

**INTERNATIONAL COURT OF JUSTICE**

**WRITTEN OBSERVATIONS**

**OF THE FEDERAL REPUBLIC OF GERMANY**

**ON THE CONSTRUCTION OF ARTICLE IX OF THE CONVENTION ON  
THE PREVENTION AND PUNISHMENT OF THE CRIME OF  
GENOCIDE**

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)**

## I. Introduction

1. On 5 June 2023, the Court decided that the declarations of intervention under Article 63 of the Statute of the Court (“the Statute”) submitted by, among others, Germany (“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. Germany avails itself of the right to intervene conferred upon it by Article 63, paragraph 2, of the Statute. 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>3</sup> concerning the Court’s jurisdiction *ratione materiae* is in question at the present stage of the proceedings. In accordance with the Order on Admissibility of the Declarations of Intervention, the written observations will solely concern the construction of Article IX of the Genocide Convention, determining the Court’s jurisdiction in the Proceedings<sup>4</sup>. References to other rules and principles of international law outside the Genocide Convention in the written observations will be made only where and as far as they concern the construction of Article IX of the Genocide Convention.

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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> 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>4</sup> *Ibid.*, para. 99.

3. Upon the Court's invitation to the intervening States to coordinate the observations in the interest of the good administration of justice,<sup>5</sup> Germany hereby submits its observations, which are largely coordinated on substance with the interventions of other EU Member States.

## II. Construction of Article IX of the Genocide Convention

4. Germany wishes to make submissions on the construction of Article IX of the Genocide Convention regarding the following four points:

- (1) the requirement and notion of a 'dispute' that must exist between the Contracting Parties applies to disputes about allegations of genocide;
- (2) the broad scope of Article IX of the Genocide Convention includes disputes about the "fulfilment" of obligations under the Convention;
- (3) Article IX of the Genocide Convention applies to disputes about whether an otherwise unlawful use of force can be justified as a means for prevention and punishment of genocide;
- (4) to submit the dispute to the Court is possible at the request of any of the parties to such dispute.

### 1. Notion of dispute between the Contracting Parties applies to allegations of genocide

5. According to the established case law of the Court,<sup>6</sup> a dispute is "*a disagreement on a point of law or fact, a conflict of legal views or of interests*" between parties.<sup>7</sup>

<sup>5</sup> Letter by the Court's Registrar dated 6 June 2023.

<sup>6</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, ICJ, 22 July 2022, para 63.

<sup>7</sup> *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

In order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”.<sup>8</sup> The two sides must “‘hold clearly opposite views concerning the question of the performance or non-performance of certain’ international obligations”.<sup>9</sup> A dispute typically exists when one of the Parties maintains that the Convention applies, while the other denies it.<sup>10</sup>

6. The case at hand raises the question whether an alleged behavior by the applicant State, which would violate the provisions of the Genocide Convention, can justify a reaction by another state. The Parties thus disagree over the lawfulness of the conduct of the applicant State under the Genocide Convention. Their opposite views concerning the question of whether the applicant State abided by its obligations under the Genocide Convention or not constitute a disagreement that is encompassed by the term “dispute”.

7. Germany has carefully reviewed the question of whether the Convention enables a State to seize the Court of a dispute concerning allegations of genocide made by another State.<sup>11</sup>

8. Germany contends that Article IX of the Genocide Convention applies also to disputes about abusive allegations of genocide, as they raise the question of compliance with Article I of the Genocide Convention, which provides context for the construction of Article IX.

9. According to Article I of the Genocide Convention, all States Parties are obliged to prevent and punish genocide. As the Court has observed, the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such

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<sup>8</sup> *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment, I.C.J. Reports 1962, p. 328.

<sup>9</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, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, First Phase, Advisory Opinion, I.C.J. Reports 1950, p. 74.

<sup>10</sup> *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II), p. 414, para. 18.

<sup>11</sup> For a discussion of this question, see e.g. Order on Provisional Measures (n 9), Declaration of Judge Bennouna, <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-02-EN.pdf>, para. 2.

a manner that its purpose can be realized”<sup>12</sup>. Good faith interpretation thus operates as a safeguard against misuse of the terms and institutions of the Genocide Convention.

10. In Germany’s view, the notion of “undertake to prevent” refers not only to one’s own territory, but also to transnational and international efforts to prevent genocide. The notion implies that each State Party must first assess whether a genocide or a serious risk of genocide exists prior to taking action pursuant to Article I<sup>13</sup>. Such an assessment must be justified by substantial evidence “that is fully conclusive”<sup>14</sup>:

11. The Genocide Convention provides guidance concerning the lawful means by which the Contracting Parties may prevent and punish genocide. While “Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation”,<sup>15</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>16</sup> Rather than making an abusive allegation of genocide against another State without having discharged its due diligence obligations, a State may seize the United Nations’ political or judicial organs.<sup>17</sup>

12. It follows that an abusive allegation from one State against another State runs contrary to the former State’s obligations to apply Article I of the Convention in good faith, distorts the terms of the Convention and thus constitutes a dispute according to Article IX of the Genocide Convention.

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<sup>12</sup> *Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

<sup>13</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 pp. 221-222, paras. 430-431.

<sup>14</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>15</sup> Order on Provisional Measures (n 26), para. 56.

<sup>16</sup> *Ibid.*

<sup>17</sup> Order on Provisional Measures (n 26) Separate Opinion of Judge Robinson, para. 30.

## 2. Broad scope of Article IX of the Genocide Convention

13. If a dispute between the Contracting Parties exists, this dispute must relate to the interpretation, application or fulfilment of the Convention in order for the Court to be able to exercise its jurisdiction under Article IX of the Genocide Convention.

14. Germany contends that Article IX is intentionally broad. As Professor Kolb has observed, Article IX of the Genocide Convention is “a model of clarity and simplicity, opening the seizing of the Court as largely as possible”<sup>18</sup>.

15. As the Court has recalled in its order on provisional measures in the case at hand, a compromissory clause of a specific treaty can be invoked provided the dispute refers to the subject-matter of the treaty with sufficient clarity.<sup>19</sup>

16. The term „relating to“ in Article IX establishes a link between the dispute and the Convention. The subject matter of the dispute must concern the Convention itself. Or, to put it otherwise: it would not be permissible to use the Genocide Convention as a means of bringing before the Court a dispute regarding alleged violations of other rules of international law.

17. The phrase “interpretation, application or fulfilment of the Convention” encompasses three terms. While interpretation is typically understood as the process of ‘explaining the meaning’ of a legal norm, ‘application’ is the ‘action of putting something into operation’ in a given case<sup>20</sup>. The inclusion of the word “fulfilment” is “unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission of the International Court of such disputes between Contracting Parties as relate to the interpretation or application of

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<sup>18</sup> R. Kolb, “The Compromissory Clause of the Convention”, in: Paola Gaeta (ed), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 420.

<sup>19</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of the Court of 16 March 2022 on the Request for the Indication of Provisional Measures, para. 44.

<sup>20</sup> C. Tams, Article IX, note 45, in: Tams/Gerster/Schiffbauer, *Convention on the Prevention and Punishment of Genocide, A Commentary* (Beck 2014).

the treaties in question”<sup>21</sup>. The term ‘fulfilment’ partially overlaps with the term “application”, since it may be understood to refer to an application that ‘meets the requirements’ of a norm<sup>22</sup>. Nevertheless, the addition of the term ‘fulfilment’ supports a broad interpretation of Article IX,<sup>23</sup> since the fulfilment of a norm may also be understood to refer to more than its mere application. It appears that ‘by inserting all the three alternative terms, drafters had sought to ‘give a coverage as exhaustive as possible to the compromissory clause’ and to ‘close down all possible loopholes’<sup>24</sup>.

18. It is already the ordinary meaning of Article IX which makes it clear that the Court has jurisdiction over the question whether genocidal acts have been or are being committed or not.<sup>25</sup> In particular, the inclusion of the word “fulfilment” in Article IX in addition to the more common formulation of “interpretation and application” in compromissory clauses supports the view that the Court has jurisdiction *rationae materiae* to declare the absence of genocide when genocide is being alleged to take place. Where one State party to the Genocide Convention accuses another of committing genocidal acts, the ‘fulfilment’ of the Convention is clearly at stake.

19. Thus, whenever there is a dispute between two or more State parties on whether a State party has engaged in conduct contrary to the Convention, the State party 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 will be in a position to exercise its jurisdiction.

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<sup>21</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).

<sup>22</sup> C. Tams (n 18), Article IX, note 45.

<sup>23</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Joint Declaration of Intervention of the Governments of Canada and the Kingdom of the Netherlands of 7 December 2022, para. 29.

<sup>24</sup> C. Tams (note 18), Article IX, note 45; R. Kolb, *Scope Ratione Materiae*, in: Paola Gaeta (ed), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 451.

<sup>25</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, p. 10, para. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2020, I.C.J. Reports 2020, p. 14, para. 30.

20. Otherwise a State party could freely invent violations of the Genocide Convention, allegedly committed by another State party without the latter being able to have recourse to the Court. Such interpretation would thereby not only pave the way for genocide-related disputes arising which the Court could not address, but also as the current situation brought about by the allegations of genocide brought forward by the Russian Federation unfortunately to serious misuses of the Genocide Convention.

21. The all-encompassing nature of Article IX of the Genocide Convention is further supported by the unusual feature of the words “including”. It indicates a broader scope of Article IX of the Convention when compared to a standard compromissory clause<sup>26</sup>. Disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III are therefore only one type of dispute covered by Article IX, which are “included” in the wider phrase of disputes “relating to the interpretation, application and fulfilment” of the Convention.<sup>27</sup>

22. A broad understanding of the Convention’s compromissory clause is furthermore supported by the fact that it does not require, unlike many other compromissory clauses, any additional procedural steps such as prior negotiations or attempts to settle the dispute by way of arbitration.

23. Finally, the object and purpose gives further support to the wide interpretation of Article IX. Famously, in its 1951 Advisory Opinion, the Court held<sup>28</sup>

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<sup>26</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.

<sup>27</sup> See also the Written Observations of The Gambia on the Preliminary Objections raised by Myanmar, 20 April 2021, pp. 28-29, para. 3.22 (“The inclusion of disputes “relating to the responsibility of a State for genocide” among those that can be brought before the Court unmistakably means that responsibility for genocide can be the object of a dispute brought before the Court by any contracting party”).

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



“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.”

24. The Convention's object to protect the most elementary principles of morality also prohibits any possibility of a Contracting Party to abuse its provisions for other means. It would undermine the Convention's credibility as a universal instrument to outlaw the most abhorrent crime of genocide if its authority could be abused by any Contracting Party without a possibility of the victim of such abuse to turn to the Court. The purpose of the Convention hence speaks loudly in favour of a reading of Article IX, according to which disputes relating to the interpretation, application and fulfilment include disputes about the abuse of the Convention's authority to justify a Contracting State's action vis-à-vis another Contracting State.

25. Thus, the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the entire Convention all confirm that a dispute regarding acts carried out by one State against another State based on false claims of genocide while claiming to be itself in fulfilment of its obligations to prevent and punish genocide falls under the notion of a “dispute between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention”.

Accordingly, the Court has jurisdiction to declare the absence of genocide and the violation of a good faith performance of the Convention resulting in an abuse of the law.

3. Application to disputes about an otherwise unlawful action that is being justified as a means for prevention and punishment of genocide

26. Germany contends that Article IX of the Genocide Convention also applies to disputes about an otherwise unlawful action that is being justified as a means for the prevention and punishment of genocide. This follows from the correct construction of Article I of the Genocide Convention whereby a State is under a due diligence obligation to gather evidence from independent sources before making any allegations of genocide against another State.

27. In the same vein, a State may not take other unlawful action based on such abusive allegations.

28. Rather, the scope of the “undertaking to prevent” genocide should be read in light of the final recital in the preamble, which emphasizes the need for “international co-operation”. Referring to the preamble is an accepted method of treaty interpretation, as stressed by the Court for example in the Whaling case<sup>29</sup>. Moreover, under Article VIII States may call upon the competent organs of the UN to take action, and Article IX provides for judicial settlement. All this speaks in favour of a duty under the Convention to employ all multilateral and peaceful means available to prevent genocide.

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<sup>29</sup> See e.g. *Australia v. Japan (New Zealand intervening)*, Judgment, I.C.J. Reports 2014, p. 226, at p. 215, para. 56 (referring to the preamble of the International Convention on the Regulation of Whaling to discern its object and purpose).

29. Article IX thus also gives effect to the parties' pre-existing obligations under Article 2(3) of the UN Charter and customary international law to settle all their disputes peacefully<sup>30</sup>.

4. Possibility to submit the dispute to the Court at the request of any of the parties to such dispute.

30. The words „any of the parties to the dispute“ make it abundantly clear that such a dispute can not only be submitted to the Court (as has been done in the past) by a party that accuses the other party to the dispute of committing acts of genocide. On the contrary, this language suggests that a State accused of committing genocide has the same right to submit the dispute to the Court as the State making the accusation. Indeed, there is no reason why a State facing what it considers to be an unfounded allegation of breach of the Convention cannot, on its own accord, bring the matter before the Court. Certainly, in the case of the Genocide Convention, a State party standing accused of acts of genocide has a legal interest in obtaining a resolution of the dispute. Otherwise, due to the *erga omnes* character of the obligations under the Genocide Convention, that State stands exposed to possible (counter-)measures taken by any of the other State parties of the Convention.

### III. Conclusion

31. It is on the basis of the above arguments that Germany interprets Article IX of the Genocide Convention as follows:

32. Article IX of the Genocide Convention is intentionally broad, covering all disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including disputes relating to abusive allegations of genocide.

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<sup>30</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of New Zealand of 28 July 2022, para. 25.

33. Article IX of the Genocide Convention also applies to disputes about an otherwise unlawful action that is being justified as means for prevention and punishment of genocide under the Genocide Convention. Any party to the dispute may seize the Court under Article IX, including the party who is the victim of an abusive allegation or an unlawful action that is being justified as a means for prevention and punishment of genocide.

34. Article IX of the Genocide Convention thus also covers disputes which relate to situations in which one State party of the Convention alleges that another State party is committing acts of genocide on its territory and where, relying on such accusations, the former State party then uses military force against the latter.

35. In order to resolve such a dispute, the Court is called upon to apply the Genocide Convention to the relevant facts in order to determine whether there is a basis for such allegations.

Respectfully submitted,



Ambassador Cyril Jean Nunn

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