNDER ARTICLE 63 OF THE STATUTE OF THE COURT
OF THE GOVERNMENTS OF CANADA AND THE KINGDOM OF THE NETHERLANDS**

INTRODUCTION

1. These Written Observations are submitted to the Court in accordance with its Order of June 5, 2023 (the “Order”) in relation to the joint intervention of the Governments of Canada and the Kingdom of the Netherlands pursuant to Article 63 of the Statute of the Court (the “Statute”) in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.¹ In that Order, the Court decided that the Joint Declaration of Intervention filed by Canada and the Netherlands pursuant to Article 63(2) of the Statute was admissible at the preliminary objections stage of the proceedings in so far as it concerns the construction of Article IX and other provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide*² (the “Genocide Convention”) that are relevant for the determination of the jurisdiction of the Court. The Court fixed July 5, 2023 as the time-limit for the filing of these Written Observations, as provided for in Article 86(1) of the Rules of the Court.

2. Canada and the Netherlands are intervening in their capacity as Contracting Parties to the Genocide Convention. These Written Observations present to the Court the views of Canada and the Netherlands on the issues of interpretation under the Genocide Convention that are relevant at the preliminary objections stage of the proceedings. In accordance with the Order, the Written Observations are confined to observations on the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the jurisdiction of the Court, and do not deal with any other aspect of the case before the Court.

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

² *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, United Nations, *Treaty Series*, [vol. 78](#), p. 277. Entry into force on 12 January 1951.

3. As outlined in their Joint Declaration of Intervention, Canada and the Netherlands consider that the proper construction of Articles I and IX of the Genocide Convention is in question in the case.³ With respect to the jurisdiction of the Court in particular, Canada and the Netherlands noted that “Article IX grants jurisdiction to the Court to make a declaration of a Contracting Party’s compliance with its obligations under the Genocide Convention, irrespective of whether it is the applicant State or the respondent State, provided that this is a matter in dispute between the parties to the case.”⁴

4. An outline of the interpretation of the Genocide Convention was provided in the Joint Declaration of Intervention of Canada and the Netherlands.⁵ These Written Observations further elaborate on the reasoning and authority for this interpretation as it relates to Article IX of the Genocide Convention.

5. First, Section I of these Written Observations provides a summary of the principles that guide the interpretation of Article IX. Then, Section II presents the scope of Article IX of the Genocide Convention as the basis of the Court’s jurisdiction. It establishes that the term “dispute” must be interpreted consistently with the wide meaning given to that term in the case law of the Court. It notes that disputes can be referred to the Court “at the request of any of the parties”. Finally, it argues that the inclusion of the word “fulfilment” in Article IX supports a broad interpretation of this provision.

6. On the basis of that analysis, Section III concludes with a summary of the proper construction of Article IX of the Genocide Convention. Specifically, Article IX grants jurisdiction to the Court to make a declaration of a Contracting Party’s compliance with its obligations under the Genocide Convention, irrespective of whether the acts or omissions of the applicant

³ *Joint Declaration of Intervention Pursuant to Article 63 of the Statute by the Governments of Canada and the Kingdom of the Netherlands, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, December 7, 2022, (“Joint Declaration of Intervention”), paragraphs 26 and 29.

⁴ *Ibid*, paragraph 21.

⁵ *Ibid*, paragraph 33-48.

State or the respondent State are at issue, provided that this is a matter in dispute between the parties to the case.

SECTION I: PRINCIPLES OF INTERPRETATION

7. The interpretation of the Genocide Convention, as an international agreement, is governed by the provisions of Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "VCLT").⁶ Article 31(1) of the VCLT provides as the basic rule of interpretation that "a treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." The "context" includes the text and structure of the treaty as a whole,⁷ including its preamble and any annexes.⁸ Furthermore, the principle of good faith requires that a party apply a treaty provision "in a reasonable way and in such a manner that its purpose can be realised."⁹

8. Pursuant to Article 31(3) of the VCLT, the interpretation of the Genocide Convention must take account of the subsequent practice of the parties to the treaty, and pursuant to Article 32 of the VCLT, may also be confirmed by reference to supplementary means of interpretation, including the preparatory work of the treaty.

9. In light of the above, when interpreting the Genocide Convention, the ordinary terms of its provisions must be considered in the context of the convention as a whole and in light of its object and purpose. In addition to the practice of the Contracting Parties under the Genocide Convention, resolutions adopted by the United Nations General Assembly and United Nations Security Council should also be taken into account both as evidence of subsequent practice under Article 31(3)(b) or as supplementary means of interpretation under Article 32 of the

⁶ *Vienna Convention on the Law of Treaties (Vienna, 1969)*, United Nations Treaty Series Vol. 1155, p. 331.

⁷ See, for example, *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, paragraphs 97-98.

⁸ Article 31(2) of the VCLT.

⁹ *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment of 25 September 1997, I.C.J. Reports 1997, p. 7, paragraph 142.

VCLT. Such resolutions may confirm the interpretation that flows from the ordinary meaning of the provisions of the Genocide Convention in their context.

10. As recognized by this Court in its Advisory Opinion on *Reservations to the Genocide Convention*, the object of the Genocide Convention is to “safeguard the very existence of certain human groups” and “confirm and endorse the most elementary principles of morality.”¹⁰ The Genocide Convention was “manifestly adopted for a purely humanitarian and civilizing purpose”¹¹ and those “high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”¹² This Court further noted 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.”¹³

SECTION II: ARTICLE IX OF THE GENOCIDE CONVENTION

11. Article IX gives effect to the Contracting Parties’ obligation to settle their disputes by peaceful means, in accordance with Articles 2(3) and 33 of the UN Charter. It must be interpreted and applied in a way that achieves this obligation in a manner consistent with the provision’s central objective of peaceful settlement of disputes.

12. Article IX of the Genocide Convention attributes jurisdiction to the Court under Article 36(1) of the Statute for disputes arising under and with respect to the Genocide Convention. It confers jurisdiction to the Court over “disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention”. There is nothing in Article IX that limits the Court’s jurisdiction to cases where it is the applicant State accusing the

¹⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15 at p. 23.

¹¹ *Ibid.*

¹² *Ibid.*

¹³ *Ibid.*

respondent State of breaching its obligations under the Genocide Convention. It can equally apply to situations where the applicant State disagrees with accusations of the respondent State with respect to breaches of obligations under the Genocide Convention.

A: The term “dispute” must be interpreted consistently with the wide meaning given to that term in the case law of the Court

13. As referred to in the Order, Canada and the Netherlands will not address the existence of a dispute between the parties in this case, but will focus exclusively on the proper interpretation of the term “dispute”, as included in Article IX. The existence of a “dispute” between the parties to a case is a precondition to the Court having jurisdiction under Article IX of the Genocide Convention. The term “dispute” is sufficiently broad to encompass a disagreement over the lawfulness of the conduct of an applicant State; it is not limited to the conduct of the respondent State.

14. As the Court made clear in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, the term “dispute” as used in Article IX should be interpreted consistently with the wide meaning given to that term generally in international law.¹⁴ The Court said:

“The existence of a dispute between the Parties is a requirement for the Court’s jurisdiction under Article IX of the Genocide Convention. According to the established case law of the Court, a dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties (...). In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other” (...). The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations (...)”¹⁵

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 22 July 2022, Preliminary Objections, paragraph 63.

¹⁵ Ibid.

15. In *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, this Court concluded that a dispute existed between the parties relating to the interpretation, application or fulfilment of the Genocide Convention in accordance with Article IX, given that the parties disputed the facts of the case, questioned whether these facts could be imputed to them, challenged whether the provisions of the Genocide Convention applied to the facts, and disagreed with respect to the meaning and legal scope of several provisions of the convention, including Article IX.¹⁶

16. As mentioned above, it is well established that a dispute exists when there is “a disagreement on a point of law or fact, a conflict of legal views or interests”¹⁷ between parties, provided that they hold views which are opposed to each other. It is not necessary that a respondent State has expressly opposed the claims of the applicant State.¹⁸

17. The existence of a dispute is a matter of substance, not of form or procedure, and must be determined objectively by the Court in the particular case.¹⁹ As such, one State’s denial that a dispute has arisen is not determinative of whether or not a dispute exists.

18. Furthermore, this Court recognized that “certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty.”²⁰ As such, the Court can exercise its jurisdiction under Article IX in relation to allegations of violations of the Genocide Convention, irrespective of whether the conduct in question breaches other rules of international law.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia)*, Judgment of July 11, 1996, Preliminary Objections, I.C.J. Reports 1996, p. 595, paragraph 33.

¹⁷ *Mavrommatis Palestine Concessions*, Judgment No 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 22 July 2022, Preliminary Objections, paragraph 71.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 22 July 2022, Preliminary Objections, paragraph 64.

²⁰ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of March 16, 2022, Provisional Measures, paragraph 46.

19. To establish the existence of a dispute, the Court may take into account contemporaneous material existing prior to the application, “in particular any statements or documents exchanged between the parties (...), as well as any exchanges made in multilateral settings.”²¹ A dispute under the Genocide Convention may exist despite the absence of a specific reference to the Genocide Convention in public statements by the parties, provided that those statements “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.”²²

B: Disputes can be referred to the Court “at the request of any of the parties”

20. Article IX of the Genocide Convention expressly states that disputes shall be referred to the Court “at the request *of any of the parties* to the dispute” (emphasis added). It is clear from the ordinary meaning of these words that any Contracting Party facing what it considers to be unfounded allegations of a breach of the Genocide Convention can, on its own accord, bring the matter before the Court. This language underscores that the Court’s jurisdiction is not limited to situations where the applicant State claims that the respondent State is responsible for genocide.

21. Thus, where there is a dispute concerning whether a State has engaged in conduct contrary to the Genocide Convention, the State accused of such conduct has the same right to submit the dispute to the Court as the State that has made the accusation, and the Court has jurisdiction over that dispute.

22. A State accused of committing genocide may therefore seek a “negative” declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual foundation.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 22 July 2022, Preliminary Objections, paragraph 64.*

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 22 July 2022, Preliminary Objections, paragraph 72.*

C: The inclusion of the word “fulfilment” in Article IX supports a broad interpretation of this provision

23. The inclusion of the word “fulfilment” in Article IX, – “interpretation, application or *fulfilment* of the present Convention” – as an addition to the more common formulation of simply “interpretation and application” often found in compromissory clauses, supports a broad interpretation of this provision. Article IX confers jurisdiction over a dispute as to whether a Contracting Party’s conduct complies with its obligations under the Genocide Convention. It clearly encompasses disputes about the scope and content of the provisions of the Genocide Convention and actions taken (or not taken) by the Contracting Parties in respect of those obligations, including the duty to prevent and punish genocide outlined in Article I, and it emphasizes that this includes whether those actions or inactions can be said to be in fulfilment of those obligations.

24. Specifically, Article I of the Genocide Convention sets out the Contracting Parties’ undertaking to “prevent and punish” genocide, as defined in Article II of the Genocide Convention. The duty to punish genocide is further detailed in Articles IV to VII of the Genocide Convention, which outline an obligation to investigate and prosecute persons accused of genocide, and to punish persons found guilty of genocide. A dispute over allegations of genocide under the Genocide Convention, and measures taken to prevent and punish such an alleged genocide, naturally relates to the interpretation, application, or fulfilment of these provisions of the Genocide Convention. If a Contracting Party to the Genocide Convention accuses another of committing genocidal acts, and takes corresponding actions purporting to respond, the “fulfilment” of the Convention is clearly at stake. The inclusion of the word “fulfilment” in Article IX supports the view that the Court has jurisdiction to declare whether allegations of genocide made by one Contracting Party against another are justified under the Genocide Convention, and to decide on the lawfulness of any measures taken to prevent and punish an alleged genocide.

25. A broad interpretation of Article IX is supported by the context of this provision, in particular the use of the words “including” and “relating to”, which underscore the comprehensive nature of Article IX, as well as by the absence of any additional procedural steps, such as a requirement to first attempt negotiation and arbitration, unlike the compromissory clauses contained in many other treaties.²³ In the absence of any such procedural requirements, and given that it permits a unilateral seizing of the Court by any party to a dispute, Article IX allows for the broadest possible seizing of the Court.

26. The object and purpose of the Genocide Convention, as outlined in paragraph 11 above, also support a broad interpretation of Article IX. A narrow interpretation of this provision, which relates to the peaceful settlement of disputes, would undermine the Genocide Convention’s humanitarian and civilizing purpose.

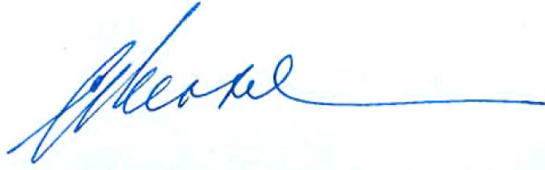
SECTION III: CONCLUSION

27. The ordinary meaning of Article IX, taken together with its context and the object and purpose of the Genocide Convention, confirms that a dispute over allegations of genocide and measures taken to prevent and punish such a genocide, clearly relates to the interpretation, application, or fulfilment of the Genocide Convention, and therefore falls within the scope of Article IX. This provision grants jurisdiction to the Court to rule on a Contracting Party’s compliance with its obligations under the Genocide Convention, irrespective of whether it is the acts or omissions of the applicant State or the respondent State at issue, provided that this is a matter in dispute between the parties to the case. Article IX applies equally to disputes submitted to the Court by, or against, a party alleged to have breached the Genocide Convention.

²³ For example, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations Treaty Series, Vol. 1465, p. 85, Article 30; *Convention on the Elimination of All Forms of Discrimination against Women*, United Nations Treaty Series, Vol. 1249, p. 13, Article 29; *Convention on the Elimination of All Forms of Racial Discrimination*, United Nations Treaty Series Vol. 660, p. 195, Article 22.

28. Subject to the Court's decision on Russia's preliminary objections, Canada and the Netherlands reserve the right to submit, at the merit stage of these proceedings, further Written Observations on the interpretation of provisions of the Genocide Convention that are relevant to a determination of the case before the Court, including Articles I, II and IV to VIII.

Respectfully,



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