

WRITTEN OBSERVATIONS
OF THE
GOVERNMENT OF AUSTRALIA



PRELIMINARY OBJECTIONS
in the case of
*Allegations of Genocide under the Convention on the Prevention and Punishment of the
Crime of Genocide*
(Ukraine v. Russian Federation: 32 States Intervening)

5 JULY 2023

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I. INTRODUCTION

1. On 30 September 2022, Australia, invoking its right under Article 63 of the Statute of the International Court of Justice, submitted its Declaration of Intervention (**Australia's Declaration**) in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. On 5 June 2023, the Court decided that Australia's Declaration (alongside 31 declarations of intervention of other States) is admissible at the preliminary objections stage of the proceeding.¹ The Court fixed 5 July 2023 as the time-limit for filing of Australia's written observations, pursuant to Article 86, paragraph 1, of the Rules of Court.² These written observations are filed pursuant to that Order.
2. Australia intervenes in its capacity as a party to the *Convention on the Prevention and Punishment of the Crime of Genocide* (the **Genocide Convention** or the **Convention**).³ In these written observations, Australia sets out its views on the construction of Article IX, taking account of the written pleadings of the Parties to this dispute.
3. In filing these written observations, Australia recalls the profound consequences of the unilateral use of force by the Russian Federation in Ukraine. Australia continues to share the deep concerns expressed by the United Nations General Assembly (the **UNGA**) in March 2022, April 2022, October 2022, November 2022, and most recently in February 2023.⁴ In particular, on that latter occasion, the UNGA deplored "the dire human rights

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023*, para. 102(1).

² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023*, para. 102(3).

³ Genocide Convention, opened for signature 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).

⁴ GA Resolution A/RES/ES-11/1, 2 March 2022; GA Resolution A/RES/ES-11/2, 24 March 2022; GA Resolution A/RES/ES-11/3, 7 April 2022; GA Resolution A/RES/ES-11/4, 13 October 2022; GA

and humanitarian consequences of the aggression by the Russian Federation against Ukraine”.⁵ Australia submits these written observations as part of its continued commitment to protecting and promoting the rules-based international order and the peaceful settlement of disputes, in which the Court plays a vital role.⁶

II. CONSTRUCTION OF ARTICLE IX OF THE GENOCIDE CONVENTION

4. In order to establish jurisdiction in this case, Ukraine relies on Article IX of the Genocide Convention, which provides that:

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.

5. These written observations set out Australia’s construction of Article IX as relevant to the dispute between the Parties. Specifically:

- (a) **Subsection A** addresses the interpretation of the term “dispute” in Article IX, which is relevant to the Russian Federation’s first preliminary objection.
- (b) **Subsection B** addresses the Court’s jurisdiction under Article IX to declare whether an applicant has complied with the Genocide Convention, where this is a matter in dispute, which is relevant to the Russian Federation’s fifth preliminary objection.
- (c) **Subsection C** addresses the Court’s jurisdiction under Article IX in respect of disputes concerning action taken in purported reliance on Articles I and/or IV of the Convention, which is relevant to the Russian Federation’s second preliminary

Resolution A/RES/ES-11/5, 15 November 2022; and GA Resolution A/RES/ES-11/6, 23 February 2023.

⁵ GA Resolution A/RES/ES-11/6, 23 February 2023, preamble.

⁶ See further, Australia’s Declaration, paras. 4-7.

objection.

A. The interpretation of the term “dispute” in Article IX

6. The Russian Federation’s first preliminary objection is that there is no dispute under the Genocide Convention. It contends that Article IX requires that the Parties hold clearly opposing views “with respect to precise obligations arising under the Convention”.⁷ It argues that this means “Ukraine must demonstrate that the claims it has put before the Court on the basis of the Convention had been positively opposed by the Russian Federation before these proceedings were instituted.”⁸ It also contends that no “dispute” exists, alleging that Ukraine’s statements did not expressly refer to the Genocide Convention.⁹ Taking those submissions together, Australia therefore understands the Russian Federation to interpret the term “dispute” in Article IX as requiring: (i) evidence that the applicant’s claims on the basis of the Genocide Convention have been expressly opposed by the respondent; and (ii) that the parties’ exchanges expressly refer to the Genocide Convention and the precise claims made thereunder.
7. As noted in Australia’s Declaration, the existence of a “dispute” between the Parties is a precondition to the Court having jurisdiction under Article IX of the Genocide Convention.¹⁰ The Court addressed the standard required for an applicant to demonstrate the existence of a dispute under Article IX in its 2022 judgment on preliminary objections in *The Gambia v. Myanmar*. In that judgment, the Court set out the following propositions in the context of Article IX, with which Australia agrees:

⁷ Preliminary Objections Submitted by the Russian Federation, 1 October 2022 (**Russian Federation’s Preliminary Objections**), para. 63.

⁸ Russian Federation’s Preliminary Objections, para. 63.

⁹ Russian Federation’s Preliminary Objections, paras. 98, 101, 104 and 106.

¹⁰ Australia’s Declaration, para. 29.

- (a) A dispute is “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties, and in order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”.¹¹
- (b) “[T]he existence of a dispute is a matter of substance and not a question of form or procedure”.¹²
- (c) “In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court”, but the “conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute.”¹³
- (d) “[T]he 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.”¹⁴ If it did, the Court noted, a respondent could simply remain silent in the face of legal claims and thus prevent a finding that a dispute exists.¹⁵ The Court explicitly dismissed the contention that there was any “requirement of ‘mutual awareness’ based on two explicitly opposed positions”.¹⁶
- (e) It did not matter that the statements made in that case did not specifically mention

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 63 (references omitted).

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 64 (references omitted).

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 64 (references omitted).

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 71.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 71.

¹⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, 22 July 2022*, para. 71.

the Genocide Convention, because “a specific reference to a treaty or its provisions” is not required,¹⁷ although the relevant 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”.¹⁸

8. The Court’s judgment in *The Gambia v. Myanmar* concerning Article IX is consistent with the practice of the Court in construing the term “dispute” in proceedings brought under other compromissory clauses. For example:

- (a) In *Land and Boundary between Cameroon and Nigeria*, the Court noted that “a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*”. Rather, “the position or the attitude of a party can be established by inference”.¹⁹
- (b) In *Georgia v. Russian Federation*, the Court confirmed that the exchanges between the parties need not expressly refer to the treaty that is the basis for the claim, provided that the subject-matter of the treaty is identified with sufficient clarity.²⁰

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 72.

¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 72, quoting *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2011, p. 85, para. 30.

¹⁹ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

²⁰ *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, pp. 84-85, para. 30. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 428-429, para. 83, where the Court dismissed an objection to jurisdiction on the basis that the applicant had not mentioned the treaty relied on as the basis of its claims before filing its memorial:

“[I]t does not necessarily follow that, because a State has not expressly referred in negotiations with another State to a particular treaty as having been violated by conduct of

9. As this Court has made very clear that a party does not need to have expressly referred to the Genocide Convention in order to establish the existence of a dispute under Article IX, it would be both illogical and impractical to require an applicant to demonstrate that the parties hold opposite views “with respect to precise obligations arising under the Convention”,²¹ as the Russian Federation contends. Rather, a dispute exists for the purposes of Article IX where the parties hold opposing views on the subject-matter of the treaty, even if the Genocide Convention, articles thereof, or the “precise obligations arising under it”, have not been expressly referred to in the parties’ exchanges or statements.
10. Further, consistent with the Court’s case law set out above, Australia considers that Article IX does not require that the claims put forward by the applicant have been explicitly opposed by the respondent. If it did, as the Court has recognised, it would follow that a respondent could prevent a finding that a dispute exists simply by remaining silent in the face of legal claims.²² A respondent’s opposition “can be established by inference”,²³ including on the basis of statements made by the parties over a period of time before the application is submitted to the Court.
11. The Russian Federation cites three decisions of the Court in support of its objection. In Australia’s view, none of these authorities contradict the clear statements in the

that other State, it is debarred from invoking a compromissory clause in that treaty. The United States was well aware that Nicaragua alleged that its conduct was a breach of international obligations before the present case was instituted; and it is now aware that specific articles of the 1956 Treaty are alleged to have been violated. It would make no sense to require Nicaragua now to institute fresh proceedings based on the Treaty, which it would be fully entitled to do.”

²¹ Russian Federation’s Preliminary Objections, para. 63.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, para. 71.

²³ *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

authorities cited above. Specifically, none of them indicate either that the term “dispute” requires: (i) evidence that the applicant’s claims have been expressly opposed by the respondent; or (ii) that the parties’ exchanges or statements refer to the relevant treaty and the precise claims made thereunder.

- (a) First, the Russian Federation relies²⁴ on the Court’s statement in its provisional measures order in *Legality of the Use of Force* that, for the purposes of determining whether a dispute within the meaning of Article IX exists,

“the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; ... the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX”.²⁵

As is clear from the underlined text, in that passage the Court was not considering whether a dispute had arisen, but rather the scope and extent of its subject-matter jurisdiction. In context, it is evident that the Court was not suggesting that an applicant must show that the parties hold opposing views “with respect to precise obligations” arising under the treaty, nor that the claims “on the basis of the [treaty]” were expressly opposed by the respondent before the proceedings were instituted.²⁶

- (b) Next, the Russian Federation relies²⁷ on *Marshall Islands v. United Kingdom*, in which the Court found that a statement made by the Minister of Foreign Affairs of

²⁴ See Russian Federation’s Preliminary Objections, para. 64.

²⁵ *Legality of the Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 372, para. 25 (emphasis added, references omitted). See also *Legality of the Use of Force (Yugoslavia v. United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999*, p. 838, para. 33.

²⁶ Cf. Russian Federation’s Preliminary Objections, para. 63.

²⁷ See Russian Federation’s Preliminary Objections, para. 67.

the Marshall Islands to the UNGA “urg[ing] all nuclear weapons states to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament” did not meet the conditions to establish a dispute with the United Kingdom with respect to the subject-matter of the Marshall Islands’ claims.²⁸ Notably, this statement did not refer at all to the United Kingdom, nor did it refer to any alleged breach of an obligation.²⁹ It does not support the contention that an applicant must demonstrate opposing views “with respect to precise obligations arising under the [Genocide] Convention.”³⁰

- (c) Finally, the Russian Federation relies³¹ on *Belgium v. Senegal*, where the Court found that there was a dispute with respect to the obligation under the *Convention*

²⁸ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, p. 853, para. 49.

²⁹ See also *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, pp. 852-854, paras. 46-52.

³⁰ Russian Federation’s Preliminary Objections, para. 63.

The Russian Federation also refers to the dissenting opinion of Judge Cançado Trindade (Russian Federation’s Preliminary Objections, para. 66). The full paragraph of the dissenting opinion reads as follows (the text omitted from the Russian Federation’s selective quotation is in emphasis):

“In the present cases, ... the Court’s majority has unduly heightened the threshold for establishing the existence of dispute. Even if dismissing the need for an applicant State to provide notice of a dispute, in practice, the requirement stipulated goes far beyond giving notice: the Court effectively requires an applicant State to set out its legal claim, to direct it specifically to the prospective-respondent State(s), and to make the alleged harmful conduct clear. All of this forms part of the “awareness” requirement that the Court’s majority has laid down, seemingly undermining its own ability to infer the existence of a dispute from the conflicting courses of conduct of the Contending Parties.” (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016*, Dissenting opinion of Judge Cançado Trindade, p. 917, para. 20, emphasis added).

Judge Cançado Trindade’s dissenting opinion then explains why he considered that this approach was “not in line” with the prior jurisprudence of the Court (see pp. 917-919, paras. 21-25). Taking the passage as a whole, Australia considers it to be clear that: (i) Judge Cançado Trindade was expressing his own characterisation of the approach taken by the majority of the Court, which Australia considers overstates the effect of the majority’s reasoning; (ii) Judge Cançado Trindade was not endorsing the “awareness requirement” (as he described it), but rather was criticising it; and (iii) in any event, his view does not appear to support the conclusion that an applicant must demonstrate that the parties “hold such opposite views with respect to precise obligations arising under the [Genocide] Convention” (Russian Federation’s Preliminary Objections, para. 63).

³¹ See Russian Federation’s Preliminary Objections, para. 68.

against Torture and Other Cruel, Inhumane or Degrading Treatment (Convention against Torture), to extradite or prosecute an individual for alleged acts of torture.³² Belgium's Application to the Court also included a claim with respect to an alleged obligation under customary international law to prosecute the same individual for crimes against humanity, and later extended its submission to cover war crimes and genocide.³³ The exchanges that Belgium relied upon did not address an alleged obligation under customary international law to prosecute in respect of crimes against humanity, war crimes, or genocide, but only referred to obligations under the Convention against Torture. It was in that specific factual context that the Court found that, at the time of filing of the application, the dispute between the parties related to the Convention against Torture but did not relate to breaches of obligations under customary international law concerning crimes against humanity, war crimes, or genocide.³⁴ Thus, the Court's judgment is consistent with its established approach, which requires that there must be a dispute with respect to the subject-matter of the claim at the time of the application. The Court did not posit any higher threshold to establish a dispute, such as a requirement that an applicant demonstrate opposing views "with respect to precise obligations arising under" the treaty relied upon,³⁵ or that the applicant allege "a breach of a specific obligation" under that treaty.³⁶

12. For the above reasons, Australia submits that in order to satisfy the "dispute" requirement

³² *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 443-444, paras. 49-52.

³³ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, p. 444, para. 53.

³⁴ *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 444-445, paras. 52 and 55.

³⁵ Russian Federation's Preliminary Objections, para. 63.

³⁶ Russian Federation's Preliminary Objections, para. 68.

in Article IX:

- (a) While an applicant must show that the claim of one party is positively opposed by the other, this does not require an applicant to demonstrate that the respondent expressly opposed the claims of the applicant. The position of a party can be established by inference.
- (b) Exchanges between the parties need not cite the Genocide Convention or its specific provisions. Instead, it is sufficient if those exchanges 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. Thus neither an applicant nor a respondent needs expressly to refer to the Genocide Convention or its provisions in order for a dispute between them to exist for the purposes of Article IX.

B. Article IX confers jurisdiction on the Court to declare whether an applicant has complied with the Genocide Convention, if this is in dispute

- 13. Ukraine identifies the precise dispute falling within the scope of Article IX of the Convention as concerning the Russian Federation’s allegations that Ukraine has committed or is committing genocide in breach of the Convention, and the Russian Federation’s reliance on those allegations in taking unilateral action in and against Ukraine.³⁷ Ukraine specifically asks the Court to adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in breach of the Convention.³⁸ The Russian Federation refers to this request for relief as the “reverse

³⁷ Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation Submitted by Ukraine, 3 February 2023 (**Ukraine’s Observations**), para. 27; see also Memorial Submitted by Ukraine (**Ukraine’s Memorial**), para. 149; Application instituting proceedings, filed in the Registry of the Court, 27 February 2022, paras. 8 and 11.

³⁸ Ukraine’s Memorial, para. 178(b).

compliance request”.³⁹ It is, in effect, a request for a declaration that, contrary to the allegation made by the Russian Federation, Ukraine has complied with the Convention.⁴⁰

14. The Russian Federation does not object to the Court’s jurisdiction to make the declaration sought by Ukraine, but it contends that Ukraine’s request is inadmissible.⁴¹ Nonetheless, in order to assist the Court,⁴² Australia addresses the question of the Court’s jurisdiction under Article IX to make the declaration sought by Ukraine.
15. As explained in Australia’s Declaration,⁴³ Article IX confers jurisdiction on the Court to declare that a party to the Convention has complied with its obligations (and thus is not responsible for genocide) if that is a matter in dispute. This conclusion is reinforced by the following:
 - (a) First, the Court’s power to give a declaratory judgment is well-established in its case law.⁴⁴ The purpose of such a judgment is “to ensure recognition of a situation at law, once and for all and with binding force as between the Parties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned”.⁴⁵ Further, Australia recalls in this

³⁹ Russian Federation’s Preliminary Objections, para. 230(c).

⁴⁰ It has also been described as a “negative declaration”: see *Allegations of Genocide under the Convention on the Prevention and Punishment of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023*, Dissenting Opinion of Judge Xue, para. 24.

⁴¹ Russian Federation’s Preliminary Objections, paras. 274-288. These matters are thus not addressed because they do not relate to construction of the Genocide Convention.

⁴² Australia notes the views on this point expressed at an earlier stage of this proceeding: see *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022*, Declaration of Vice-President Gevorgian, para. 8; cf. Separate Opinion of Judge Robinson, para. 16. See also Declaration of Judge Bennouna, para. 2.

⁴³ See further Australia’s Declaration, paras. 34-38.

⁴⁴ This has been reiterated most recently in *Dispute Over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, 1 December 2022*, para. 45 (citing *Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37; and *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49).

⁴⁵ *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J. Series A*,

context that where the Court has jurisdiction over a particular matter, no separate basis for jurisdiction is required for the Court to consider a party's request for remedies.⁴⁶

- (b) Secondly, Article IX is broad enough to encompass a claim for a declaration of compliance with the Genocide Convention, including one advanced by a party accused of committing genocide. As noted above, Article IX of the Convention confers jurisdiction over “[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention”. It is not otherwise limited in its subject-matter.⁴⁷ That language is ample to confer jurisdiction over disputes as to whether a party to the Convention has complied with its obligations, where this is in dispute. This conclusion is confirmed by the fact that: (i) Article IX allows a dispute to be submitted to the Court “at the request of any of the parties to the dispute”, which must naturally include a State that is accused of committing genocide; (ii) as the Court has previously noted, Article IX contains an unusual feature, *vis-à-vis* other compromissory clauses, in that it expressly indicates that the jurisdiction that it confers extends to disputes relating to the responsibility of a State for genocide or other acts enumerated in Article III,⁴⁸

No. 13, p. 20.

⁴⁶ *LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001*, p. 485, para. 48 (“[w]here jurisdiction exists over a dispute on a particular matter, no separate basis for jurisdiction is required by the Court to consider the remedies a party has requested for the breach of the obligation”); approved in *Avena and Other Mexican Nationals (Mexico v. United States of America), Judgment, I.C.J. Reports 2004*, p. 33, para. 34. As concerns the lack of necessity to consider jurisdiction for reparation generally, see also *Case Concerning the Factory at Chorzów (Jurisdiction), Judgment No. 8, 1927, P.C.I.J. Series A, No. 9*, pp. 21-25; *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 142, para. 283.

⁴⁷ The Court has confirmed that the reference in Article IX to disputes “relating to the responsibility of a State” indicates that such disputes “are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention”: *Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), I.C.J. Reports 2007*, p. 114, para. 169.

⁴⁸ *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. 114, paras. 168-169; see further

and (iii) Article IX is intended to give the Court exhaustive jurisdiction over matters relating to “the life of the Convention”,⁴⁹ of which compliance with its rights and duties forms an essential part.

(c) Thirdly, and contrary to the Russian Federation’s contention,⁵⁰ declarations of compliance are not within the exclusive preserve of the World Trade Organization (the WTO). The fact that the WTO has a specific dispute settlement procedure to adjudicate disputes about compliance with adopted reports does not have any impact on this Court’s jurisdiction to issue a declaration of compliance under the Genocide Convention.⁵¹ Further and in any event, as Australia observed in its Declaration,⁵² applicants have made similar requests to the Court in other cases in which the Court found that it had jurisdiction.⁵³

16. For the above reasons, Australia submits that Article IX confers jurisdiction on the Court to declare whether an applicant has complied with the Genocide Convention, where this is a matter in dispute between the parties.

Australia’s Declaration, para. 35.

⁴⁹ Robert Kolb, “The Scope Rationae Materiae of the Compulsory Jurisdiction of the ICJ”, in Paolo Gaeta (ed), *The UN Genocide Convention: A Commentary* (OUP, 2009), p. 453.

⁵⁰ Russian Federation’s Preliminary Objections, para. 276.

⁵¹ It is notable that the WTO Appellate Body has confirmed that any party to the dispute may make such a request in circumstances where the language of the relevant provision of the Dispute Settlement Understanding does not specifically address the question of which party may initiate proceedings: see *Canada - Continued Suspension of Obligations in the EC - Hormones Dispute*, WTO Doc WT/DS321/AB/R, Report of the Appellate Body, 16 October 2008, para. 347; Understanding on Rules and Procedures Governing the Settlement of Disputes (Annex 2 of the WTO Agreement) available at <https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm>, Article 21.5 (“Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures”).

⁵² Australia’s Declaration, footnote 35.

⁵³ See *Case Concerning rights of nationals of the United States of America in Morocco (France v. United States of America)*, Judgment, I.C.J. Reports 1952, pp. 179-180; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 14, para. 14 and p. 30, para. 53.

C. Article IX confers jurisdiction on the Court over disputes concerning action taken in purported reliance on Articles I and/or IV of the Genocide Convention

17. Australia understands that Ukraine claims that the Russian Federation has alleged that Ukraine has committed or is committing genocide in breach of the Genocide Convention and that the Russian Federation has relied on these allegations as a pretext for its unilateral use of force in and against Ukraine.⁵⁴ Thus, in its Memorial, Ukraine states that:

The present dispute raises questions of whether, as Russia claims, Ukraine is responsible for “the commission of genocide” for purposes of Article I, whether Ukrainian officials are “persons committing genocide” as defined in the Convention for purposes of Article IV, and whether Russia may engage in a use of force in and against Ukraine and violations of Ukraine’s sovereignty in response to a perceived failure by Ukraine to fulfil its obligations under Article I, and as a measure to prevent and punish the genocide alleged by Russia.⁵⁵

18. Article I of the Convention contains an undertaking “to prevent and punish” genocide. Australia notes that the Parties appear to agree that a State must conduct appropriate due diligence before acting in reliance on Article I of the Genocide Convention.⁵⁶ They also appear to agree that Article I does not itself authorise the unilateral use of force.⁵⁷ Nevertheless, their agreement on those points does not deny the fundamental point that a dispute regarding the scope, content or exercise of the undertaking to prevent and punish genocide is necessarily a dispute about the “interpretation, application or

⁵⁴ Ukraine’s Memorial, paras. 72 and 149; Ukraine’s Observations, paras. 27 and 81.

⁵⁵ Ukraine’s Memorial, para. 74.

⁵⁶ See Ukraine’s Memorial, para. 102; and Russian Federation’s Preliminary Objections, para. 153.

⁵⁷ See Ukraine’s Memorial, para. 100; Russian Federation’s Preliminary Objections, para. 181. See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures Order, 16 March 2022, para. 59.

fulfilment” of Article I, and therefore within the Court’s jurisdiction under Article IX.⁵⁸

19. Article IV of the Convention provides that “[p]ersons committing genocide ... shall be punished.” A dispute regarding the existence or exercise of the obligation to punish persons committing genocide, being a dispute that would relate to a party’s obligations under Article IV, is therefore likewise a dispute about the “interpretation, application or fulfilment” of the Convention and is within the Court’s jurisdiction under Article IX.
20. A dispute as to whether a party to the Convention has acted in good faith in taking action in purported compliance with its duty “to prevent and punish” genocide under Article I, or to punish “[p]ersons committing genocide” under Article IV, also falls within the scope *ratione materiae* of Article IX.⁵⁹ Disputes of both of those kinds necessarily relate to the “interpretation, application or fulfilment” of the Convention.
21. The Russian Federation objects to the Court’s jurisdiction on the basis that, in its view, Ukraine is asking the Court “to establish, under the guise of claims ostensibly related to the Convention, ... that the special military operation and the recognition of the DPR and LPR are unlawful under the UN Charter and customary international law, and that the Russian Federation is internationally responsible for those alleged breaches.”⁶⁰ The Russian Federation also argues that “Ukraine misuses Article IX of the Convention as a vehicle to bring its true claims before the Court.”⁶¹ Thus, Australia understands that the Russian Federation’s core objection in relation to Article IX is based on the proposition that Ukraine asks the Court to rule on alleged breaches of other obligations under international law, which it submits is an impermissible expansion of the Court’s

⁵⁸ Australia’s Declaration, para. 39.

⁵⁹ Australia’s Declaration, para. 40.

⁶⁰ Russian Federation’s Preliminary Objections, para. 140 (references omitted).

⁶¹ Russian Federation’s Preliminary Objections, para. 141.

jurisdiction *ratione materiae* under Article IX.⁶² It is a matter for the Parties to address the correctness of that characterisation of Ukraine’s claims.

22. Australia does, however, submit that the objection of the Russian Federation summarised above raises issues concerning the construction of Article IX. In particular, it raises a question as to the extent to which the Court has jurisdiction to consider whether conduct of a State is compatible with its obligations under the Convention, when the same conduct may also be relevant to international obligations that arise under another treaty or under customary international law.

23. Australia contends that Article IX confers jurisdiction on the Court to consider whether any conduct by a party is compatible, or incompatible, with its obligations under the Convention, including conduct involving the threat or use of force.⁶³ That is so whether or not the State party that engages in that conduct claims to be entitled to do so under another treaty or under customary international law. The Court has confirmed that the same acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty.⁶⁴ Thus, a dispute as to whether conduct is authorised by Articles I and/or IV of the Genocide Convention is a dispute squarely within the scope of the Court’s jurisdiction under Article IX, whether or not the same conduct could give rise to a dispute under another treaty or under customary international law.

24. For the above reasons, Australia submits that:

⁶² Russian Federation’s Preliminary Objections, para. 170.


⁶³ See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, pp. 811-812, para. 21, noting that 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 any other means”.

⁶⁴ Australia’s Declaration, para. 41. See also, e.g., *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Relations (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 27, para. 56.

- (a) A dispute regarding the scope, content or exercise of any right or duty under Articles I and/or IV of the Genocide Convention is a dispute within the Court's jurisdiction under Article IX of the Convention.
- (b) A dispute as to whether a State party to the Convention has acted in good faith in taking action in purported compliance with Articles I and/or IV is likewise a dispute within the Court's jurisdiction under Article IX.
- (c) Article IX confers jurisdiction on the Court to consider whether any conduct by a State party is compatible or incompatible with that State party's obligations under the Convention, including conduct involving the threat or use of force.
- (d) The Court's jurisdiction under Article IX is unaffected by the fact that the conduct being considered may also fall within the ambit of another treaty or customary international law.

III. CONCLUSION

25. Australia makes the above observations in the exercise of its right to intervene in the proceedings to provide the Court with its views as to the construction of Article IX of the Genocide Convention relevant to the determination of the Court's jurisdiction in the present case. Australia remains at the disposal of the Court if any clarification or elaboration of its views would assist it.



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Co-Agent of the Government of Australia