

International Court of Justice

***Allegations of Genocide under the Convention on the
Prevention and Punishment of the Crime of Genocide***

(Ukraine v. Russian Federation: 32 States Intervening)

***Written Observations of the Portuguese Republic
on the Construction of Article IX of the Genocide Convention and of Other Provisions
Relevant the Determination of the Jurisdiction of the Court***

5 July 2023

I . Introduction

1. On 26 February 2022, Ukraine instituted proceedings at the International Court of Justice against the Russian Federation in a dispute concerning the interpretation, application or fulfilment of the Convention on the Prevention and Punishment of Genocide (the “Convention”).¹
2. Ukraine contends that there is a dispute between Ukraine and the Russian Federation within the meaning of Article IX relating to the interpretation, application, or fulfilment of the Convention.² On substance, Ukraine claims that the use of force by the Russian Federation in or against Ukraine since 24 February 2022 based on an alleged genocide, as well as the recognition that preceded the military operation, are incompatible with the Convention, quoting Articles I-III thereof.³
3. On 7 October 2022, the Portuguese Republic submitted to the Court a Declaration of Intervention pursuant to Article 63, paragraph 2.
4. On 5 June 2023, the International Court of Justice decided that the declarations of intervention under Article 63 of the Statute of the Court submitted by, among others, the Portuguese Republic, were admissible.⁴ 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.⁵

¹ Application instituting proceedings, filed in the Registry of the Court on 27 February 2022.

² *Ibid*, paras. 4-12.

³ *Ibid*, paras. 26-29.

⁴ *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).

⁵ *Ibid*, para. 102(3).

5. Upon the Court's invitation to coordinate with other intervening States, the Portuguese Republic has reached a large substantive convergence with the position of other interveners. However, in order to be able to meet the strict deadline set by the Court and for logistical reasons, the Portuguese Republic files its own Written Observations.
6. As determined by the Court, the construction of Article IX and of other provisions of the Convention concerning the Court's jurisdiction *ratione materiae* is in question at the present stage of the Proceedings⁶.
7. It is the view of the Portuguese Republic that the Court has jurisdiction under Article IX of the Convention over the claim submitted by Ukraine, since the claim refers to a dispute between Ukraine and the Russian Federation relating to substantive matters dealt with by the Convention.
8. The elements that, in the opinion of the Portuguese Republic, establish the Court's jurisdiction in the present case are addressed in sequence below.

II. Construction of Article IX of the Genocide Convention and of Other Provisions Relevant the Determination of the Jurisdiction of the Court

9. Article IX of the Convention reads as follows:

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

⁶ Order on Admissibility of the Declarations of Intervention (n 1), p. 26.

10. It is worth starting by noting that, in its order of 16 March 2022 indicating provisional measures, the Court affirmed its jurisdiction *prima facie* on the basis of Article IX of the Genocide Convention.⁷ Although not being a definitive stance on whether it has jurisdiction to rule on the merits of the case, the case law of the International Court of Justice shows that it is nevertheless a strong indication that the jurisdiction requirements for the Court to entertain the claim are met.
11. In fact, in other cases in the past involving questions related to genocide between contracting parties to the Genocide Convention, where a similar finding occurred regarding the establishment of *prima facie* jurisdiction at the provisional measures stage on the existence of a dispute between the Parties relating to the interpretation, application or fulfillment of the Genocide Convention on the basis of Article IX of the Convention (Bosnia Herzegovina v. Serbia and Montenegro and The Gambia v. Myanmar),⁸ in the judgment on Preliminary Objections the Court has always confirmed its decision on *prima facie* jurisdiction.⁹
12. At the present stage of the proceedings, and taking into consideration the specific claim before the Court, the Portuguese Republic wishes to submit four observations on the construction of the Genocide Convention concerning the Court's jurisdiction, as follows:
 - A) The claim concerns an existing dispute;
 - B) The dispute relates to the interpretation, application, or fulfilment of the Convention;
 - C) The dispute relates to substantive obligations under the Convention;
 - D) The claim was duly submitted by one of the Parties to the dispute.

⁷ *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, paras. 28-49.

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Order of 8 April 1993; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 23 January 2022.

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 11 July 1996; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022.

A. The Claim concerns an Existing Dispute

13. First, the Portuguese Republic observes that the claim submitted by Ukraine concerns an existing dispute.
14. The notion of 'dispute' is already well-established in the case law of the Court, which considers the meaning given to the word 'dispute' as "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties.¹⁰ 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 The two sides must "hold clearly opposite views concerning the question of the performance or nonperformance of certain international obligations".¹² Moreover, "in case the respondent has failed to reply to the applicant's claims, it may be inferred from this silence, in certain circumstances, that it rejects those claims and that, therefore, a dispute exists".¹³
15. In that respect, the communication by the Russian Federation to the Court on 7 March 2022 seems to construe the notion of a dispute too narrowly by insisting that Article IX cannot be used to establish jurisdiction of the Court for disputes relating to the use of force or issues of self-defense under general international law.¹⁴

¹⁰ *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, p. 11.

¹¹ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa)*, Preliminary Objections, Judgment of 21 December 1962, I.C.J. Reports 1962, p. 319, at p. 328.

¹² *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, p. 406, at p. 414, para. 18; ICJ, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 3, at 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.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 27, para. 71.

¹⁴ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Document of the Russian Federation of 7 March 2022, paras. 8-15.

16. However, it follows from established case law of the Court that certain facts or omissions may give rise to a dispute that fall within the scope of more than one treaty.¹⁵ Hence, a parallel dispute arising out of the same facts does not create an obstacle to the jurisdiction of the Court under Article IX of the Convention, provided that its other conditions are fulfilled.

17. Moreover, in its Order of 16 March 2022, the Court determined that

[t]he statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention.¹⁶

18. The Court furthermore noted that “in the Court’s view, the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention”¹⁷ and that, with regard to the Russian Federation’s assertion the its “special military operation” is based on Article 51 of the UN Charter and customary international law “certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty”¹⁸, concluding that this “does not (...) preclude a prima facie finding by the Court that the dispute presented in the Application relates to the interpretation, application and fulfillment of the Genocide Convention”¹⁹.

¹⁵ *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021, para. 56.

¹⁶ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 45.

¹⁷ *Ibid*, para. 45.

¹⁸ *Ibid*, para. 46.

¹⁹ *Ibid*, para. 46.

19. Therefore, a dispute under Article IX of the Convention clearly exists between Ukraine and the Russian Federation.

B. The Dispute Relates to the Interpretation, Application, or Fulfilment of the Convention

20. *Second*, the Portuguese Republic further observes that the dispute relates to the interpretation, application, or fulfilment of the Convention.

21. The Portuguese Republic is of the view that Article IX constitutes a broad jurisdictional clause, allowing the Court to adjudicate upon a vast array of disputes concerning the interpretation, application, or fulfilment by a State Party of its obligations under the Convention.

22. The usual meaning of the phrase “relating to the interpretation, application or fulfilment of the Convention” may be divided in two elements:

- a) The first element (“relating to”) establishes a link between the dispute and the Convention;
- b) The second element (“interpretation, application or fulfilment of the Convention”) encompasses different scenarios.²⁰

23. Regarding the first element (“relating to”), the Portuguese Republic considers that an allegation by a State Party to the Convention that another State Party to the Convention has committed genocide establishes a link between the dispute and the Convention, since the Convention contains elements that both State Parties have accepted as being essential to assess whether a genocide has been committed.

²⁰ As Kolb has observed, Article IX of the Convention is «a model of clarity and simplicity, opening the seizing of the Court as largely as possible» – R. Kolb, “The Compromissory Clause of the Convention”, in: Paola Gaeta (ed.), *The UN Genocide Convention: A Commentary*, (OUP 2009), p. 420.

24. The second element (“interpretation, application and fulfilment of the Convention”) encompasses four different concepts. 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 case²¹. The term *fulfilment* partially overlaps with the latter, and it may be understood to refer to an application that “meets the requirements” of a norm.²² Finally, the reference to *the Convention* makes clear that the compromissory clause refers to the provisions of the Convention.
25. The inclusion of the term *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 the treaties in question.²³
26. It appears that by inserting all the three alternative terms, the drafters of the Convention had sought to “give a coverage as exhaustive as possible to the compromissory clause” and to “close down all possible loopholes”.²⁴ The inclusion of the term *fulfilment* thus supports a broad interpretation of Article IX.²⁵
27. Finally, the use of the expression *of the Convention* confirms the broad scope of the compromissory clause. It makes clear that Article IX relates to the entire life of the Convention, including a wide range of breaches thereof.²⁶

²¹ C. Tams, Article IX, note 45, in: Tams/Gerster/Schiffbauer, *Convention on the Prevention and Punishment of Genocide, A Commentary* (Beck 2014).

²² C. Tams (n 18), Article IX, note 45.

²³ *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.

²⁴ 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.

²⁵ *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.

²⁶ R. Kolb, *Scope Ratione Materiae* (note 21), p. 453 with an account of the case law.

C. The Dispute relates to Obligations Under or Connected with the Convention

28. *Third*, the Portuguese Republic is of the view that the dispute in question relates to substantive obligations under or connected with the Convention. In fact, the jurisdiction *ratione materiae* of the Court includes the competence to address allegations of genocide that contravene the limits imposed by international law, as they raise the question of compliance with Article I of the Convention, which in turn provides context for the construction of Article IX.

29. Article I of the Convention reads as follows:

The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.

30. In accordance with Article I of the Convention, all States Parties are obliged to prevent and punish genocide by employing “all means reasonably available so as to prevent genocide as far as possible”.²⁷ However, in fulfilling their duty to prevent genocide, States Parties must act within the limits permitted by international law²⁸, including, among others, the limits imposed by the definition of ‘genocide’, the principle of good faith, the prohibition of abuse of law, the obligation to settle disputes peacefully, or the principle of sovereignty. A State may not claim to enforce international law by violating international law. Therefore, if a State acts beyond the limits permitted by international law in the case at hand, the acts of the State may constitute a breach of the Convention.

²⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430.

²⁸ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43, at p. 221, para. 430; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 16 March 2022, para. 57.

31. As mentioned above, and as discussed in the Court’s Provisional Measures Order of 16 March 2022, the substance of the dispute between these two parties to the Genocide Convention relates to two main questions:

whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfillment of the obligation to prevent genocide contained in Article I of the Convention.²⁹

32. Whether or not certain specific facts amount to genocide that would trigger Article I of the Convention is not a matter left to the subjective determination of one interested party. Article II of the Convention deals with the *definition of genocide* and Article III lists five modes of committing genocide. The elements of genocide are already well-established in the case law of the Court and they support the current interpretation. In particular, in order for genocide to occur, there is a requirement to establish, based on compelling evidence, both genocidal action and a (specific) genocidal intent next to the mental elements present in the acts listed in Article II.³⁰

33. In carrying out their duty under Article I States Parties *must act in good faith*.³¹ As “one of the basic principles governing the creation and performance of legal obligations”³², it follows from the obligation to act in good faith that a State Party to the Convention shall abstain from undermining the object and purpose of the Convention underlying Article I or abuse its provisions. Failing to do so may result in an abuse of law and consequent breach of the Convention.

²⁹ *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. 45.

³⁰ *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 (I), p. 43, at pp. 121-122, paras. 186-189.

³¹ Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, at p. 79, para. 142.

³² *Nuclear Tests (Australia v. France)*, I.C.J. Reports 1974, p. 253, at p. 268, para. 46.

34. Where a State has not carried out in good faith an assessment of genocide or serious risk of genocide, it cannot invoke the “undertak[ing] to prevent” genocide in Article I of the Convention as a justification for its conduct. This of course includes conduct which involves the threat or use of force, as underlined by the Court in the case *Oil Platforms*³³.
35. The Convention’s object and purpose and the high values and principles it protects also *prohibits any possibility of a State Party to abuse its provisions* and invoke them for any other end or purpose than those foreseen in the Convention. The Portuguese Republic emphasizes that all State Parties shall be engaged in preventing and punishing genocide worldwide for the benefit of humankind, and not in order to pursue their own interests.
36. A State is under a due diligence obligation to gather evidence from independent sources before making any allegation of genocide against another State. In the same vein, a State may not take unlawful action based on such abusive allegations. In fact, it constitutes good practice to rely on the results of independent investigations under United Nations auspices³⁴ before qualifying a situation as genocide.
37. Furthermore, Article VIII of the Genocide Convention provides that:
- Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III.

³³ *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1996, pp. 811-812, para. 21. See also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention of Australia of 30 September 2022, para. 41.

³⁴ See for example the reliance of The Gambia on the reports of the Independent International Fact-Finding Mission on Myanmar established by the UN Human Rights Council before bringing a case to the Court; for details see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, at pp. 25-27, paras. 65-69.

38. The prevention and suppression of genocide is not a domestic matter but concerns the international community as a whole. States Parties may call upon competent organs of the United Nations to take the necessary action under the Charter for the prevention and suppression of acts of genocide. Both the Security Council and the General Assembly are “competent organs” who may take collective action, either by a non-binding General Assembly resolution or by Security Council enforcement action under Chapter VII. In addition, Article IX of the Convention confers the right to seize the Court regarding disputes under the Convention.
39. The duty to prevent genocide is not exhausted by Article VIII³⁵, including when the competent organs of the United Nations have manifestly failed to act. However, the legality of any unilateral measure must always be assessed against the obligation set out in Article VIII and other applicable international law obligations, including those enshrined in the Charter of the United Nations. In fact, the obligation to prevent genocide provided for in Article I of the Convention does not provide by itself a legal basis for the use of force in violation of Article 2, paragraph 4, of the Charter of the United Nations.
40. Rather than making an abusive allegation of genocide and act against another State without having discharged its due diligence obligations, a State should seize the United Nations’ political or judicial organs³⁶. In fact, it would undermine the Convention’s credibility as a universal instrument to outlaw the abhorrent crime of genocide if its authority could be abused by any State Party without possibility of review by the Court.

³⁵ *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. 219-220, para. 427.

³⁶ Order on Provisional Measures (n 9) Separate Opinion of Judge Robinson, para. 30.

41. Therefore, Article IX 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*³⁷.
42. Furthermore, allegations of genocide against a State are extremely serious and are susceptible to affect the credibility of a State and thus its capacity – and that of its representatives – to conduct diplomatic relations, or any other type of international relations with public and private actors, as any other sovereign State. Hence, a determination on whether a State is or not responsible for acts of genocide has also an important connection with the effective exercise of its *sovereign competences*.
43. *In conclusion*, the jurisdiction of the Court extends to disputes concerning unlawful action for the stated purpose of preventing and punishing alleged genocide.³⁸ Therefore, the Court has jurisdiction *ratione materiae* to declare the absence of genocide when a State makes false allegations that are not based on existing facts, thus constituting a violation of performance in good faith of the obligations under the Convention resulting in an abuse of its provisions.

D. The Claim was Submitted by one of the Parties to the Dispute

44. *Fourth*, any party to the dispute may seize the Court under Article IX, including the party which is the victim of an abusive allegation of genocide or of any unlawful action as a means for prevention and punishment of genocide.
45. There is a dispute on the interpretation, application, or fulfilment of the Convention when one State Party alleges that another State Party has committed genocide³⁹. In such situation, the Court must verify the factual basis for the allegation and whether

³⁷ *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.

³⁸ Order on Provisional Measures (n 9), p. 11, para. 45;

³⁹ *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.

it is or not satisfied that there were acts of genocide committed in violation of the Convention.⁴⁰

46. As noted above, the concepts of “dispute” and “fulfilment” in Article IX are sufficiently broad to allow the Court to issue a declaration that no genocide has taken place in a given case or that the applicant State bears no responsibility for a breach under the Convention, as alleged by another State.
47. Moreover, the wording of Article IX confirms that “any of the parties” to the dispute may seize the Court. The gravity of the crime of genocide entails that any accusation of commission of such crime is to be taken seriously, and may negatively affect the credibility of the State – and of its representatives – that has been accused of genocide. Genocide is an odious scourge of concern to the international community as a whole. Thus, in a dispute concerning whether a State has engaged in a conduct contrary to the Convention, the State accused of such conduct should have the same right to submit the dispute to the Court as the State that has made the accusation.
48. In addition, the *erga omnes partes* character of the Convention speaks 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. 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 fundamental mechanism for redress against abuses of international law.

⁴⁰ *Case Concerning Legality of Use of Force (Yugoslavia v. Portugal)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 656, at pp. 669-670, paras. 35-40. Later, the ICJ declined its jurisdiction on the ground that Serbia and Montenegro did not have access to the Court, at the time of the institution of the proceedings, under Article 35 of the Statute (see ICJ, *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Preliminary Objections, Judgment of 15 December 2004, I.C.J. Reports 2004, p. 1160).

Conclusion

For the reasons set out above, the Portuguese Republic is convinced that the Court has jurisdiction to decide on the merits of the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation: 32 States intervening).

Therefore, the Portuguese Republic respectfully submits that the Court should decide that it has jurisdiction.

Respectfully,

Clara Nunes dos Santos



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