Before the
INTERNATIONAL COURT OF JUSTICE

WRITTEN OBSERVATIONS ON THE SUBJECT-MATTER OF THE INTERVENTION UNDER ARTICLE 63 OF THE STATUTE OF THE COURT BY THE REPUBLIC OF CYPRUS

In the case concerning

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

3 July 2023

WRITTEN OBSERVATIONS ON THE SUBJECT-MATTER OF THE INTERVENTION UNDER ARTICLE 63 OF THE STATUTE OF THE COURT BY THE REPUBLIC OF CYPRUS

I. INTRODUCTION

1. The Republic of Cyprus (the 'Republic' or 'Cyprus') hereby submits its written observations on the subject-matter of its Intervention under Article 63 of the Statute of the International Court of Justice (the 'Court') in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*.

2. On 13 December 2022, the Republic of Cyprus availed itself of the right of intervention conferred upon it by the Statute of the Court (the 'Statute') by filing a declaration of intervention under Article 63 of the Statute. The Russian Federation having raised objections to the admissibility of the Republic's declaration of intervention, the Republic submitted written observations on the admissibility of its declaration on 13 February 2023.

3. On 5 June 2023, the Court delivered a single Order on the admissibility of all declarations of intervention submitted, including the declaration of the Republic of Cyprus.[1] In its Order, the Court decided that the Republic's declaration was admissible, and 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.[2]

4. In the section that follows, the Republic of Cyprus will set out its written observations on the construction of Articles IX and I of the Convention on the Prevention and Punishment of the Crime of Genocide (the 'Genocide Convention' or the 'Convention')[3]. Article IX is the compromissory clause of the Convention and its construction is evidently in question at the present stage of the proceedings. Article I is a provision that is 'relevant to determining jurisdiction *ratione materiae*' in the case, and thus is 'in question in the preliminary objections phase'.[4] In its construction of the provisions in question, the Republic of Cyprus is guided by the general rule of interpretation in Article 31 of the Vienna Convention on the Law of Treaties, which the Court has already stated on numerous occasions reflects customary international law.[5]

II. CONSTRUCTION OF ARTICLES IX AND I OF THE GENOCIDE CONVENTION

5. The Republic of Cyprus makes two submissions on the construction of Articles IX and I of the Genocide Convention.

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1 *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, *ICJ Reports 2023*.

2 Ibid, paragraph 102(1) and (3).

3 Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

4 Order of 5 June 2023, n 1, paragraph 74.

5 See, eg, *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment of 13 December 1999, *ICJ Reports 1999*, p 1059, paragraph 18.

6. First, the scope of Article IX of the Convention is so broad as to encompass 'non-violation' disputes, which are disputes about the proper interpretation, application, and fulfilment of the Genocide Convention.

7. Second, the scope of Article IX of the Convention encompasses disputes as to compliance with the obligations to prevent and punish genocide under Article I.

A. The Scope of Article IX encompasses 'non-violation' disputes

8. Article IX, the compromissory clause of the Convention, provides:

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

9. A 'dispute' must thus exist between the parties to the Genocide Convention which 'relates' to the 'interpretation, application or fulfilment' of the Genocide Convention for the Court to be able to exercise its jurisdiction 'at the request of any of the parties to the dispute'.

10. The jurisprudence of the Court as to the existence of a dispute is well developed. As per the Permanent Court of International Justice in *Mavrommatis*, '[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests' between parties.[6] The Court has further elaborated that in order for a dispute to exist, the claim of one party must be shown to be 'positively opposed' by the other,[7] and it must further be shown that the respondent 'was aware, or could not have been unaware, that its views were "positively opposed" by the applicant'.[8] It is noted in this respect that, as the Court recalled in its Provisional Measures Order, any exchanges with another State do not need to expressly refer to a specific treaty, as long as they do refer 'to the subject-matter of the treaty with sufficient clarity to enable the State against which the claim is made to ascertain that there is, or may be, a dispute with regard to that subject matter'.[9] It is further noted that the existence of a dispute may be inferred from the silence of the respondent towards claims made by the applicant, if such silence can be construed as a rejection of the claims.[10] The question of the existence of a dispute is one that falls to be 'objectively determined' by the Court.[11]

11. The dispute must 'relate' to the 'interpretation, application or fulfilment' of the Genocide Convention. The requirement that the dispute 'relate to' (rather than 'concern' or 'arise

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6 *Mavrommatis Palestine Concessions*, Judgment of 30 August 1924, *PCIJ Ser A No 2*, p 11.

7 *South West Africa (Ethiopia v South Africa; Liberia v South Africa)*, Preliminary Objections, Judgment of 21 December 1962, *ICJ Reports 1962*, p 328.

8 *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, Preliminary Objections, Judgment of 5 October 2016, *ICJ Report 2016*, p 850, paragraph 41.

9 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order on the Request for Provisional Measures of 16 March 2022, *ICJ Reports 2022*, paragraph 44.

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

11 *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom)*, n 8, p 849, paragraph 39.

out of') the interpretation, application or fulfilment of the Convention is a first indication that the parties intended the compromissory clause of Article IX to be broad in scope. This is further supported by the unusual complement of 'fulfilment' to 'interpretation' and 'application', as well as by the indicative mention of disputes relating to the responsibility of a State for genocide being 'included', itself an 'unusual feature'.[12] These 'unusual' features may not add much to the interpretation of Article IX, in the sense that a similar interpretation of the provision as the one advanced here could be reached (and, according to Cyprus, should be reached) even in their absence. However, they do serve as a clear indication of the intention of the States parties to draft a compromissory clause which would be construed in as broad a manner as possible.

12. The broad scope of Article IX must be seen to encompass what are referred to as 'non-violation complaints'.[13] If a State party to the Convention can assert that another is violating the Convention and can thus also bring a claim before the Court on the basis of Article IX (assuming that the assertion is positively opposed, ie that there is a dispute), it must be also that a State party accused of violating the Convention and positively opposing this accusation may avail itself of the same right. The latter must be able to request the Court to determine that any accusations of violations of the Convention against it are ill-founded. A State party must be afforded a possibility to 'clear its name', and Article IX provides it exactly with that possibility: the relevant dispute is clearly one that 'relates to' 'the responsibility of a State for genocide'.

13. This interpretation is supported by the fact that the compromissory clause allows submission of a dispute to the Court by *any* of the parties to the dispute, and not only, eg, by the party alleging a violation of the Convention. The State party subjected to such an allegation has an equal right to submit the dispute to the Court under Article IX.

14. The construction advanced in the preceding paragraphs is particularly on point when an allegation of genocide, which is disputed, further serves as a basis for resort to the use of force in response to the alleged infraction, ie to subject the accused to unlawful action. While a State party should be able, as discussed above, to 'clear its name' whenever a disputed allegation against it is made, the fact that relevant allegations may then be used to justify further measures, including the use of force, throws this right to bring a 'non-violation complaint' into sharp relief. If the compromissory clause could not be relied upon to bring such matters to the Court, its effectiveness would be severely curtailed.

15. While the matters raised in the preceding paragraph are further discussed in section B below, it is worth making one final point: in the decentralised legal order, every State determines for itself, and *at its own risk*, the legal situation between itself and any other State.[14]

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[12] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Merits, Judgment of 26 February 2007, *ICJ Reports 2007*, p 114, paragraph 169.

[13] See the expression of Vice-President Gevorgian in his Declaration, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)*, Order on the Request for Provisional Measures of 16 March 2022, *ICJ Reports 2022*, paragraph 8.

[14] *Air Service Agreement of 27 March 1946 between the United States of America and France*, Decision of 9 December 1978, *Reports of International Arbitral Awards*, Vol XVII, p 443, paragraph 81: 'each State establishes for itself its legal situation vis-à-vis other States'; *Lac Lanoux (Espagne, France)*, sentence du 16 novembre 1957, *Reports of International Arbitral Awards*, Vol XII, p 310, paragraph 16: 'il appartient à chaque État d'apprécier, raisonnablement et de bonne foi, les situations et les règles qui le mettent en cause'; but: 'en exerçant sa compétence, elle *prend le risque* de voir sa responsabilité internationale mise en cause s'il est établi qu'elle n'a pas agi dans la limite de ses droits' [emphasis added].

When a State 'forms its own appraisal of the situation'[15] with regard to genocide, however, the compromissory clause of Article IX allows any State party to the Convention implicated in such 'appraisal' to call upon the Court to test that 'appraisal' by another State party. The Court may find that that 'own appraisal' was not based on a proper interpretation, application, and fulfilment of the Convention, even to the extent that the interpretation and performance of the Convention by the State forming that 'appraisal' was not in good faith.[16] In such an instance, the State forming that 'own appraisal' is in breach of the Convention, it has acted beyond the limits of its rights under the Convention,[17] and thus the risk it has taken in 'forming its own appraisal' of the legal situation comes to bear.

16. In this connection, a State party to the Convention may not hide behind its 'own appraisal' being vague or inconsistent in order to avoid having that 'appraisal' tested under Article IX of the Convention. Once the spectre of genocide is raised in a State's 'own appraisal' of the legal situation, and even more so once that 'appraisal' serves as the basis for unilateral action in purported reaction to genocide (on which see section B below), the subject-matter of the Convention has been implicated with sufficient clarity, and the possibility of litigation under Article IX arises.[18] Any other interpretation of the compromissory clause would incentivise States to be as vague or as incoherent as possible in their exchanges, in order to shield themselves from potential litigation and final determination of the legal situation by the Court.

B. The Scope of Article IX encompasses disputes relating to the obligations to prevent and punish under Article I

17. A claim (or 'appraisal') that a serious risk of genocide exists or that genocide is taking place 'activates' the obligations of States parties to the Convention to prevent and punish the crime of genocide, in accordance with its Article I. Article I provides:

> 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.

18. In its 2007 Judgment in the *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, the Court found that 'a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.[19] What the Court was *not* dealing with in that case, however, is the instance where a State *claims* (rather than 'learns of') the existence of a serious risk that genocide will be committed (or is being committed), thereby, in its view, activating its obligation under the Convention to prevent the genocide.

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15 See for this expression: *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, Merits, Judgment of 27 June 1986, *ICJ Reports 1986*, p 134, paragraph 268.

16 See Articles 26 and 31(1) of the Vienna Convention on the Law of Treaties.

17 *Lac Lanoux*, n 14, p 310, paragraph 16: 'elle prend le risque de voir sa responsabilité internationale mise en cause s'il est établi qu'elle *n'a pas agi dans la limite de ses droits*' [emphasis added].

18 See also paragraph 10 of these written observations.

19 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, n 12, p 222, paragraph 431.

19. Cyprus submits that, in such a case, the action taken by a State party to the Convention in purported performance ('fulfilment') of its obligation to prevent genocide under the Convention, must be able to be tested against the requirements of the Convention regarding the obligation (and thus also power, the outer limits of the right) of a State party to prevent genocide. To put it simply: much like in alleging genocide, when taking unilateral action to purportedly prevent it, a State party 'appraises' its own legal position and acts at its own risk.[20] This means that it may be challenged as to its 'appraisal' and the unilateral action it is taking, and it runs the risk of being found to have misinterpreted the Convention and to have misapplied it to the facts. Any dispute, thus, as to the scope of the obligation to prevent genocide and as to whether certain actions or omissions fall within the scope of the obligation to prevent genocide is a dispute 'relating to' the interpretation, application, or fulfilment of the Convention. The Court has subject-matter jurisdiction over such a dispute under Article IX of the Convention, which brings the risk assumed by the unilaterally acting State to bear.

20. What the obligation of prevention entails is of crucial importance in this respect. The Court has been unambiguous in stating that the obligation, being 'one of conduct and not one of result',[21] requires States 'to employ all means reasonably available to them, so as to prevent genocide so far as possible'.[22] In that, the obligation to prevent is a positive obligation, an obligation to take action when there is at least a serious risk that genocide will be committed. As discussed in section A of these written observations, the question of whether such a serious risk exists, or if genocide is being committed, is itself a matter relating to the interpretation and application of the Convention.

21. Even if, however, a claim that a serious risk that genocide will be committed, or that genocide is being committed, were to be substantiated (and, according to the Court, this would require evidence that is fully conclusive),[23] the question of the content and scope of the obligation to prevent under Article I would remain. An examination of the scope of the obligation will answer the question whether the Convention allows a State party to the Convention to take action that is not otherwise permitted in international law.

22. In clarifying the scope of the obligation to prevent, the Court has already determined that 'it is clear that every State may only act within the limits permitted by international law'.[24] This is because the obligation to prevent also grants a co-extensive permission, a right to a State party to the Convention to act in order to prevent genocide. Or, to be more specific, it turns the otherwise extant faculty that a state has under international law to react to a breach of international law when injured by it,[25] to a more specific and limited obligation. But the right and obligation to act under Article I of the Convention is circumscribed by that provision as being no more extensive than the faculty to react to a violation of international law under international law.

23. It is for this reason that an analogy with countermeasures is instructive in the instance. Countermeasures are of course a faculty granted by international law to an injured State in

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20 See paragraph 15 of these written observations.

21 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, n 12, p 221, paragraph 430.

22 ibid.

23 ibid, p 129, paragraph 209.

24 ibid.

25 See Articles 42, 48, 49 of the Articles on the Responsibility of States for Internationally Wrongful Acts, *Yearbook of the International Law Commission 2001*, Vol II (Part Two).

response to an internationally wrongful act. Such countermeasures, however, can never involve the use of armed force in violation of the Charter of the United Nations.[26] Whatever 'action' a State may take in order to respond to an internationally wrongful act, such action must remain within the limits of international law, and in particular Article 2, paragraph 4, of the Charter of the United Nations.

24. It would be more than peculiar if Article I of the Genocide Convention, in turning a general faculty under international law into an obligation under the Convention, were to extend the powers of States parties to the Convention beyond the limits otherwise applicable in international law, without at least some express indication to this effect. It must be the case then that the appropriate interpretation of the obligation of prevention under Article I is that in fulfilling that obligation, States parties remain limited by the prohibition of the use of force in international relations under Article 2, paragraph 4, of the UN Charter and general international law.

25. This is further the case, given that Article VIII of the Convention reminds States parties of the possibility of calling 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'. The provision is meant to safeguard the collective security system established by the Charter. The Preamble further affirms the requirement of 'international co-operation'.

26. The construction put forward in the preceding paragraphs fits well with the jurisprudence of the Court regarding the protection of human rights under treaties and more generally regarding recourse to armed force in response to 'own appraisals' or perceived wrongs. In *Military and Paramilitary Activities In and Against Nicaragua*, the Court stated in no uncertain terms that 'the use of force could not be the appropriate method to monitor or ensure [...] respect [for human rights]'.[27] And in its very first contentious case, the present Court had this to say as to forcible intervention:

> The Court can only regard the alleged right of intervention as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law. Intervention [...] from the nature of things, [...] would be reserved for the most powerful States [...].[28]

27. In this connection, it is worth citing the Court further. In its 1951 Advisory Opinion on *Reservations to the Genocide Convention*, the Court held that the Convention 'was manifestly adopted for a purely humanitarian and civilising purpose'.[29] In *Military and Paramilitary Activities In and Against Nicaragua*, the Court held further that 'a strictly humanitarian objective cannot be compatible' with measures amounting to the use of armed force.[30]

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[26] See Article 50(1)(a) of the Articles on the Responsibility of States for Internationally Wrongful Acts, and Commentary thereto, *Yearbook of the International Law Commission 2001*, n 25, p 132, paragraphs 4–5.

[27] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, n 15, p 134, paragraph 268.

[28] *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v Albania)*, Merits, Judgment of 9 April 1949, *ICJ Reports 1949*, p 35.

[29] *Reservation to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion of 28 May 1951, *ICJ Reports 1951*, p 23.

[30] *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America)*, n 15, pp 134–5, paragraph 268.

28. With this in mind, the Republic of Cyprus submits that questions as to the scope of unilateral action allowed under international treaties constitute an existential matter for itself and many other States. As a small State, the Republic of Cyprus relies for its security on the global rules-based order with the United Nations Charter and adherence to international law as its core. Given its relatively short but rather tumultuous history, it is an existential matter for the Republic of Cyprus that provisions in conventions and treaties not be left to the 'own appraisal' of any State party in order to justify the use of force against other States, but be properly construed by States and ultimately by this Court, setting out the parameters of such provisions in accordance with international law. Questions as to the scope of unilateral action allowed under international treaties also constitute a matter that relates to the interpretation and application of these treaties against the background of general international law, in the sense of Article 31(3)(c) of the Vienna Convention on the Law of Treaties. In view of this, and specifically with respect to the Genocide Convention, the Republic of Cyprus submits that a dispute regarding the scope and content of the obligation to prevent genocide under Article I of the Convention, and thus regarding the scope of any unilateral action permitted under this provision, is clearly a dispute 'relating to' the interpretation, application, or fulfilment of the Convention. It lies within the subject-matter jurisdiction of the Court under Article IX of the Convention.

III. CONCLUSION

29. In summary, the Republic of Cyprus submits that Article IX of the Convention is so broad as to encompass 'non-violation' complaints, that is to say, requests by a State party to adjudge and declare that that State party has not violated the Convention, when that position is positively opposed by another State party. This is a matter of the proper construction of the obligation not to commit genocide implied in Article I.

30. The Republic of Cyprus further submits that Article IX of the Convention encompasses disputes as to the proper scope of the obligation of prevention under Article I of the Convention. The Republic of Cyprus submits that no action taken in response to a (real or perceived) breach of a treaty could ever lawfully involve the use of armed force in violation of Article 2, paragraph 4, of the United Nations Charter. This is true also for determining the scope of the obligation to prevent under Article I, as the Court itself has stated.

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