

INTERNATIONAL COURT OF JUSTICE  
INTERVENTION OF NORWAY  
PRELIMINARY OBJECTIONS STAGE

5 July 2023

In the case of

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

## 1. INTRODUCTION

1. On 26 February 2022, Ukraine instituted proceedings before the International Court of Justice against the Russian Federation. In its Application, Ukraine asserts that there is a dispute between Ukraine and the Russian Federation within the meaning of Article IX of the Genocide Convention concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of Genocide (hereafter the “Genocide Convention” or the “Convention”).<sup>1</sup>
2. On substance, Ukraine contends that the use of force by the Russian Federation in or against Ukraine since 24 February 2022 on the basis of alleged genocide perpetrated by Ukraine, as well as the Russian Federation’s preceding recognition of the so-called ‘Donetsk People’s Republic’ and the so-called ‘Luhansk People’s Republic’ with the pronounced aim of preventing and suppressing acts of genocide by Ukraine are incompatible with the Genocide Convention.
3. On 30 March 2022, the Registrar notified the Government of Norway, as a party to the Genocide Convention, that Ukraine in its Application to the Court had invoked the Genocide Convention “*both as a basis for the Court’s jurisdiction and the substantive basis of the Applicant’s claims on the merits*”.<sup>2</sup>
4. On 24 November 2022, the Government of Norway availed itself of its right to intervene in the proceedings as conferred upon it by Article 63, paragraph 2, of the Statute of the Court.<sup>3</sup> In its Declaration of intervention, Norway identified Article IX and Articles I, II, III and VIII of the Convention as provisions of the convention raised in the case and provided a preliminary statement on their construction.<sup>4</sup> Pursuant to the Russian Federation’s subsequent request to dismiss Norway’s intervention, the Government of Norway submitted its Observations on the admissibility of the declaration on the 13 February 2023.
5. In its order of 5 June 2023, the Court rejected the Russian Federation’s objections and ruled that the Norwegian Declaration of intervention is admissible at the preliminary objections stage of the proceedings “*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.*”<sup>5</sup> The Court has fixed 5 July 2023 as the time-limit for the filing, by the States whose declarations of intervention have been deemed admissible at the preliminary

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<sup>1</sup> Application instituting proceedings from Ukraine to the International Court of Justice of 26 February 2022.

<sup>2</sup> Letter from the Registrar of the Court to Norway of 30 March 2022.

<sup>3</sup> Declaration of Intervention under Article 63 of Norway of 24 November 2022.

<sup>4</sup> Declaration of Intervention under Article 63 of Norway para. 10, and cf. Rules of Court Article 82.

<sup>5</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order on Admissibility of the Declarations of Intervention of 5 June 2023 para. 99.

objections stage of the proceedings, of the written observations referred to in Article 86, paragraph 1, of the Rules of Court.<sup>6</sup>

6. Norway will focus its written observations at this stage on the construction of Article IX as the main provision that the Court must interpret and apply at the preliminary objections stage. If the Court should find it necessary to consider the construction of other provisions of the Convention *for the purposes of determining its jurisdiction ratione materiae*, Norway's written observations pertaining to Articles I, II, III and VIII provided in its Declaration of intervention are sufficient to confirm Norway's views on their construction at this stage.<sup>7</sup> Norway however reserves its right to supplement its observations at any later stage of the proceedings. While recognizing the Court's call on the intervening states to coordinate their written and oral interventions, Norway at present also reserves its right to present its observations with respect to both Article IX and Articles I, II, III and VIII, during the oral proceedings.<sup>8</sup>
7. Upon the Court's invitation to coordinate their submissions with other intervening States in the interest of an efficient administration of justice, Norway's observations are largely coordinated on substance with the interventions of the EU Member States.

## 2. CONSTRUCTION OF ARTICLE IX OF THE GENOCIDE CONVENTION

### 2.1 OVERVIEW

8. Article IX of the Genocide Convention provides:

*“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.”*

9. Norway considers that Article IX presents three main questions that need to be assessed to determine the Court's jurisdiction under the Convention's compromissory clause. First, the Court's jurisdiction under Article IX is premised on the existence of a “dispute” subject to the Court's adjudication. Second, the Court's jurisdiction *ratione materiae* depends on whether such a dispute is considered to relate inter alia to the “interpretation, application and fulfilment” of the Genocide Convention. Third, and finally, Article IX provides that disputes shall be submitted to the Court “at the request of any of the parties to the dispute”. Norway will submit its views on these issues in part 2.2, 2.3 and 2.4, respectively. Norway's conclusions are found in part 3.
10. The means of treaty interpretation follow from customary international law as reflected in the Vienna Convention on the Law of Treaties Articles 31-33 and will form the basis for Norway's interpretation concerning relevant provisions of the Genocide Convention.

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<sup>6</sup> Letter from the Registrar of the Court to Norway of 6 June 2023.

<sup>7</sup> Declaration of Intervention under Article 63 of Norway para. 25-33.

<sup>8</sup> In line with the Rules of Court Article 86, paragraph 2.

## 2.2 THE CONCEPT OF A “DISPUTE” IN ARTICLE IX

11. The wording “disputes between the Contracting Parties” clarifies that the Court’s jurisdiction under the Genocide Convention requires the existence of a dispute. The ordinary meaning of the word “dispute” connotes a form of disagreement or argument.<sup>9</sup> Norway thus concurs with the meaning of the word as “*a disagreement on a point of law or fact, a conflict of legal views or of interests*” between parties.<sup>10</sup> In other words, the two sides must hold “*clearly opposite views concerning the question of the performance or non-performance of certain international obligations*”.<sup>11</sup>
12. The determination of the existence of a dispute is a matter of substance, not form.<sup>12</sup> The Court has held that “[w]hether there is a dispute in a given case is a matter for “*objective determination*” by the Court”.<sup>13</sup> In undertaking this determination, the Court may have regard inter alia to the conduct of the Parties involved, as well as “*any statements or documents exchanged between the parties*” and “*any exchanges made in multilateral settings*.”<sup>14</sup>
13. Thus, the relevant starting point for the Court at this stage is to objectively assess whether a party has, “*rightly or wrongly, formulated complaints of fact and law*” against another party “*which the latter has denied*”.<sup>15</sup> If this is so, a legal dispute exists between them.
14. Norway notes that the finding of a “dispute” in the meaning of Article IX does not demand that a state has specified its claims towards another state. Notably, there is no requirement to clarify which convention or provisions it considers to be in dispute, as long as the claims relate to the relevant subject-matter. As the Court stated in *The Gambia v. Myanmar* (pending) “[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

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<sup>9</sup> Oxford Dictionary of English, Second Edition, Revised, 2005 p. 502.

<sup>10</sup> *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11, see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, para. 63.

<sup>11</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>12</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, para. 30.

<sup>13</sup> *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74, and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, para. 30.

<sup>14</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, para. 64 with further references.

<sup>15</sup> *East Timor* (Portugal v. Australia), I. C. J. Reports 1995, p. 100, para. 22, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996, p. 616, para. 29.

made to identify that there is, or may be, a dispute with regard to that subject-matter”.<sup>16</sup>

15. The Court has further confirmed that a “dispute” can be found to exist regardless of whether the parties have positively expressed their opposition. Nor does the finding of a “dispute” require a proven “mutual awareness” of the parties that they hold contrary positions. The Court recently rejected such an argument in *The Gambia v. Myanmar* where it found that “*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*” and that such a consequence would be “*unacceptable*”.<sup>17</sup> Consequently, the Court can also infer the existence of a dispute from the silence of one party in response to claims by another.<sup>18</sup> Thus, it is clear that a unilateral denial of the existence of a dispute cannot in itself disprove the existence of a dispute within the meaning of Article IX of the Genocide Convention.

### 2.3 REMARKS ON THE SCOPE OF ARTICLE IX FOR THE PURPOSES OF DEFINING THE COURT’S JURISDICTION *RATIONE MATERIAE*

16. To define its jurisdiction, the Court must first identify the subject-matter of the dispute before it. It should do so by analyzing the Application as well as the written and oral pleadings of the parties “*while giving particular attention to the formulation of the dispute chosen by the applicant*” and taking account of “*the facts that the applicant presents as the basis for its claim*”.<sup>19</sup> Thus, the Court’s assessment at the preliminary objections stage must be based on the claim and the pertaining facts as formulated and alleged by the applicant. Any further examination of the facts or of the validity of the claims put forward by the applicant constitutes subject-matters relevant for the merits’ stage of the proceedings.<sup>20</sup>
17. Next, the Court must assess whether the dispute brought before it “is capable of falling within the provisions” of the Genocide Convention, thus constituting a dispute over which “the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX”.<sup>21</sup>

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<sup>16</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, para. 72. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, para. 30.

<sup>17</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, para. 71.

<sup>18</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, para. 30.

<sup>19</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, p. 584, para. 24.

<sup>20</sup> *ibid*, p. 584, para 94.

<sup>21</sup> *Legality of Use of Force* (Yugoslavia v. Belgium), Provisional Measures, Order, I.C.J. Reports 1999, p. 137, para. 38, see also *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, p. 584, para. 57, and *Immunities and Criminal Proceedings* (Equatorial Guinea v. France), Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 319, para. 85.

18. According to the wording of Article IX, the Court has jurisdiction *ratione materiae* over disputes “*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.*”
19. The ordinary meaning of “*interpretation, application or fulfilment*” indicates that the Court can hear disputes pertaining to how the provisions of the Convention are to be construed, how a party to the Convention exercises its rights and obligations under the Convention, as well as whether a party’s conduct and acts are in compliance with its obligations under the Convention.
20. As the Court is well aware, several conventions contain compromissory clauses regarding the “*interpretation and application*” of its provisions. Article IX of the Genocide Convention also expressly includes disputes relating to its “*fulfilment*”. This addition is “*unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission to the International Court of Justice of such disputes between Contracting Parties as relate to the interpretation or application of the treaties in question.*”<sup>22</sup> Its inclusion was deliberate and with the intention of ensuring that a broad scope of disputes could be brought to the Court, including questions of compliance or non-compliance with the obligations under the Convention, as echoed in the discussions evidenced in the Convention’s *Travaux Préparatoires*.<sup>23</sup> Accordingly, it is clear that the Court has jurisdiction under Article IX over disputes concerning the alleged fulfilment by a Contracting Party of its obligations under the Convention.
21. Moreover, the choice of the word “*or*” confirms that the Court would also have jurisdiction to hear a dispute if only related to the fulfilment of the Genocide Convention, regardless of whether the Court found that the case also raised questions of interpretation and/or application of its provisions.
22. The comprehensive character of Article IX is further reinforced by the sentence “*including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III*”. For one, the word “*including*” signifies that disputes relating to the responsibility of a State for genocide or for any other acts under Article III are *only one category* of disputes “*relating to the interpretation, application or fulfilment of the Convention*”.<sup>24</sup> Secondly, the Court has confirmed that the reference to “*the responsibility of a State for genocide or for any of the other acts*

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<sup>22</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.

<sup>23</sup> Representative of India, *Official records of the 3rd session of the General Assembly. legal questions: 6th Committee: summary records of meetings*, 21 September -10 December 1948 p. 437.

<sup>24</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. 75, para. 169.

enumerated in article III” “does not exclude any form of State responsibility,”<sup>25</sup> thus underscoring the intended broad nature of Article IX.

23. The Convention’s object and purpose confirm this understanding. The Genocide Convention is a means employed by the international community to “*liberate mankind from such an odious scourge*”.<sup>26</sup> As such, the Court has established that the Convention imposes obligations *erga omnes partes* on States parties,<sup>27</sup> and that the prohibition of genocide represents a *jus cogens* norm.<sup>28</sup> The purpose of the Convention thus speaks clearly in favour of a broad understanding of the Court’s jurisdiction to adjudicate disputes under the Convention.
24. Additionally, Norway notes that even though the Court’s jurisdiction relates to the occurrence of a breach of the Genocide Convention, the means with which it is alleged that a Contracting Party has breached its obligations is not relevant for the assessment of the Court’s jurisdiction to hear the claim. As the Court confirmed in its Judgment of the Preliminary Objections in *Oil Platforms* “[a]ny action by one of the Parties that is incompatible with those obligations is unlawful, regardless of the means by which it is brought about. A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation by administrative decision or by any other means.”<sup>29</sup>
25. Norway further considers that the fact that a dispute forms part of a broader complex of conflicts between the same parties is in no way decisive. Indeed, it is often the case that “*applications that are submitted (...) often present a particular dispute that arises in the context of a broader disagreement between the parties.*”<sup>30</sup> As the Court has rightly articulated this “*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>31</sup> Similarly, one concrete situation may at the same time contain several disputes “*which relate to more than one body of law and which are subject to different dispute settlement procedures*”.<sup>32</sup> Clearly, neither of these circumstances can in themselves prevent the Court from finding that it has jurisdiction *ratione materiae* to adjudicate a particular dispute brought before it.

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<sup>25</sup> *Case Concerning application of the convention on the prevention and punishment of the crime of Genocide* (Bosnia and Herzegovina v. Yugoslavia), Judgment of 11 July 1996, para. 32. Emphasis added.

<sup>26</sup> The Genocide Convention, Preamble.

<sup>27</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, p. 36, para. 107.

<sup>28</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. 111, paras. 161-162.

<sup>29</sup> *Oil Platforms*, Preliminary Objections, Judgment of 12 December 1996, para 16. Emphasis added.

<sup>30</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.

<sup>31</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), Judgment of 8 November 2019, para. 28.

<sup>32</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment of 1 April 2011, para. 31.

## 2.4 A DISPUTE CAN BE BROUGHT BEFORE THE COURT BY “ANY” OF THE PARTIES TO THE DISPUTE

26. As follows from Article IX, disputes that fall within the remit of the Convention “*shall be submitted to the International Court of Justice at the request of any of the parties to the dispute*”.
27. The ordinary meaning of the words “*any of the parties to the dispute*” indicates that if a dispute arises under the Convention, all parties to that dispute are entitled to seize the Court at their own discretion.<sup>33</sup> In the Court’s words “[i]t does not matter which one of them advances a claim and which one opposes it.”<sup>34</sup> Thus, Article IX expressly provides that the jurisdiction of the Court is established at the request of any and either of the parties to a dispute.
28. This is substantiated by the context in which the wording appears. For one, the choice of the word “shall” in lieu of “may” or “can” suggests that the intention was to ensure that disputes pertaining to the Genocide Convention was brought to the attention of the Court. This speaks against any attempt at construing a narrow interpretation. Secondly, the preceding wording “[d]isputes between the Contracting parties” affirms that there are at least two parties to any dispute that can be brought before the Court, of which “any” can institute legal proceedings.
29. The Convention’s object and purpose also underscore this understanding. The Court has confirmed that “[a]ll the States parties to the Genocide Convention [thus] 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>35</sup> Of the different avenues made available to the Contracting Parties through the Convention for the purposes of achieving this common interest, recourse to the Court under Article IX is particularly important. As articulated by ad hoc Judge Kress in his Declaration related to jurisdiction in *The Gambia v. Myanmar*:

*“While the entitlement of a State party to invoke the responsibility of another State party for an alleged violation of an obligation erga omnes partes under the Genocide Convention is not the only way to act in the relevant common interest, a State’s entitlement*

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<sup>33</sup> The word «any» is defined as «whichever of a specified class might be chosen», see Oxford Dictionary of English, Second Edition, Revised, 2005.

<sup>34</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. 26, para. 50

<sup>35</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v. Myanmar), Judgment of 22 July 2022, p. 36, para. 107. Famously, in its 1951 Advisory Opinion, the Court held: “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 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.”



*to seek judicial protection before the Court significantly complements the other avenues through which it may uphold that interest.* ”<sup>36</sup>

30. Norway considers that the common interest and *erga omnes partes* character underpinning the Genocide Convention speak against a narrowly construed opportunity to seeking the “*judicial protection before the Court*”. On the contrary, such an interpretation would risk precluding a victim state from seeking relief from the Court in the face of abuses of the Convention. In Norway’s opinion, this would undermine the Convention’s credibility and efficiency as a universal instrument for the prevention of genocide, as well as the role of the Court as a critical avenue for redress against abuses of the law.
31. Thus, where there is a dispute concerning whether a State has engaged in conduct contrary to the Convention, the accused State has the same right to submit the dispute to the Court as the State that has made the accusation.

#### 4. CONCLUSION

32. In Norway’s view, the ordinary meaning of the terms of Article IX, read in their context and in light of the Convention’s object and purpose shows that a dispute regarding acts carried out by one state against another state based on alleged claims of genocide constitutes “a dispute between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention” pursuant to Article IX. Since the Court has jurisdiction over the question of whether genocidal acts have been or are being committed or not, Norway considers that the Court also has jurisdiction to declare the absence of genocide. Norway holds that the same is true for disputes concerning the alleged abuse of the Convention’s authority to justify a State’s action against another State party to the Convention, questions of violations of a good faith application of the Convention, as well as whether such alleged abuse constitutes a violation of a State’s obligations under the Convention. Norway also believes that Article IX specifically allows such a dispute to be submitted to the Court at the request of any party to the dispute.

Respectfully,

  
Kristian Jervell  
Agent of the Government of Norway

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<sup>36</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Declaration of ad hoc Judge Kress, para. 18.