

APPLICATION AND INTERPRETATION OF THE GENOCIDE CONVENTION IN THE RECENT JURISPRUDENCE OF THE INTERNATIONAL COURT OF JUSTICE: ISSUES OF JURISDICTION

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The author analyses certain questions regarding the jurisdiction of the International Court of Justice under the Convention on the Prevention and Punishment of the Crime of Genocide in the most recent cases deliberated before the Court. Special attention is given to the decisions in the cases The Gambia v. Myanmar and Ukraine v. Russian Federation in which the Court discussed issues of a preliminary character relevant for the establishment of its (prima facie) jurisdiction. Hence, the author particularly addresses the questions of the existence of a dispute between the parties, the ratione personae jurisdiction of the Court, the erga omnes character of obligations under the Convention, jus standi of the parties before the Court, the relationship between Articles VIII and IX of the Convention, and the problem of the use of force for the purpose of preventing or punishing genocide. In the author's opinion, despite the fact that it has not yet been decided on the merits in the analysed cases, the decisions made so far are significant in two ways. On the one hand, they strengthen the Convention in terms of reaffirmation of the prerequisites for the establishment of the jurisdiction of the Court, and, on the other, they contribute to the preservation of the fundamental principles of international law and the rules on State responsibility, as well as to the prevention of future acts of genocide.

Keywords: *Convention on the Prevention and Punishment of the Crime of Genocide; the International Court of Justice; the jurisdiction of the Court; the case of The Gambia v. Myanmar; the case of Ukraine v. Russian Federation.*

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1. INTRODUCTION

The adoption of the Convention on the Prevention and Punishment of the Crime of Genocide¹ in 1948 (hereinafter: Genocide Convention, Convention) is considered a tremendous success of the international community that had survived the horrors of World War II, in terms of condemning the most horrific crimes that certain groups of people had suffered, setting the legal definition of the crime of genocide, and providing for the legal prerequisites for the international responsibility of States and individuals for genocide. A total of over 150 States Parties² that have ratified or acceded to the Genocide Convention might indicate that the noble goal of States Parties to liberate mankind from “such an odious scourge”³ expressed in the Preamble, as well as the idea that this atrocious crime must be prevented, are truly shared between nations and States which are devoted to their duty to prevent it and punish it.⁴

Meanwhile, we have witnessed grave atrocities committed in Cambodia, Rwanda, Bosnia and Herzegovina, and most recently in Myanmar, as well as serious violations of human rights in Ukraine. Although the International Court of Justice (hereinafter: ICJ, the Court) had the unfortunate task of dealing with the application and interpretation of the Genocide Convention connected to armed conflicts conducted on the territory of the former Yugoslavia during the 1990s, its judgments contributed to the clarification of various issues concerning its jurisdiction, as well as the responsibility of States for genocide under the

¹ Convention on the Prevention and Punishment of the Crime of Genocide, 1948, UNTS, vol. 78, 1951.

² The most recent information on the status of the Genocide Convention in State territories of the UN Member States is available at United Nations Office on Genocide Prevention and the Responsibility to Protect, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (accessed 1 June 2023).

³ Genocide Convention, *op. cit.*, note 1, Preamble.

⁴ *Ibid.*, Article I. According to Article V, “The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention, and, in particular, to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in Article III.” The obligation not to commit genocide, as well as to prevent it and punish its perpetrators, is also considered as a norm of international customary law which, therefore, binds all States whether or not they have ratified the Convention. See more in Wyler, E.; Castellanos-Jankiewicz, L. A., *State Responsibility and International Crimes*, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Routledge Taylor & Francis Group, London and New York, 2011, pp. 397-398. See also United Nations Office on Genocide Prevention and the Responsibility to Protect, <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-ENG.pdf> (accessed 10 June 2023).

Convention. However, apart from the aforementioned legal value of the judgments in the cases *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007 and *Croatia v. Serbia* in 2015,⁵ one might ask whether legal norms and judicial mechanisms at the national and international level are efficient enough to provide remedy for the most serious violations of human rights and, even more, to prevent future unthinkable crimes which certainly represent a defeat for humanity. One might also ask if the correct interpretation of the Genocide Convention by the ICJ has any weight when it comes to influencing the governments of States, State leaders, and non-state actors to act within the boundaries of the law and human rights protection. Moreover, can the world court in the cases currently being deliberated before it make a difference and, if the facts presented by the parties point to such a conclusion, for the first time declare a State responsible for genocide and truly contribute to the prevention of future commissions of such a crime?

These questions are yet to be answered since the Court still has not decided on the merits in the most recent cases on the application and interpretation of the Genocide Convention. However, in the author's opinion, issues concerning the jurisdiction of the Court under the Genocide Convention are of particular importance for the effective application of this Convention and, ultimately, for the establishment of State responsibility for genocide. In this context, special attention in this paper is given to the decisions made in the cases *The Gambia v. Myanmar* and *Ukraine v. Russian Federation* in which the Court discussed issues of a preliminary character relevant for the establishment of its (*prima facie*) jurisdiction. Hence, the author particularly addresses questions such as the *ratione personae* jurisdiction of the Court, the existence of a dispute between the parties, the relationship between Articles VIII and IX of the Convention, the *erga omnes* character of obligations under the Convention, the *jus standi* of the parties, and the problem of the use of force for the purpose of preventing or punishing genocide. In the author's opinion, despite the fact that it has not yet been decided on the merits in the analysed cases, the decisions made so far are significant in two respects. On the one hand, they strengthen the Convention in terms of affirmation of the Court's interpretation of its provisions given in its previous decisions, and, on the other, they might have a significant impact on the efficient application of the Genocide Convention in the future. This applies particularly in terms of clarification of the prerequisites for the establishment of the jurisdiction of the Court, preservation of the fundamental

⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 26 February 2007; *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports, 3 February 2015.

principles of international law and the rules on State responsibility, as well as in terms of the prevention of future acts of genocide.

2. THE GAMBIA V. MYANMAR

2.1. Case Overview

On 11 November 2019, The Gambia filed an application instituting proceedings before the ICJ and a request for provisional measures against Myanmar.⁶ The Gambia bases the jurisdiction of the Court on Article IX⁷ of the Genocide Convention which both States are parties to.⁸ Furthermore, The Gambia grounds its *jus standi* before the Court on the prohibition of genocide as a *jus cogens* norm of international law and the obligations under the Convention being owed *erga omnes partes*.⁹ In its application, The Gambia accuses Myanmar of being responsible for violations of its obligations under the Genocide Convention, particularly for: committing genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempting to commit genocide, failing to prevent genocide, failing to punish genocide, as well as failing to enact the necessary legislation to give effect to the provisions of the Convention and to provide effective penalties for persons guilty of genocide.¹⁰

According to the facts presented in the application, The Gambia claims that Myanmar is responsible for committing systematic attacks on and persecution of the Rohingya, one of the ethnic and religious minorities living in Myanmar (in Myanmar's Rohingya State),¹¹ particularly by denial of legal rights to members of

⁶ *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, ICJ Reports, 11 November 2019.

⁷ Article IX prescribes: "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". See the Genocide Convention, *op. cit.*, note 1.

⁸ Myanmar deposited its instrument of ratification on 14 March 1956, while The Gambia deposited its instrument of accession on 29 December 1978. ICJ Reports (2019), *op. cit.*, note 6, para. 17.

⁹ *Ibid.*, para. 20.

¹⁰ *Ibid.*, para. 111.

¹¹ *Ibid.*, paras. 26-28. According to official data of the Embassy of Myanmar, there are eight major national ethnic races and 135 different ethnic groups in Myanmar. See Embassy

the Rohingya group and of conducting hate propaganda against them.¹² However, according to the application, the persecution of the Rohingya population escalated dramatically in October 2016 with the commencement of brutal “clearance operations” by the military and security forces of Myanmar, which eventually led to genocidal acts against the Rohingya group in the period from 2016 to 2018.¹³ The Gambia submitted a voluminous document with evidence in support of its claims, asserting that these acts were committed with the intent to destroy, in whole or in part, the Rohingya group as such, thus fulfilling the elements of genocide under the Genocide Convention (Article II).¹⁴

As previously said, The Gambia bases the jurisdiction of the ICJ in Article IX of the Convention, noting in addition that neither party has made a reservation in relation to this Article. On the other hand, Myanmar bases one of its objections to the Court’s jurisdiction on the argument that, although no reservation has been made to Article IX, Myanmar’s reservation to Article VIII precludes the seising of the Court by any contracting party to the Convention that is not an injured State.¹⁵ Further, The Gambia demonstrates in its application that there

of Myanmar, <https://www.embassyofmyanmar.be/ABOUT/ethnicgroups.htm> (accessed 1 June 2023). The Rohingya minority is, according to the UN, the most persecuted minority in the world. See Sidhu, J. S., *The Rohingya: Myanmar’s Unwanted Minority*, *European Yearbook of Minority Issues*, vol. 18 (2019), p. 236.

¹² ICJ Reports (2019), *ibid.*, paras. 29–46. For more on the evidence provided by the UN Fact-Finding Mission on discriminatory policies carried out by Myanmar’s authorities, restricting citizenship rights of the Rohingya, their freedom of movement, and family rights, see General Assembly, Human Rights Council, *The Report of the Independent International Fact-Finding Mission on Myanmar*, UN Doc. A/HRC/39/64, 12 September 2018, paras. 21 *et seq.* The history of the status of the members of the Rohingya ethnic group in Myanmar (Burma) from 1948 when Burma gained independence from Great Britain are presented in Alam, J., *The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law*, *International Journal on Minority and Group Rights*, vol. 25 (2018), no. 2, pp. 157–182.

¹³ ICJ Reports (2019), *ibid.*, para. 47. See also *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Memorial by The Gambia, ICJ Reports, 23 October 2020, paras. 5.1–11.103. For more on the so-called “clearance operations”, see Becker, M. A., *The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the Gambia v Myanmar at the International Court of Justice*, *Melbourne Journal of International Law*, vol. 21 (2020), no. 2, pp. 430–431; UN Doc. A/HRC/39/64 (2018), *op. cit.*, note 12, para. 32.

¹⁴ ICJ Reports (2020), *ibid.*, para. 1.2. See also Article II of the Genocide Convention, *op. cit.*, note 1.

¹⁵ *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections of the Republic of the Union of Myanmar, ICJ Reports, 20 January 2021, paras. 355, 373–378, 400, 443, 485. Article VIII reads as follows: “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

is a dispute between the parties relating to the interpretation and application of the Genocide Convention and the fulfilment by Myanmar of its obligations to prevent genocide.¹⁶ Myanmar responded that there was no dispute between the Gambia and Myanmar on the date of the filing of the application within the meaning of Article IX, claiming that the requirements for the existence of a dispute, which the Court established in its previous case law,¹⁷ should be even more rigorously interpreted in the case of alleged violations of *erga omnes* obligations, where States not specially affected by the violations also have the right to bring a claim before the Court.¹⁸

Apart from the invocation of Article IX of the Genocide Convention and the existence of a dispute within the meaning of this article, The Gambia further explains in its application the foundation of its *jus standi in judicio*. It recalls the *jus cogens* character of the prohibition of genocide as well as the *erga omnes* and *erga omnes partes* character of the obligations owed under the Convention, which the Court has confirmed on several occasions.¹⁹ On the other hand, Myanmar denies The Gambia's standing to bring the case before the Court, arguing that, in comparison to some previous cases (*Bosnia and Herzegovina v. Serbia and Montenegro* and *Croatia v. Serbia*), in this case the applicant has no link to the facts of the case, there is no territorial connection between The Gambia and the alleged violations of the Genocide Convention in Myanmar, and neither is there a link between the purported offenders or the victims with The Gambia.²⁰ Moreover, Myanmar

appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III", Genocide Convention, *op. cit.*, note 1.

¹⁶ ICJ Reports (2019), *op. cit.*, note 6, paras. 20-24; ICJ Reports (2020), *op. cit.*, note 13, paras. 2.7.-2.21.

¹⁷ See, for example, *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports, 1 April 2011, paras. 29-30; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports, 20 July 2012, para. 46; *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports, 5 October 2016, paras. 36-43.

¹⁸ Myanmar explains that if this were not so, potentially dozens of States who have no particular connection to the facts of a certain situation would be in a position to initiate separate proceedings before the Court against the same respondent State in relation to the same facts, which would jeopardise the international dispute settlement system. See more in ICJ Reports (2021), *op. cit.*, note 15, para. 491.

¹⁹ ICJ Reports (2019), *op. cit.*, note 6, paras. 15, 123, 127; ICJ Reports (2020), *op. cit.*, note 13, paras. 2.11, 2.23, 2.26.

²⁰ ICJ Reports (2021), *op. cit.*, note 15, para. 212.

contends that Article IX does not grant non-injured Contracting States standing to claim alleged violations of the Convention.²¹

2.2. Judgment on the Preliminary Objections

After receiving the preliminary objections by the respondent and written observations²² on these objections by the applicant, the Court delivered the judgment on the preliminary objections²³ on 22 July 2022. In this paragraph, we will present the key issues considered by the Court in the judgment, which are crucial for the determination of the jurisdiction of the Court in this case concerning the application and interpretation of the Genocide Convention.

As regards the issue of the applicant (not) being the “real applicant” in this case, the Court refers to Myanmar’s argument that the Court lacks jurisdiction, or that the application is inadmissible, because the “real applicant” in the proceedings is the OIC (Organization of Islamic Cooperation), an international organisation which cannot be a party before the Court.²⁴ Namely, Myanmar argues that The Gambia, as the nominal applicant, actually acts on behalf of an entity other than a State, “as an organ, agent or proxy” of the OIC, with the aim of circumventing the limitations of the *ratione personae* jurisdiction of the Court and invoking the compromissory clause of the Genocide Convention.²⁵ The Gambia contends that the motivation or another entity’s support for the commencement of the proceedings are irrelevant to jurisdictional matters.²⁶

The Court rejected Myanmar’s first preliminary objection by clarifying that the legal bases for its *ratione personae* jurisdiction are Articles 34 and 35 of the Statute.²⁷ Therefore, The Gambia, as a UN Member State and an *ipso facto* party

²¹ *Ibid.*, paras. 215 *et seq.*

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar, ICJ Reports, 20 April 2021.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment on the Preliminary Objections, ICJ Reports, 22 July 2022.

²⁴ *Ibid.*, para. 34. According to Article 34, para. 1 of the ICJ Statute: “Only States may be Parties in cases before the Court”. See the Statute of the International Court of Justice, available at United Nations, <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice> (accessed 5 June 2023).

²⁵ ICJ Reports (2022), *ibid.*, paras. 35–37.

²⁶ *Ibid.*, paras. 38–41.

²⁷ Articles 34 and 35, para. 1 of the ICJ Statute, *op. cit.*, note 24. According to Article 93, para. 1 of the UN Charter: “All Members of the United Nations are *ipso facto* Parties to the

to the statute of the ICJ, meets the required conditions for being a party before the Court.²⁸ With regards to the question of the “real applicant”, the Court dismissed Myanmar’s objection, arguing that political motives or a proposal of an international organisation to a State to initiate proceedings before the Court do not abolish its status as applicant before the Court.²⁹

The second preliminary objection concerned the question of the existence of a dispute on the date of the filing of the application instituting proceedings. According to Myanmar, the documents and statements provided by The Gambia in its application may not serve as evidence in this context, as they, *inter alia*, did not emanate from Gambian official organs, and Myanmar could not have been aware of any specific legal claims considering its responsibility for the violation of the Convention.³⁰ The Gambia’s position in these matters can be subsumed in the following: the threshold for the existence of a dispute that Myanmar is trying to introduce is too high and has no support in the Court’s jurisprudence;³¹ the respondent’s awareness of the applicant’s opposed views is sufficient to establish the existence of a dispute; the evidence submitted supports the conclusion of the existence of a dispute between the parties at the time of the filing of the application.³²

The Court rejected Myanmar’s second preliminary objection regarding the (non)-existence of a dispute by recalling its established jurisprudence. The Court explained that the dispute can be defined as “a disagreement on a point of law or fact, a conflict of legal views or of interests” between parties.³³ Further, the

Statute of the International Court of Justice”. See Charter of the United Nations, available at United Nations, <https://www.un.org/en/about-us/un-charter/> (accessed 5 June 2023).

²⁸ ICJ Reports (2022), *op. cit.*, note 23, para. 42.

²⁹ *Ibid.*, para. 44. See also *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment on the Jurisdiction of the Court and Admissibility of the Application, ICJ Reports, 20 December 1988, para. 52. Some authors refer to this kind of situation as “strategic litigation”, explaining this term as a tool which, for example, international organisations use to promote their own goals. Ramsden, M., *Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice*, *Harvard Negotiation Law Review*, vol. 26 (2021), no. 2, pp. 154-157.

³⁰ ICJ Reports (2022), *ibid.*, paras. 52-54.

³¹ The Gambia claims that the standards of specificity in the claim proposed by Myanmar would significantly restrict access to the Court by requiring States fully to develop their legal and factual claims prior to the seising of the Court. *Ibid.*, para. 57.

³² *Ibid.*, paras. 59-62.

³³ *Ibid.*, para. 63. An identical definition is given in the case law of the Permanent Court of International Justice (PCIJ): *Mavrommatis Palestine Concessions*, Judgment No. 2, PCIJ Reports, Series A, No. 2, 30 August 1924, p. 11.

Court recalled its previous argumentation that “the two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”,³⁴ and also that a reference to a specific treaty or to its provisions is not required in this regard.³⁵ For the determination of the existence of a dispute, the Court relied not only on the date of the submission of the application, but also on the subsequent conduct of the parties.³⁶ By taking all the submitted evidence into account, the Court concluded that a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention existed between the parties at the time of the filing of the application by The Gambia.³⁷

The interpretation of the reservation to Article VIII of the Genocide Convention filed by Myanmar and its relationship with Article IX, as well as the legal effects thereof, were discussed in the third preliminary objection before the Court. Namely, Myanmar contends that the wording of Article VIII that “[a]ny Contracting Party may call upon the competent organs of the United Nations” includes the Court and forms the basis for its jurisdiction, and that there is nothing in the article that limits the scope of its application to specific (only political) organs of the UN.³⁸ Thus, the difference in the scope of application of Article VIII and Article IX of the Convention lies in the fact that Article VIII governs the seisin of the Court, while Article IX governs only the Court’s jurisdiction.³⁹ Therefore, the reservation made has the effect of precluding the seising of the Court by The Gambia.

The Court concluded that it is necessary to read Article VIII as a whole and not merely the words “competent organs of the United Nations”.⁴⁰ In this sense, the phrase “to take such action (...) as they consider appropriate” suggests that these

³⁴ See also *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility Judgment, ICJ Reports, 5 October 2016 (I), para. 34.

³⁵ The exchanges between the Parties must refer to a subject matter of the treaty with sufficient clarity to enable the State against which the claim is made to identify that there is a dispute. ICJ Reports (2022), *op. cit.*, note 23, para. 72. See also ICJ Reports (2011), *op. cit.*, note 17, para. 30.

³⁶ ICJ Reports (2022), *ibid.*, paras. 64–76.

³⁷ *Ibid.*, para. 77.

³⁸ *Ibid.*, paras. 80–81.

³⁹ *Ibid.*, para. 81.

⁴⁰ The Court applied the rules of customary international law on treaty interpretation, as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties. See *The Vienna Convention on the Law of Treaties*, 1969, UNTS, vol. 1155, 1980.

organs exercise discretion in determining the action that should be taken with a view to “the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III”. The Court continues by stating that the function of the competent organs within the meaning of Article VIII is thus different from that of the Court, whose function is to decide in accordance with the rules of international law pursuant to Article 38 of its statute.⁴¹ The Court concluded that the purpose of Article VIII is to address political questions rather than to determine international responsibility for genocide.⁴² Further, the Court explained that, unlike Article IX, the application of Article VIII is not dependent on the existence of a dispute between the parties.⁴³ Hence, since Article VIII does not govern the seisin of the Court, Myanmar’s reservation to that provision has no relevance in this case.⁴⁴ The third preliminary objection of Myanmar was thus rejected.

Crucial issues of the fourth preliminary objection concerned the *jus standi* of The Gambia to bring this case before the Court, the differentiation between injured and non-injured States (not) having the right to present a claim before the Court, and the question of legal interest of the applicant to initiate proceedings under the Genocide Convention against Myanmar.⁴⁵ The Gambia, on the other hand, bases its right to bring a claim before the Court and to institute proceedings against Myanmar on the *erga omnes partes* character of the obligations of States under the Convention.⁴⁶

In relation to the question of injured and non-injured States, the Court only recalled the Advisory Opinion on *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide* of 1951, in which it explained: “In such a convention the contracting States (...) have a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention”.⁴⁷ Thus, all the States Parties to the Genocide Convention have a common interest to ensure the prevention, suppression, and punishment of genocide by committing themselves to

⁴¹ ICJ Reports (2022), *op. cit.*, note 23, para. 88.

⁴² *Ibid.* Similarly, see ICJ Reports (2007), *op. cit.*, note 5, para. 159.

⁴³ ICJ Reports (2022), *ibid.*, para. 89.

⁴⁴ *Ibid.*, paras. 90–91.

⁴⁵ *Ibid.*, paras. 93–94.

⁴⁶ *Ibid.*, para. 100. The drafting history of the Convention, according to The Gambia, supports the view that the limitation of standing to “specially injured” States would undermine the effectiveness of the Convention with respect to acts committed within a State’s territory against a minority population. *Ibid.*, para. 103.

⁴⁷ *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports, 28 May 1951, p. 23.

fulfilling the obligations contained in the Convention.⁴⁸ In this sense, these obligations are obligations *erga omnes partes*,⁴⁹ which entail the right of every State Party to invoke the responsibility of another State Party for an alleged breach of its obligations under the Convention through the institution of proceedings before the Court.⁵⁰ The issue of nationality of claims, in relation to the *erga omnes* character of obligations, is also irrelevant. According to the argumentation of the Court, a State initiating proceedings does not need to demonstrate that victims of an alleged violation of the Genocide Convention are its nationals. This confirms the humanitarian purpose of the Genocide Convention and its objective to safeguard the very existence of certain human groups and to confirm the most elementary principles of morality, as was already emphasised in the Advisory Opinion of 1951.⁵¹

3. UKRAINE V. RUSSIAN FEDERATION

3.1. Case Overview

On 24 February 2022 on President Putin's orders, armed forces of the Russian Federation started a military invasion against the territory of Ukraine. The goal of the so-called "special military operation" was to "protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime".⁵² In his address, Putin also invoked Article 51 of the UN Charter, i.e. the right to self-defence, as the legal basis for the military intervention in Ukraine.⁵³

Along with the military response to defend its territory and its citizens, Ukraine immediately decided to file an application instituting proceedings before the ICJ on 26 February 2022, as well as a request for the indication of

⁴⁸ ICJ Reports (2022), *op. cit.*, note 23, para. 107.

⁴⁹ *Ibid.* See also ICJ Reports (2012), *op. cit.*, note 17, para. 68. In the case *Barcelona Traction*, the Court explained that obligations *erga omnes* are by their very nature the concern of all States and that all States have a legal interest in their protection. See *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports, 5 February 1970, para. 33.

⁵⁰ ICJ Reports (2022), *ibid.*, para. 108. See also Becker, M. A., *The Plight of the Rohingya...*, *op. cit.*, pp. 438–440.

⁵¹ ICJ Reports (2022), *ibid.*, paras. 109–113.

⁵² President of Russia, <http://en.kremlin.ru/events/president/transcripts/statements/67843> (accessed 10 June 2023).

⁵³ *Ibid.*

provisional measures.⁵⁴ The basis for the application were false claims of genocide committed by the Ukrainian authorities against Russian-speaking citizens, as well as the use of force as the justification for the prevention of and punishment of acts of genocide. To prove that there was a dispute between the parties within the meaning of Article IX of the Genocide Convention, the applicant referred to the claims by Russia that genocidal acts had occurred in the Luhansk and Donetsk oblasts of Ukraine, and that Russia had thus undertaken military and other actions against Ukraine with the purpose of preventing and punishing genocide.⁵⁵ Ukraine grounded the jurisdiction of the Court in Article IX of the Convention, which both States are parties to.⁵⁶

In support of its contentions, the applicant listed statements made at the international level by the highest Russian officials, in which the protection of the Russian people from genocide by the Kiev regime was mentioned as the goal of the “special military operation”.⁵⁷ The applicant emphasised that Ukraine and Russia held opposite views on whether genocide had been committed in Ukraine, and whether Article I of the Convention provides a basis for Russia to use military force against Ukraine to prevent and punish genocide.⁵⁸ To summarise, Ukraine requested the Court to judge and declare that no acts of genocide, as defined by Article III of the Convention, have been committed in Ukraine; that Russia cannot lawfully take any action under the Convention in Ukraine; that Russia’s recognition of the independence of the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic”, as well as the “special military operation” carried out by Russia, has no basis in the Genocide Convention; that Russia provide assurances that it will not take unlawful actions in and against Ukraine, including by the use of force, on the false claim of genocide.⁵⁹

⁵⁴ *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Institution Proceedings, ICJ Reports, 26 February 2022.

⁵⁵ *Ibid.*, paras. 2-3.

⁵⁶ Ukraine ratified the Convention as the Ukrainian Soviet Socialist Republic on 15 November 1954, while the Russian Federation is a State Party to the Convention, continuing the legal personality of the Union of Soviet Socialist Republics, which ratified the Convention on 3 May 1954. A list of all the parties to the Genocide Convention are available at UN Treaty Series, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac&clang=_en (accessed 5 June 2023). While both States Parties made a reservation to Article IX of the Convention, they both withdrew their reservations in 1989.

⁵⁷ ICJ Reports (2022), *op. cit.*, note 54, paras. 7-8.

⁵⁸ *Ibid.*, paras. 9-11. Facts of the case encompassing the period from 2014 until the present day are presented in paragraphs 13-25 of the application.

⁵⁹ *Ibid.*, para. 30.

A couple of days later, Russia submitted a document setting out its position regarding the alleged “lack of jurisdiction” of the Court. Russia offered several arguments in favour of its claim. First, even though both States are parties to the Genocide Convention, Russia argued that the Court must first “ascertain whether the alleged breaches of the Convention 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”.⁶⁰ Russia further noted that the use of force between States, the recognition of States, as well as the provision of the right of self-defence are issues that fall beyond the scope of the Convention.⁶¹ The respondent argued that the legal justification of its military action in Ukraine is based on Article 51 of the UN Charter and customary international law, that such action is aimed at protecting the Russian people, and that the recognition of the Donetsk and Lugansk People’s Republics is a manifestation of a sovereign political act of the Russian Federation and a confirmation of the right of self-determination, as confirmed in the UN Charter.⁶² Accordingly, the application and the request for the indication of provisional measures fall beyond the scope of the Genocide Convention and beyond the jurisdiction of the Court.

Since the Court suspended the proceedings on the merits in order to decide on the submitted preliminary objections,⁶³ we will focus our analysis of the key issues relating to the *prima facie jurisdiction* of the Court established by the order indicating provisional measures. We will also briefly present the content of the provisional measures ordered by the Court.

3.2. Order Indicating Provisional Measures

After convening a public hearing in which only Ukraine participated, but taking into account the views expressed by Russia in its document setting out its position regarding the lack of its jurisdiction, the Court made a decision on

⁶⁰ Document from the Russian Federation Setting Out its Position Regarding the Alleged “Lack of Jurisdiction” of the Court, ICJ Reports, 7 March 2022, paras. 7-9.

⁶¹ *Ibid.*, paras. 10-13.

⁶² *Ibid.*, paras. 16-19.

⁶³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, ICJ Reports, 7 October 2022. In the meantime, the Russian Federation also submitted a document containing the objections with respect to the admissibility of all the declarations of intervention. See International Court of Justice, <https://icj-cij.org/case/182/intervention> (accessed 18 September 2023).

its *prima facie* jurisdiction in this case and indicated provisional measures of 16 March 2022.⁶⁴ In the introduction, the Court emphasised its deep concern of the extent of the human tragedy taking place in Ukraine and the use of force by Russia in Ukraine. The Court also underlined awareness of its responsibility for international peace and security, as well as the peaceful settlement of disputes under the UN Charter and the ICJ Statute.⁶⁵

The Court explained that it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but that it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.⁶⁶ In this case, the Court indicated that it must ascertain whether there exists a dispute between the parties under Article IX of the Genocide Convention relating to the interpretation, application, or fulfilment of obligations under the Convention at the time of the filing of the application.⁶⁷ Further, the Court noted that it must be shown that “the claim of one Party is positively opposed by the other”,⁶⁸ for which purpose it took into account in particular statements and documents exchanged between the parties, as well as those made in international organisations. The Court also assessed the author(s), the content, and the other circumstances of these statements.⁶⁹

By reaching a conclusion that there was a dispute between the parties in the case at hand, the Court explained that while it is not necessary for a State to refer expressly to a specific treaty in its exchanges with the other State, the exchanges must refer to the subject matter of the treaty with sufficient clarity to enable the State against which a claim is made to ascertain that there is, or may be, a dispute with regard to that subject matter.⁷⁰ The evidence presented, according to the Court, *prima facie* demonstrates that the statements made by the parties refer

⁶⁴ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order Indicating Provisional Measures, ICJ Reports, 16 March 2022.

⁶⁵ *Ibid.*, paras. 17–18.

⁶⁶ See also *Application of the Convention on Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order, ICJ Reports, 23 January 2020, para. 16.

⁶⁷ ICJ Reports (2022), *op. cit.*, note 64, para. 28.

⁶⁸ *Ibid.* See also *South West Africa (Ethiopia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports, 21 December 1962, p. 328.

⁶⁹ The Court observed references by several Russian State organs and officials, as well as statements made by Ukrainian State organs. See ICJ Reports (2022), *ibid.*, paras. 37–42.

⁷⁰ *Ibid.*, para. 44. See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports, 26 November 1984, para. 83.

to the subject matter of the Genocide Convention to allow Ukraine to invoke Article IX of the Convention as the basis for the Court's jurisdiction.⁷¹ Furthermore, the Court found that Russia's invocation of Article 51 of the UN Charter does not preclude the Court from *prima facie* concluding the existence of its jurisdiction under the Genocide Convention, since certain acts or omissions may give rise to a dispute that falls within the scope of more than one treaty.⁷²

In deciding whether there are conditions for the indication of provisional measures, the Court had to decide whether the rights claimed by Ukraine, and for which it is seeking protection, are plausible, and that there must be a link between those rights and the provisional measures being requested.⁷³ In its decision, the Court explained that every State Party to the Genocide Convention, in accordance with Article I, is obliged to prevent and punish genocide, while the measures to be undertaken to fulfil that obligation are not specified. However, it is self-explanatory that it must be fulfilled in good faith, taking into account other provisions, particularly Articles VIII and IX, and must be undertaken within the limitations set by international law.⁷⁴ Although the Court's task in this preliminary stage of proceedings is not to decide on the merits of the case and on whether genocide in Ukraine has been committed, it considers it doubtful that the Convention, in light of its object and purpose, authorises States Parties to unilaterally use force in the territory of another State Party for the purpose of preventing and punishing acts of genocide.⁷⁵

⁷¹ ICJ Reports (2022), *ibid.*, paras. 44–45.

⁷² *Ibid.*, para. 46. See also *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, ICJ Reports, 3 February 2021, para. 56.

⁷³ ICJ Reports (2022), *ibid.*, paras. 50–51. The same argumentation is used in the Order instituting provisional measures against Myanmar. See ICJ Reports (2020), *op. cit.*, note 66, paras. 43–44. The development of the plausibility test through the jurisprudence of the ICJ is presented in Lando, M., Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice, *Leiden Journal of International Law*, vol. 31 (2018), no. 3, pp. 641–668; Marchuk, I., Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, *Melbourne Journal of International Law*, vol. 18 (2017), no. 2, pp. 436–459.

⁷⁴ ICJ Reports (2022), *ibid.*, paras. 56–57. See also ICJ Reports (2007), *op. cit.*, note 5, para. 430. The Court specifically cites Article I of the UN Charter, which says that the purpose of the United Nations is, *inter alia*, "to maintain international peace and security, and (...) to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace". See ICJ Reports (2022), *ibid.*, and Article I of the UN Charter, *op. cit.*, note 27.

⁷⁵ ICJ Reports (2022), *ibid.*, paras. 59–60.

For the indication of provisional measures, the element of urgency is also required, which means that irreparable prejudice could be caused to rights claimed before the Court or when the alleged disregard of such rights may entail irreparable consequences.⁷⁶ In this context, the Court referred, *inter alia*, to the UN General Assembly Resolution of 2 March 2022, in which the Assembly expressed “grave concern at reports of attacks against civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, children”; it also “recognised that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war”.⁷⁷

Taking all the above-mentioned facts and circumstances into consideration, the Court concluded that the conditions for the indication of provisional measures were met in this case,⁷⁸ thus indicating the following measures: the Russian Federation must immediately suspend military operations in the Ukrainian territory; it must ensure that any military and irregular armed units, any organisations or persons it controls or directs, take no steps in the furtherance of these operations; both parties must refrain from any action which might aggravate or extend the dispute before the Court.⁷⁹ The Court declined the Ukrainian request for Russia to provide the Court with a report on measures taken to implement provisional measures one week after the adoption of the Order and further on a regular basis.⁸⁰ We find this part of the Court’s decision deficient since, in our opinion, regular reporting on the measures taken would have enhanced public scrutiny, as well as the influence and political pressure of human rights organisations on both parties in regard to their actions on the ground, as well as their observance of their international obligations.⁸¹

Currently, the case between Ukraine and the Russian Federation is in the preliminary objections phase, and thus the proceedings on the merits are suspended until the decision on the jurisdiction of the Court is reached.⁸²

⁷⁶ *Ibid.*, paras. 65–66.

⁷⁷ General Assembly Resolution, UN Doc. A/RES/ES-11/1, 2 March 2022, Preamble.

⁷⁸ ICJ Reports (2022), *op. cit.*, note 64, para. 78.

⁷⁹ *Ibid.*, para. 86.

⁸⁰ *Ibid.*, para. 83.

⁸¹ Becker criticises in a similar way the content of the provisional measures ordered against Myanmar. See Becker, M. A., *The Plight of the Rohingya...*, *op. cit.*, pp. 446–447.

⁸² According to the available information, considering the fact that 33 States filed declarations on intervention in the case, the Court first had to decide on the admissibility of

4. ANALYSIS OF CRUCIAL JURISDICTIONAL ISSUES

Although both of the analysed cases are not yet in a phase in which the Court deliberates on all the presented facts and arguments of all the parties, the decisions made so far already have significant value for the consideration of the most relevant issues concerning the determination of the jurisdiction of the ICJ under the Genocide Convention. To some extent, these issues have already been discussed before the Court in previous cases, primarily in the first case ever involving the crime of genocide under the Convention, *Bosnia and Herzegovina v. Serbia and Montenegro* in 2007. However, since the jurisprudence of the Court in relation to the application and interpretation of the Genocide Convention is not abundant, the Court's legal interpretation of the issues concerning the existence of a dispute, the meaning of the *erga omnes* and *erga omnes partes* obligations under international law, *jus standi* before the Court, the scope of application of Articles VIII and IX of the Convention, as well as the problem of the use of force for the purpose of preventing and punishing genocide, will help us draw conclusions on future cases involving similar legal problems.

4.1. The Gambia v. Myanmar

As far as the case between The Gambia and Myanmar is concerned, one of the important aspects of the judgment on the preliminary objections was the acknowledgment of the Rohingya group as a protected group under the Genocide Convention, regardless of the fact that in Myanmar's law they are not afforded such status. Myanmar's policies eventually led to the abolition of certain civil and political rights of the members of the Rohingya and the deterioration of their legal and actual position in Myanmar society.⁸³ The subsumption of the

these declarations. In its decision of 5 June 2023, the Court rendered the majority of the declarations admissible. See *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Admissibility of the Declarations of Intervention Order, ICJ Reports, 5 June 2023. For more on the right to intervention in the proceedings before the ICJ, see Palchetti, P., Opening the International Court of Justice to Third States: Intervention and Beyond, *Max Planck Yearbook of United Nations Law*, vol. 6 (2002), pp. 141-145; Alexander, A.; Guha, S. K., Critical Analysis of Third-Party Intervention before the International Court of Justice, *Indonesian Journal of International & Comparative Law*, vol. 8 (2021), no. 4, pp. 441-466.

⁸³ In this context, the Court afforded significant probative value to the reports submitted by the Fact-Finding Mission on Myanmar of the UN Human Rights Council. The significance of such reports and findings was explained in prior decisions, as well. See ICJ Reports (2015), *op. cit.*, note 5, para. 459. For more about the probative value of evidence

Rohingya group under Article II of the Genocide Convention has enabled this vulnerable group to be protected under international law, or at least for their rights and protection to be discussed at the world court.⁸⁴

Furthermore, a unique feature of this case is also the fact that for the first time in history proceedings before the Court under the allegations of genocide were initiated by a State which, at first glance, does not have any connection either to Myanmar as the Respondent State (it is not even a neighbouring State), or to its citizens, and neither are the victims of the alleged crimes nationals of the applicant. So, in our opinion, in order for such serious allegations to be examined and the most vulnerable groups of people protected, it is even more significant that the Court in its judgment of 2022 reaffirmed the *erga omnes* and *jus cogens* character of the prohibition of genocide, as well as the *erga omnes partes* character of the obligations contained in the Genocide Convention.⁸⁵ In this sense, it is important that the Court once again emphasised that since the obligations under the Convention are obligations *erga omnes partes*, every State is entitled and has an interest to invoke the responsibility of another State Party for an alleged breach of the Convention through the institution of proceedings before the Court, whether or not there is a special interest of the applicant. This conclusion is also in line with Article 48 of the International Law Commission's articles on the Responsibility of States for Internationally Wrongful Acts, which is based on the idea that in the case of a breach of specific obligations protecting the collective interests of a group of States or the interests of the international community as a whole, responsibility may be invoked by States which are not themselves injured.⁸⁶ By analysing the development of the international legal

presented before the ICJ, see Ukabiala, N.; Pickard, D.; Yamamoto, A., *Erga Omnes Partes* before the International Court of Justice: From Standing to Judgement on the Merits, *ILSA Journal of International and Comparative Law*, vol. 27 (2021), no. 2, pp. 243–248.

⁸⁴ Similarly, Hameed, U., The ICJ's Provisional Measures Order in *Gambia v. Myanmar* and Its Implications for Pakistan's Kashmir Policy, *Pakistan Law Review*, vol. 11 (2020), p. 185. According to the Human Rights Council's report from 2016, the Rohingya Muslims "self-identify as a distinct ethnic group with their own language and culture, and claim a long-standing connection to Rakhine State". See UN General Assembly, Human Rights Council, Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, UN Doc. A/HRC/32/18, 29 June 2016, para. 3.

⁸⁵ The object of the Genocide Convention, on the one hand, is to safeguard the very existence of certain human groups and, on the other, to confirm and endorse the most elementary principles of morality. ICJ Reports (1951), *op. cit.*, note 47, para. 23.

⁸⁶ The International Law Commission explains that Article 48 does not distinguish between sources of international law; obligations protecting a collective interest of the group may derive from multilateral treaties or customary international law. Such obligations

rules protecting collective interests, it is explained in theory that the roots and *raison d'être* for their development are, among other things, the ethical value and the special vulnerability of the public good of humankind. Thus, suffering caused by massive violations of human rights and the damage resulting from the loss of lives and cultures have inspired international legal instruments on the protection of human rights and the responsibility for international crimes.⁸⁷

Hence, the problem of directly injured and non-injured States, as well as the requirement of the nationality of claims, are irrelevant for the establishment of *jus standi* before the Court.⁸⁸ *Belgium v. Senegal* is the first case deliberated before the ICJ in which the Court ruled that a State has standing before the Court by virtue of the concept of *erga omnes partes* obligations, in this case by interpreting the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.⁸⁹ In this case, the Court emphasised the following: "The common interest in compliance with the relevant obligations under the

have sometimes been referred to as "obligations *erga omnes partes*". See Report of the International Law Commission on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentary, 2001, vol. II, General Assembly Resolution, UN Doc. A/RES/56/10, 12 December 2001, p. 126.

⁸⁷ A theoretical analysis of the development of *erga omnes* obligations, *jus cogens* rules of international law, and international responsibility towards the international community as a whole is provided in Villalpando, S., The Legal Dimension of the International Community: How Community Interests Are Protected in International Law, *European Journal of International Law*, vol. 21 (2010), no. 2, pp. 387-420. See also the preamble of the Universal Declaration of Human Rights, where it is stated: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world; Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people (...)". General Assembly Resolution, Universal Declaration on Human Rights, UN Doc. A/RES/217 (III), 10 December 1948, Preamble. The Statute of the International Criminal Court also says: "Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity; Recognizing that such grave crimes threaten the peace, security and well-being of the world (...)". Rome Statute of the International Criminal Court, 1998, UNTS, vol. 2187, 2004, Preamble.

⁸⁸ The opposite argument invoked by Myanmar would render the purpose of the Convention meaningless and the legal protection sought for the abused groups of people almost impossible to realise. Hameed, U., The ICJ's Provisional Measures..., *op. cit.*, p. 185.

⁸⁹ ICJ Reports (2012), *op. cit.*, note 17, para. 68. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UNTS, vol. 1465, 1987.

Convention against Torture implies the entitlement of each State Party to the Convention to make a claim concerning the cessation of an alleged breach by another State Party. If a special interest were required for that purpose, in many cases no State would be in the position to make such a claim”.⁹⁰ However, *jus standi* before the ICJ is nevertheless conditioned by the requirement that there must be consent to the Courts jurisdiction by both States Parties to a dispute.⁹¹ It can be concluded that the *erga omnes partes* concept of international law has been confirmed as customary international law by virtue of the widespread practice of States and *opinion juris*, and has been reflected in many international conventions and in the jurisprudence of international courts and tribunals.⁹²

The relationship between Articles VIII and IX of the Convention remains to some extent vague in spite of the explanation of the Court that these provisions have distinct areas of application. According to the Court’s argumentation, Article VIII refers primarily to political organs, whereas Article IX explicitly refers to the competence of the ICJ as the UN’s judicial organ. Its authority is to decide on the issues of international responsibility.⁹³ The Court’s reasoning is convincing if one looks at the wording of these articles. Namely, the term “dispute” is mentioned verbatim in Article IX and is related to the competence of the ICJ, whereas the phrases “competent organs of the United Nations” and “to take such action (...) as they consider appropriate (...)” contained in Article VIII indicate that this article covers situations which refer to the engagement of various UN organs competent to use more diverse measures (and not merely legal ones) in order to prevent and suppress acts of genocide. Otherwise, the separation of the two articles in the Convention and differentiating “competent organs of the

⁹⁰ ICJ Reports (2012), *ibid.*, para. 69. See also Hamid, A. G., The Rohingya Genocide Case (*The Gambia v Myanmar*): Breach of Obligations *Erga Omnes Partes* and Issues of Standing, *IIUM Law Journal*, vol. 29 (2021), no. 1, pp. 42-43.

⁹¹ In the case between the DR Congo and Rwanda, deliberating on the legal effect of the reservation to Article IX of the Genocide Convention by Rwanda, the ICJ recalled that “(...) the fact that a dispute relates to compliance with a norm having such a character, which is assuredly the case with regard to the prohibition of genocide, cannot of itself provide a basis for the jurisdiction of the Court to entertain that dispute. Under the Court’s Statute that jurisdiction is always based on the consent of the Parties”. *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and the Admissibility of the Application, Judgment, ICJ Reports, 3 February 2006, paras. 64-65.

⁹² For the practice of various international courts confirming the existence of and the significance of *erga omnes partes* in international law, see Hamid, A. G., The Rohingya Genocide Case..., *op. cit.*, pp. 42-46.

⁹³ See *supra* in para. 2.2.

United Nations” and the ICJ would serve no meaningful purpose for the States Parties other than affording them the right to turn to different organs of the UN for the purpose of the application of the obligations under the Convention. The argumentation of the Court is in line with its previous decisions, such as the judgment in the case *Bosnia and Herzegovina v. Serbia and Montenegro*, where the Court explained that Article VIII “may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility”.⁹⁴

To conclude, the significance of the Court’s judgment on the preliminary objections in the case between The Gambia and Myanmar lies, in our opinion, in the effect that the Court’s ruling could have on the protection of the most vulnerable minority in Myanmar and in the world, particularly where the Security Council is unable to adopt coercive measures due to the veto right of the five permanent members.⁹⁵ Even in this phase of the proceedings when it has not yet been decided on the merits, but provisional measures have been ordered and the jurisdiction established, the role of the ICJ may have a much greater value for the protection of minority groups in general at the time of ethnic conflicts.⁹⁶ If the Court finds that Myanmar is directly responsible for genocide, which would be the first such ruling, it would be confirmation of the view that international crimes of such a scale and effect are virtually inconceivable without the involvement of a State.⁹⁷ At the same time, it is important to bear in mind that, although the Genocide Convention envisages both individual as well as State responsibility, mechanisms for attributing responsibility for genocide to these two legal subjects are not quite the same. Namely, as previous ICJ decisions show, genocidal intent as one of two elements of the crime can hardly be attributed to a State as an abstract legal entity. By contrast, as a wrongful act of exceptional seriousness, genocide always requires the existence of a genocidal policy and a pattern of a widespread and systematic violence of a certain group.⁹⁸ However,

⁹⁴ ICJ Reports (2007), *op. cit.*, note 5, para. 159.

⁹⁵ See, for example, UN Security Council Press Release, UN Doc. SC/8939, 12 January 2007.

⁹⁶ Stephenson, C. P. Y., *The International Court of Justice and Ethnic Conflicts: Challenges and Opportunities*, *Texas International Law Journal*, vol. 56 (2021), no. 1, p. 33.

⁹⁷ Schabas, W. A., *Genocide in International Law*, 2nd edn., Cambridge University Press, Cambridge, 2009, p. 512.

⁹⁸ Gaeta, P., *Genocide*, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Routledge Taylor & Francis Group, London and New York, 2011, pp. 114–117. Some authors point to two different objects of State responsibility and individual criminal responsibility. The first one is primarily invoked to obtain reparation, while the other one is associated with punishment of an individual. See Duff, R. A., *State Responsibility: An*

intent as part of the primary rule prohibiting genocide is also required to establish the crime of genocide by a State, if the intent by State organs is proven. This indicates that these two levels of responsibility can overlap.⁹⁹ It is for the Court to evaluate fairly all the evidence, which will be presented to it by both States in this case, and to deliver its judgment on the merits accordingly.

4.2. Ukraine v. Russian Federation

As for the case between Ukraine and Russia, in its order on provisional measures the ICJ reminded the parties of their international obligations and responsibilities arising from the UN Charter for the maintenance of international peace and security, the peaceful settlement of disputes, and other international legal rules, including the rules of international humanitarian law.¹⁰⁰ The proceedings before the Court initiated by Ukraine are limited in scope by the framework of the Genocide Convention since the jurisprudence of the Court in this case is only *prima facie* established under its provisions, and thus the Court must confine its decision-making to the interpretation of that international instrument.

For these reasons, in order for the Court to indicate provisional measures, it had to appear *prima facie* that the jurisdiction of the Court is based on the Genocide Convention.¹⁰¹ It is not disputable that both States are parties to the Genocide Convention, but it is somewhat disputable whether there is a dispute between the parties within the meaning of Article IX of the Genocide Convention. In other words, the issue is whether the acts complained of in the application instituting proceedings are capable of falling within the scope of the Convention *ratione materiae* and whether the parties hold opposite views concerning the question of the performance or non-performance of certain

Outsider's View, in: Besson, S. (ed.), *Theories of International Responsibility Law*, Cambridge University Press, Cambridge, 2022, pp. 73-74. For a more detailed analysis, see Wyler, E.; Castellanos-Jankiewicz, L. A., *State Responsibility and International Crimes*, *op. cit.*, pp. 385-405.

⁹⁹ Bianchi, A., *State Responsibility and Criminal Liability of Individuals*, in: Cassese, A. (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, p. 18.

¹⁰⁰ ICJ Reports (2022), *op. cit.*, note 64, para. 18. For an analysis of the violations of international law in the Russian-Ukrainian war, see Khater, M., *The Legality of the Russian Military Operations against Ukraine from the Perspective of International Law*, *Access to Justice in Eastern Europe*, no. 3, 2022, pp. 113-115; Kwiecien, R., *The Aggression of the Russian Federation against Ukraine: International Law and Power Politics or "What Happens Now"*, *Polish Review of International and European Law*, vol. 11 (2022), no. 1, p. 9 *et seq.*

¹⁰¹ See also ICJ Reports (2020), *op. cit.*, note 66, para. 16.

international obligations.¹⁰² The key question is, therefore, whether or not the Court's argumentation of the existence of a dispute between Ukraine and Russia under the Genocide Convention and the application of Article IX is clear and precise enough for it to be legally convincing.

By referring to various statements made by high-ranking State officials from both parties on a bilateral as well as international level, the Court concluded that the evidence presented supports the conclusion that *prima facie* the dispute at hand refers to the subject matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke Article IX as the basis for the Court's jurisdiction.¹⁰³ The Court relied on its previous jurisprudence, i.e. on previous decisions in which it explained that in order for a compromissory clause of an international treaty to be invoked, it is not necessary for a party to expressly refer to that specific treaty or provision. Cases such as *Nicaragua v. United States of America* or *Georgia v. Russian Federation*¹⁰⁴ confirm this reasoning. In this sense, it can be concluded that the Court's decision in regard to the existence of a dispute under Article IX in the case between Ukraine and Russia is, at least in this initial phase, well founded in law and in its previous jurisprudence.

However, the Court failed to use another argument to substantiate its decision on having *prima facie* jurisdiction *ratione materiae* in this case. In its judgment of 2007, the Court elucidated that the wording of Article IX "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 (...)" tends to confirm that "disputes relating to the responsibility of Contracting Parties for genocide (...) are comprised within a broader group of disputes relating to the interpretation, application or fulfilment of the Convention".¹⁰⁵ The dispute between the parties regarding the use of force for the prevention or suppression of genocidal acts, if understood *lato sensu*, could thus be subsumed under Article IX. Even if the Court was deciding merely on its *prima facie* jurisdiction, this argument might have strengthened the Court's reasoning for the application of Article IX. In any case, the problematic issue of the use of force and the application of the Genocide Convention will have to be elaborated in

¹⁰² ICJ Reports (2022), *op. cit.*, note 64, para. 28.

¹⁰³ The Court particularly took into account statements made by the representatives of Ukraine and Russia in the UN General Assembly and the Security Council, as well as in the European Union. *Ibid.*, para. 44.

¹⁰⁴ ICJ Reports (1984), *op. cit.*, note 70, para. 83; ICJ Reports (2011), *op. cit.*, note 17, para. 30.

¹⁰⁵ ICJ Reports (2007), *op. cit.*, note 5, para. 169. See also Plachta, M.; Zagaris, B., Atrocity Crimes in Ukraine, *International Enforcement Law Reporter*, vol. 38 (2022), no. 3, p. 86.

more detail in future decisions of the Court. Still, the Court did, but only briefly, refer to the problem of the use of force for the purpose of preventing and punishing the alleged acts of genocide as a measure for the fulfilment of the obligation contained in Article I of the Convention.¹⁰⁶ The Court merely states that the acts complained of by the applicant appear to be capable of falling under the Genocide Convention.¹⁰⁷ Of course, the standard of conviction for the Court to make certain conclusions and decisions is certainly not and need not be on the same level as in the merits decision phase.¹⁰⁸ However, it might be problematic for the later phase of the proceedings that the Court did not find it necessary, even in the decision on provisional measures, to elaborate in more detail the significance of Russia's contention that the so-called special military operation was based on the right of self-defence within the meaning of Article 51 UN Charter. The Court only observed that: "(...) certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty"¹⁰⁹ and that it does not preclude it from deciding on its *prima facie* jurisdiction under the Genocide Convention. The Court remained silent on the issue of the recognition of the independence of the "Donetsk and Luhansk People's Republics" and its significance for the application of the Convention.¹¹⁰ It is also highly unlikely that the Court will find legal ground for a conclusion that these issues are capable of falling under the scope of the Genocide Convention. However, the Court will eventually have to refer to this matter, at least in brief, in the coming proceedings on jurisdiction.

The analysis of the legal preconditions for the exercise of the right to self-defence under the UN Charter would go beyond the scope of this paper. However, we will only recall that according to well-established case law of the ICJ as well as the opinions of international lawyers, the use of force in the exercise of self-defence within the meaning of the Charter is justified only in an armed attack by another State, and the preconditions of proportionality and necessity should

¹⁰⁶ Article I of the Genocide Convention prescribes: "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". See the Genocide Convention, *op. cit.*, note 1.

¹⁰⁷ ICJ Reports (2022), *op. cit.*, note 64, para. 45.

¹⁰⁸ *Ibid.*, para. 24.

¹⁰⁹ *Ibid.*, para. 46. See also ICJ Reports (2021), *op. cit.*, note 72, para. 46.

¹¹⁰ In its resolution, the UN General Assembly stated that the recognition of the statehood of the Donetsk and Luhansk People's Republics is a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the UN Charter. See UN General Assembly Resolution, UN Doc. A/RES/ES-11/1, *op. cit.*, note 77.

be satisfied.¹¹¹ At this point, it seems almost impossible that Russia will be able to substantiate its claim and its military intervention on the territory of Ukraine by reference to Article 51.¹¹² Moreover, if Russia continues with its contentions that armed force was used as a measure for the prevention and suppression of genocidal acts within the meaning of Article I of the Convention, it is necessary to recall the Court's opinion in the order on provisional measures that "(...) it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State" for this purpose.¹¹³ Surely, it would not only be contrary to the humanitarian purpose of the Convention, but also to the fundamental principles of international law and international relations established in Article 2, para. 4 of the UN Charter, which prescribes the duty of all States to refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations, as well as the duty of States to settle their international disputes peacefully (Article 2, para. 3 of the Charter).¹¹⁴

It is to be expected from the Court in the continuation of the proceedings to emphasise and remind States Parties to the dispute of Article VIII of the

¹¹¹ Article 51 of the UN Charter states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security (...)". UN Charter, *op. cit.*, note 27. On the right to self-defence in general, see Dinstein, Y., *War, Aggression and Self-Defence*, 5th edn., Cambridge University Press, Cambridge, 2012; Seršić, M., Article 51 of the UN Charter and the "War" against Terrorism, in: Becker, S. W.; Derenčinović, D. (eds.), *International Terrorism: The Future Unchained?*, Faculty of Law, University of Zagreb, Zagreb, 2008, pp. 95-113; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports, 27 June 1986, para. 176; *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports, 6 November 2003, para. 51; Nihreieva, O., Russian Invasion of Ukraine through the Prism of International Law: Critical Overview, *Paix et Sécurité Internationales – Journal of International Law and International Relations*, vol. 10 (2022), pp. 17-18.

¹¹² Similarly, Nihreieva, O., Russian Invasion of Ukraine..., *ibid.*, pp. 21-22. Critical analysis of various interpretations of Russia's "special military operation" under the existing international legal norms is provided by Hoffmann, T., War or Peace? – International Legal Issues Concerning the Use of Force in the Russia-Ukraine Conflict, *Hungarian Journal of Legal Studies*, vol. 63 (2022), no. 3, pp. 209-220. See also Ranjan, P.; Anil, A., Russia-Ukraine War, ICJ, and the Genocide Convention, *Indonesian Journal of International & Comparative Law*, vol. 9 (2022), no. 1, pp. 103-105.

¹¹³ ICJ Reports (2022), *op. cit.*, note 64, para. 59. See also Plachta, M.; Zagaris, B., Atrocity Crimes in Ukraine, *op. cit.*, p. 89.

¹¹⁴ UN Charter, *op. cit.*, note 27, Article 2, paras. 3 and 4.

Genocide Convention and their right to call upon competent organs of the United Nations to take appropriate measures for the prevention and suppression of acts of genocide if they consider it necessary.¹¹⁵ If Russia believes that Ukraine is to be held responsible for genocide, it might have used the legal possibility to activate Article IX and initiate proceedings before the ICJ under the Genocide Convention against Ukraine since both of the States are parties to the Convention. Other means of peaceful settlement of disputes are also available for all parties. Unilateral actions by the use of armed force as a measure for the prevention of genocide cannot find justification in any legal norm. What is more, the preamble of the Convention clearly obliges States to achieve international cooperation “in order to liberate mankind from such an odious scourge” and not use armed force to that end.¹¹⁶ Russia’s unilateral use of force as well as the use of the right of veto by the Russian Representative in the UN Security Council¹¹⁷ clearly point to the conclusion that international cooperation for the purpose of suppressing the alleged acts of genocide in Ukraine is not the path Russia is willing to take, and also that the idea of self-defence is impossible to defend.

5. CONCLUSION

The two cases pending before the ICJ concerning the application, interpretation, and fulfilment of States’ obligations under the Genocide Convention offer interesting jurisdictional issues of international law, some of which have already been dealt with by the Court in its previous cases, and some which pose new challenges both for the ICJ and for international law. The arguments presented by the Court in the judgment on the preliminary objections in *The Gambia v. Myanmar* case in which it confirmed its jurisdiction are grounded in well-established jurisprudence, particularly in regard to questions of the existence of a dispute, the *erga omnes* character of certain international obligations, and the legal position of injured and non-injured States under the Genocide Convention. The greatest value of the judgment lies, in our opinion, in the fact

¹¹⁵ Ranjan, P.; Anil, A., *Russia-Ukraine War...*, *op. cit.*, p. 111; Kagan, J. M., *The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility*, *San Diego International Law Journal*, vol. 7 (2006), no. 2, p. 468. For an analysis of the means and channels for States to fulfil their obligation to prevent genocide, see De Pooter, H., *Obligation to Prevent Genocide: A Large Shell Yet to Be Filled*, *African Yearbook of International Law*, vol. 17 (2009), pp. 285-320.

¹¹⁶ Similarly in ICJ Reports (2007), *op. cit.*, note 5, paras. 163-164.

¹¹⁷ UN News, <https://news.un.org/en/story/2022/02/1112802> (accessed 15 June 2023).

that the Court strengthened the scope of protection under the Convention by confirming that the most vulnerable groups of people, even when, and perhaps particularly when, their rights are allegedly being violated by their own government, are protected by international law. In this respect, it is important to reiterate the humanitarian purpose of the Genocide Convention and its growing importance for the protection of humanity.

However, proceedings on the merits will be challenging both for the representatives of States Parties of the dispute to provide the Court with sufficient evidence of the genocidal acts committed, particularly in respect of proving the genocidal intent, as well as for the Court in assessing all the facts and evidence fairly, within the framework of international law. In its previous judgments involving the responsibility of States, the Court set a very high test for the attribution of certain acts to a State, which seems almost impossible to satisfy. Nevertheless, if the ICJ eventually determines that Myanmar as a State is responsible for genocide against its own citizens, it would be the first such ruling which, we dare believe, might truly influence States to refrain from the most serious violations of human rights and implement more decisive and efficient measures for the prevention and suppression of genocide.

On the other hand, the order on provisional measures in the case *Ukraine v. Russian Federation* did not have the desired effect; Russia did not suspend military operations, nor did it ensure that its military or irregular units or persons take no steps in the furtherance of the military actions in Ukraine. There are no procedural execution mechanisms to make the measures ordered efficient. According to Article 94, para. 1 of the UN Charter, both States are under the obligation to act in accordance with the order on provisional measures.¹¹⁸ Unfortunately, we are witnessing ongoing use of military force in Ukraine by the Russian armed forces, and there is little or no hope that the Security Council will use its enforcement power to implement coercive measures against a State which is violating its international obligations and the UN Charter.¹¹⁹ It is yet

¹¹⁸ Article 94, para. 2 of the UN Charter prescribes: "Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a Party". See the UN Charter, *op. cit.*, note 27. The ICJ confirmed the binding effect of provisional measures in the *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports, 27 June 2001, para. 102. See also in Schabas, W. A., *Genocide in International Law*, *op. cit.*, p. 504.

¹¹⁹ Veto power by permanent members of the Security Council (in this case by Russia and China) prevents the Council from deciding on the implementation of measures envisaged by Chapter VII of the UN Charter. For the possibilities of the International Criminal Court to entertain its competence in regard to individual criminal responsibility for crimes

to be seen how the Court will handle the most challenging question on the use of force and its connection to the obligations of States under the Genocide Convention. It seems to us that the continuation of the proceedings depends mostly on the resolution of this problem. Since one of the parties in this dispute is a permanent member of the Security Council, the role of the ICJ in the context of protecting the international legal order and preserving international peace and security is extremely important. Hopefully, Schwarzenberger's remark that the Genocide Convention is "unnecessary when applicable and inapplicable when necessary"¹²⁰ will prove to be incorrect.

BIBLIOGRAPHY

Books and Book Chapters:

1. Bianchi, A., State Responsibility and Criminal Liability of Individuals, in: Casese, A. (ed.), *The Oxford Companion to International Criminal Justice*, Oxford University Press, Oxford, 2009, pp. 16-38.
2. Dinstein, Y., *War, Aggression and Self-Defence*, 5th edn., Cambridge University Press, Cambridge, 2012.
3. Duff, R. A., State Responsibility: An Outsider's View, in: Besson, S. (ed.), *Theories of International Responsibility Law*, Cambridge University Press, Cambridge, 2022, pp. 70-92.
4. Gaeta, P., Genocide, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Routledge Taylor & Francis Group, London and New York, 2011, pp. 109-120.
5. Schabas, W. A., *Genocide in International Law*, 2nd edn., Cambridge University Press, Cambridge, 2009.
6. Schwarzenberger, G., *International Law*, vol. I, 3rd edn., Stevens & Sons, London, 1957, p. 143, cited in: Schabas, W., *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012, p. 122.
7. Seršić, M., Article 51 of the UN Charter and the "War" against Terrorism, in: Becker, S. W.; Derenčinović, D. (eds.), *International Terrorism: The Future Unchained?*, Faculty of Law, University of Zagreb, Zagreb, 2008, pp. 95-113.

committed in Ukraine, see Ueki, Y., Russia's Aggression Against Ukraine and the Pursuit of Individual Criminal Responsibility, *US-China Law Review*, vol. 20 (2023), no. 1, pp. 31-44.

¹²⁰ Schwarzenberger, G., *International Law*, vol. I, 3rd edn., Stevens & Sons, London, 1957, p. 143, cited in: Schabas, W., *Unimaginable Atrocities: Justice, Politics, and Rights at the War Crimes Tribunals*, Oxford University Press, Oxford, 2012, p. 122.

8. Wyler, E.; Castellanos-Jankiewicz, L. A., State Responsibility and International Crimes, in: Schabas, W. A.; Bernaz, N. (eds.), *Routledge Handbook of International Criminal Law*, Routledge Taylor & Francis Group, London and New York, 2011, pp. 385-405.

Articles:

1. Alam, J., The Rohingya Minority of Myanmar: Surveying Their Status and Protection in International Law, *International Journal on Minority and Group Rights*, vol. 25 (2018), no. 2, pp. 157-182.
2. Alexander, A.; Guha, S. K., Critical Analysis of Third-Party Intervention before the International Court of Justice, *Indonesian Journal of International & Comparative Law*, vol. 8 (2021), no. 4, pp. 441-466.
3. Becker, M. A., The Plight of the Rohingya: Genocide Allegations and Provisional Measures in the *Gambia v Myanmar* at the International Court of Justice, *Melbourne Journal of International Law*, vol. 21 (2020), no. 2, pp. 428-449.
4. De Pooter, H., Obligation to Prevent Genocide: A Large Shell Yet to Be Filled, *African Yearbook of International Law*, vol. 17 (2009), pp. 285-320.
5. Hameed, U., The ICJ's Provisional Measures Order in *Gambia v. Myanmar* and Its Implications for Pakistan's Kashmir Policy, *Pakistan Law Review*, vol. 11 (2020), pp. 165-202.
6. Hamid, A. G., The Rohingya Genocide Case (*The Gambia v Myanmar*): Breach of Obligations *Erga Omnes Partes* and Issues of Standing, *IIUM Law Journal*, vol. 29 (2021), no. 1, pp. 29-54.
7. Hoffmann, T., War or Peace? – International Legal Issues Concerning the Use of Force in the Russia-Ukraine Conflict, *Hungarian Journal of Legal Studies*, vol. 63 (2022), no. 3, pp. 206-235.
8. Kagan, J. M., The Obligation to Use Force to Stop Acts of Genocide: An Overview of Legal Precedents, Customary Norms, and State Responsibility, *San Diego International Law Journal*, vol. 7 (2006), no. 2, pp. 461-490.
9. Khater, M., The Legality of the Russian Military Operations against Ukraine from the Perspective of International Law, *Access to Justice in Eastern Europe*, no. 3, 2022, pp. 107-119.
10. Kwiecien, R., The Aggression of the Russian Federation against Ukraine: International Law and Power Politics or "What Happens Now", *Polish Review of International and European Law*, vol. 11 (2022), no. 1, pp. 9-24.
11. Lando, M., Plausibility in the Provisional Measures Jurisprudence of the International Court of Justice, *Leiden Journal of International Law*, vol. 31 (2018), no. 3, pp. 641-668.

12. Marchuk, I., Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination, *Melbourne Journal of International Law*, vol. 18 (2017), no. 2, pp. 436-459.
13. Nihreieva, O., Russian Invasion of Ukraine through the Prism of International Law: Critical Overview, *Paix et Sécurité Internationales – Journal of International Law and International Relations*, vol. 10 (2022), pp. 1-38.
14. Palchetti, P., Opening the International Court of Justice to Third States: Intervention and Beyond, *Max Planck Yearbook of United Nations Law*, vol. 6 (2002), pp. 139-182.
15. Plachta, M.; Zagaris, B., Atrocity Crimes in Ukraine, *International Enforcement Law Reporter*, vol. 38 (2022), no. 3, pp. 86-97.
16. Ramsden, M., Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice, *Harvard Negotiation Law Review*, vol. 26 (2021), no. 2, pp. 153-192.
17. Ranjan, P.; Anil, A., Russia-Ukraine War, ICJ, and the Genocide Convention, *Indonesian Journal of International & Comparative Law*, vol. 9 (2022), no. 1, pp. 101-114.
18. Sidhu, J. S., The Rohingya: Myanmar's Unwanted Minority, *European Yearbook of Minority Issues*, vol. 18 (2019), pp. 236-260.
19. Stephenson, C. P. Y., The International Court of Justice and Ethnic Conflicts: Challenges and Opportunities, *Texas International Law Journal*, vol. 56 (2021), no. 1, pp. 1-34.
20. Ueki, Y., Russia's Aggression Against Ukraine and the Pursuit of Individual Criminal Responsibility, *US-China Law Review*, vol. 20 (2023), no. 1, pp. 31-44.
21. Ukabiala, N.; Pickard, D.; Yamamoto, A., *Erga Omnes Partes* before the International Court of Justice: From Standing to Judgement on the Merits, *ILSA Journal of International and Comparative Law*, vol. 27 (2021), no. 2, pp. 233-250.
22. Villalpando, S., The Legal Dimension of the International Community: How Community Interests Are Protected in International Law, *European Journal of International Law*, vol. 21 (2010), no. 2, pp. 387-420.

Treaties:

1. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1984, UNTS, vol. 1465, 1987.
2. Convention on the Prevention and Punishment of the Crime of Genocide, 1948, UNTS, vol. 78, 1951, https://treaties.un.org/Pages/showDetails.aspx?objid=0800000280027fac&clang=_en (accessed 5 June 2023).
3. Rome Statute of the International Criminal Court, 1998, UNTS, vol. 2187, 2004.

4. Statute of the International Court of Justice, UN, <https://www.un.org/en/about-us/un-charter/statute-of-the-international-court-of-justice> (accessed 5 June 2023).
5. The Vienna Convention on the Law of Treaties, 1969, UNTS, vol. 1155, 1980.

United Nations Documents:

1. General Assembly, Human Rights Council, Situation of Human Rights of Rohingya Muslims and other Minorities in Myanmar, UN Doc. A/HRC/32/18, 29 June 2016.
2. General Assembly, Human Rights Council, The Report of the Independent International Fact-Finding Mission on Myanmar, UN Doc. A/HRC/39/64, 12 September 2018.
3. General Assembly Resolution, Report of the International Law Commission on the Work of its Fifty-third Session (23 April-1 June and 2 July-10 August 2001), Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentary, 2001, vol. II, UN Doc. A/RES/56/10, 12 December 2001.
4. General Assembly Resolution, Universal Declaration on Human Rights, UN Doc. A/RES/217 (III), 10 December 1948.
5. General Assembly Resolution, UN Doc. A/RES/ES-11/1, 2 March 2022.
6. Security Council Press Release, UN Doc. SC/8939, 12 January 2007.

Case Law of the International Court of Justice:

1. *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Admissibility of the Declarations of Intervention Order, ICJ Reports, 5 June 2023.
2. *Allegations of Genocide under the Convention on Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Institution proceedings, ICJ Reports, 26 February 2022.
3. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, ICJ Reports, 7 October 2022.
4. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order Indicating Provisional Measures, ICJ Reports, 16 March 2022.
5. *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, ICJ Reports, 3 February 2021.
6. *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, ICJ Reports, 11 November 2019.

7. *Application Instituting Proceedings and Request for Provisional Measures, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Memorial by The Gambia, ICJ Reports, 23 October 2020.
8. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment on the Preliminary Objections, ICJ Reports, 22 July 2022.
9. *Application of the Convention on Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order, ICJ Reports, 23 January 2020.
10. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Written Observations of The Gambia on the Preliminary Objections Raised by Myanmar, ICJ Reports, 20 April 2021.
11. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Reports, 26 February 2007.
12. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, ICJ Reports, 3 February 2015.
13. *Case Concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections of the Republic of the Union of Myanmar, ICJ Reports, 20 January 2021.
14. *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports, 1 April 2011.
15. *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda)*, Jurisdiction of the Court and the Admissibility of the Application, Judgment, ICJ Reports, 3 February 2006.
16. *Case Concerning Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment on the Jurisdiction of the Court and Admissibility of the Application, ICJ Reports, 20 December 1988.
17. *Case Concerning the Barcelona Traction, Light and Power Company, Limited*, Judgment, ICJ Reports, 5 February 1970.
18. *Document from the Russian Federation Setting Out its Position Regarding the Alleged "Lack of Jurisdiction" of the Court*, ICJ Reports, 7 March 2022.
19. *LaGrand Case (Germany v. United States of America)*, Judgment, ICJ Reports, 27 June 2001.
20. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, ICJ Reports, 26 November 1984.
21. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports, 27 June 1986.

22. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India)*, Jurisdiction and Admissibility Judgment, ICJ Reports, 5 October 2016 (I).
23. *Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, ICJ Reports, 5 October 2016.
24. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, ICJ Reports, 6 November 2003.
25. *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, ICJ Reports, 20 July 2012.
26. *Reservations to the Convention on Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports, 28 May 1951.
27. *South West Africa (Ethiopia v. South Africa)*, Preliminary Objections, Judgment, ICJ Reports, 21 December 1962.

Case Law of the Permanent Court of International Justice:

1. *Mavrommatis Palestine Concessions*, Judgment No. 2, PCIJ Reports, Series A, No. 2, 30 August 1924.

Other Sources:

1. Embassy of Myanmar, <https://www.embassyofmyanmar.be/ABOUT/ethnicgroups.htm> (accessed 1 June 2023).
2. International Court of Justice, <https://icj-cij.org/case/182/intervention> (accessed 18 September 2023).
3. President of Russia, <http://en.kremlin.ru/events/president/transcripts/statements/67843> (accessed 10 June 2023).
4. United Nations Office on Genocide Prevention and the Responsibility to Protect, *The Convention on the Prevention and Punishment of the Crime of Genocide (1948)*, <https://www.un.org/en/genocideprevention/documents/Genocide%20Convention-FactSheet-ENG.pdf> (accessed 10 June 2023).
5. United Nations Office on Genocide Prevention and the Responsibility to Protect, *Ratification of the Genocide Convention*, <https://www.un.org/en/genocideprevention/genocide-convention.shtml> (accessed 1 June 2023).
6. UN News, <https://news.un.org/en/story/2022/02/1112802> (accessed 15 June 2023).
7. UN, *United Nations Charter*, <https://www.un.org/en/about-us/un-charter/> (accessed 5 June 2023).

Sažetak:

**ODGOVORNOST DRŽAVA PREMA KONVENCIJI O
GENOCIDU – PITANJA NADLEŽNOSTI U NOVIJOJ PRAKSI
MEĐUNARODNOG SUDA**

*Autorica analizira određena pitanja o utvrđivanju odgovornosti država prema Konvenciji o sprječavanju i kažnjavanju zločina genocida i najnovijim slučajevima koji se razmatraju pred Međunarodnim sudom. Posebna se pažnja posvećuje odlukama Suda u slučajevima Gambija protiv Mijanmara i Ukrajina protiv Ruske Federacije te interpretaciji odredaba Konvencije o genocidu koje se odnose na uspostavljanje nadležnosti Suda. U tom se kontekstu osobito analiziraju pitanja preliminarne prirode, poput postojanja spora između stranaka, nadležnosti Suda *ratione personae*, *erga omnes* obveze koje proizlaze iz Konvencije, *jus standi* stranaka pred Sudom, odnosa između članaka VIII i IX Konvencije, kao i pitanja uporabe sile radi sprječavanja ili kažnjavanja genocida. Po mišljenju autorice, unatoč tomu što u analiziranim slučajevima još nije odlučeno o meritumu, do sada donesene odluke imat će znatan utjecaj na ispravnu i učinkovitu primjenu Konvencije o genocidu u budućnosti, u smislu pojašnjavanja preduvjeta za uspostavu nadležnosti Suda, kao i očuvanja temeljnih načela međunarodnog prava i pravila o odgovornosti država.*

Ključne riječi: odgovornost država; Konvencija o sprječavanju i kažnjavanju zločina genocida; Međunarodni sud; nadležnost Suda; slučaj Gambija protiv Mijanmara; slučaj Ukrajina protiv Ruske Federacije.