INTERNATIONAL COURT OF JUSTICE

ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(Ukraine v Russian Federation, 32 States Intervening)

WRITTEN OBSERVATIONS OF THE GOVERNMENT OF NEW ZEALAND

(PRELIMINARY OBJECTIONS)

4 JULY 2023

To the Registrar, International Court of Justice.

The undersigned being duly authorized by the Government of New Zealand.

1. These Written Observations are submitted to the Court in accordance with its Order of 5 June 2023[1] and the provisions of Article 86(1) of the Rules of the Court.

SCOPE OF THE WRITTEN OBSERVATIONS

2. New Zealand intervenes in its capacity as a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide 1948 (**"the Convention"**).[2] It does so in response to the gravity of the circumstances giving rise to this case, its implications for the maintenance of international law, and its impact on the obligations shared by all parties to the Convention.

3. In these Written Observations, New Zealand responds to the key arguments in relation to the construction of the Convention that arise from the Preliminary Objections of the Russian Federation of 1 October 2022 (**"the Russian Federation's Preliminary Objections" "the Preliminary Objections"**). In doing so it expands on the summary of New Zealand's interpretation of the Convention set out in its Declaration of Intervention submitted to the Court on 28 July 2022.

4. The position of the Government of New Zealand with respect to Russia's illegal invasion of Ukraine was clearly stated in its Declaration of Intervention.[3] It will further be clear from the interpretation set out in the Declaration and these Written Observations that New Zealand considers that, on the facts presented by Ukraine, there is a legal dispute between Ukraine and the Russian Federation within the scope of Article IX of the Convention and Ukraine has properly submitted that dispute to the Court.

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[1] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order, 5 June 2023* (*"Order"*).

[2] *Convention on the Prevention and Punishment of the Crime of Genocide*, Paris, 9 December 1948, 78 UNTS 277 (entered into force on 12 January 1951) (*"Convention"*).

[3] At para. 11.

5. In accordance with the Court's Order, however, these Written Observations are solely restricted to New Zealand's views on:[4]

> the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the Court's jurisdiction *ratione materiae* in the present case.

6. New Zealand therefore will not address the application of the Convention to the facts of the present case. Nor will it address the significant misrepresentations of fact contained in the Russian Federation's Preliminary Objections. Likewise, it will not address those legal arguments raised by the Preliminary Objections that do not relate to the interpretation of the Convention itself.

KEY ISSUES ARISING FROM THE PRELIMINARY OBJECTIONS

7. The Preliminary Objections raise two central issues:

   a. Is there a "dispute" between the parties?

   b. And, if so, is that a dispute "relating to the interpretation, application or fulfilment" of the Convention?

8. The interpretation of Article IX of the Convention is directly relevant to both issues. To an extent, the second issue – jurisdiction *ratione materiae* – also raises questions regarding the interpretation of Article I of the Convention. But, as Ukraine has correctly pointed out, it is not necessary for the Court to conclusively determine those questions at this preliminary stage.[5]

9. In assessing these issues, the Court must rely on the facts as pleaded by the applicant.[6] It is not necessary, or appropriate, for the Court to try to resolve matters of disputed fact at the jurisdictional stage. Indeed, the very presence of a disagreement as to the

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[4] *Order* at para. 99.

[5] *Written Statement of Observations and Submissions on the Preliminary Objections of the Russian Federation – Submitted by Ukraine* (3 February 2023) (*"Ukraine's Written Observations"*) at para. 105-106.

[6] *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, I.C.J. Reports 2021,* at p. 26, para. 53.

underlying facts of the case will be directly relevant to the Court's assessment of both the existence and scope of the dispute.[7]

THE COURT'S JURISDICTION UNDER ARTICLE IX OF THE CONVENTION

The legal scope of the Dispute Settlement Obligation in Article IX

10. Article IX of the Convention provides:

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

Article IX establishes compulsory jurisdiction

11. Under Article IX Contracting Parties to the Convention have agreed that they "shall" submit "disputes...relating to the interpretation, application or fulfilment" of the Convention to this Court at the request of any of the parties to the dispute. There is no further requirement for consent with respect to a particular dispute.[8]

12. By accepting Article IX, therefore, parties have consented in advance to settle their disputes by recourse to this Court. As Merrills and Brabandere note:[9]

> once a legal act indicating consent has been performed jurisdiction may be established, even if the state is unwilling to litigate when an actual case arises.

Absent any express reservation on the part of either party to the dispute,[10] Article IX therefore provides a basis for this Court to exercise compulsory jurisdiction over all disputes falling within its scope.

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[7] See, e.g., *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Preliminary Objections, Judgment, I.C.J. Reports 1996*, at p. 616, para. 32-33.

[8] In contrast, for example, to Article XI(3) of *The Antarctic Treaty*, Washington D.C., 1 December 1959, 402 UNTS 71 (entered into force on 23 June 1961) (*"The Antarctic Treaty"*).

[9] J G Merrills and E De Brabandere, *Merrills' International Dispute Settlement* (7th ed, Cambridge University Press, Cambridge, 2022) at p. 273.

[10] Compare e.g., *Legality of Use of Force (Yugoslavia v Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* at pp. 137-138, para. 37- 41 with: *Legality of Use of Force (Yugoslavia v Spain), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999,* at p. 772, para. 29-33; and *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, at p. 6, para.70.

13. This compulsory jurisdiction, established by prior agreement, is fully consistent with the principle of consent and "free choice of means".[11] It is clearly contemplated by, and falls squarely within, the scope of, Article 36(1) of the Statute.[12]

14. The Contracting Parties' decision to submit their disputes to this Court reflects the significance of the Convention's obligations,[13] the consistency of those obligations with "the spirits and aims of the United Nations",[14] and the central role the Court plays in the peaceful settlement of disputes within the United Nations system.[15] Article IX gives effect to the Contracting Parties' pre-existing obligation under Articles 2(3) and 33(1) of the United Nations Charter and customary international law to settle their disputes by peaceful means.[16] That obligation serves a central place within international law.[17] It is both a prerequisite to the maintenance of international peace and security; and necessary to secure the effectiveness of the international legal system itself.[18]

Article IX confers a deliberately wide jurisdiction on the Court

15. Article IX is an unusually – and deliberately – broad compromissory clause.[19] As highlighted by Ukraine, Article IX applies to disputes "relating to the interpretation,

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[11] See, e.g., *Status of Eastern Carelia, Advisory Opinion of 23 July 1923*, PCIJ Ser. B. 1923, No. 5, at p. 27: "It is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement."

[12] Article 36(1) of the Statute provides: "*The jurisdiction of the Court comprises* all cases which the parties refer to it and *all matters specially provided for* in the Charter of the United Nations or *in treaties and conventions in force*." (emphasis added)

[13] The Court discussed and confirmed the significance of the *Convention* and its obligations in its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1951, I.C.J. Reports,* at p.23.

[14] See the first paragraph of the preamble to the *Convention*: "Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, *contrary to the spirit and aims of the United Nations* and condemned by the civilized world" (emphasis added).

[15] See, for example, the General Assembly's reaffirmation of the role of the Court in the *Manila Declaration on the Peaceful Settlement of International Disputes*, A Res. 37/10 (15 November 1982) ("*Manila Declaration*") at para. II.5.

[16] *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits, Judgment, I.C.J. Reports 1986,* at p. 145, para. 290.

[17] Y Tanaka, *The Peaceful Settlement of International Disputes* (Cambridge University Press, Cambridge, 2018) at p.3.

[18] *Id.*

[19] R Kolb, "The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ", in *The UN Genocide Convention: A Commentary* (Paola Gaeta, ed., Oxford University Press 2009), at p. 453: "[Article IX was written] to close down all possible loopholes weakening the jurisdictional reach of the Court. The purpose

application *or fulfilment*" of the Convention. The singular use of the term "fulfilment" is of particular significance. Further, disputes can be submitted at the request of "*any of* the parties to the dispute" consistent with the *erga omnes* character of the obligations of the Convention.[20] And there is no pre-condition of prior notification, consultation or negotiation before a dispute may be submitted to the Court.[21]

Article IX has both a procedural and a substantive character

16. Article IX is not merely a procedural provision. It also has a substantive character. Through Article IX, Contacting Parties have identified a procedure for the settlement of their disputes – submission to this Court. At the same time, they have assumed a substantive obligation to comply with that procedure reasonably and in good faith.[22]

17. Although it can be regarded as an obligation of conduct rather than result, Article IX is nevertheless governed by the principle of good faith.[23] This Court recognised in the *Gabčíkovo-Nagymaros Project case* that the obligation of good faith requires a party to apply a treaty provision "in a reasonable way and in such a manner that its purpose can be realised".[24] This obligation "is no less applicable to the provisions of a treaty relating to dispute settlement".[25] It is implicit within the principle of good faith that

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pursued in 1948 was to grant the Court a jurisdiction as wide as possible in the life of the Convention, forestalling all the potential subtle arguments denying jurisdiction on account of an insufficient link with that Convention."

[20] *Bosnia Genocide Preliminary Objections* judgment, *supra* n.7, at p. 615 para. 31; and *Armed Activities on the Territory of the Congo (New Application: 2002), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006,* at p. 31 para. 64.

[21] In contrast for example to: Article XI(1) of *The Antarctic Treaty*; Articles 283 and 286 of the *United Nations Convention on the Law of the Sea*, Montego Bay, 10 December 1982, 1833 UNTS 3 (entered into force on 16 November 1994); and Article 20(1) of the *International Convention for the Suppression of Terrorist Bombings*, New York, 15 December 1997, 596 UNTS 261 (entered into force 23 May 2001).

[22] See, e.g., *Manila Declaration, supra* n. 15, at para. I.11: "States shall in accordance with international law implement in good faith all the provisions of agreements concluded by them for the settlement of their disputes."

[23] The application of the obligation of good faith in the context of dispute settlement provisions was confirmed by the Arbitral Tribunal in *South China Sea Arbitration, Philippines v China, Award, PCA Case No 2013-19,* at para. 1171. Similarly, the Court has previously found that the principle of good faith "applies to all obligations established by a treaty, including procedural obligations which are essential to co-operation between States": *Pulp Mills on the River Uruguay (Argentina v Uruguay), Judgment, I.C.J. Reports 2010,* at p. 67, para. 145-146. See also Tanaka, *supra* n. 17, at pp. 7-8.

[24] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I.C.J. Reports 1997,* at p. 79, para. 142.

[25] *South China Sea Arbitration, supra* n.23, at para. 1171.

a party must abstain from acts calculated to frustrate its treaty obligations.[26] Such acts would constitute a breach of the treaty itself.

18. Parties must therefore fulfil their obligations under Article IX in good faith and actively cooperate in the Court's determination of a given dispute:[27]

> Where a treaty provides for the compulsory settlement of disputes, the good faith performance of the treaty requires the cooperation of the parties with the applicable procedure.

That principle gives rise to certain specific expectations of conduct on the part of parties to a dispute. Most significantly, once a dispute has been submitted to the Court under Article IX, the parties must "refrain from any action whatsoever which may aggravate the situation ... and impede the peaceful settlement" of that dispute.[28]

19. By agreeing in Article IX to submit their disputes for determination by the Court, Contracting Parties to the Convention have accordingly agreed to abide by the Court's procedures and any orders or judgments issued by it. They must do so not only out of respect for the judicial authority of the Court under the Charter and the Statute, but also as a consequence of their own consent to submit their disputes to the Court's jurisdiction.

20. A singular strength of the Court's jurisdiction is its authority to issue decisions that are binding on the parties. Article 94(1) of the United Nations Charter confirms that:

> 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.

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[26] International Law Commission *Yearbook of the International Law Commission, 1996, Vol II*, at p.211, paragraph 4; see also the other authorities cited in paragraph 2.

[27] *South China Sea Arbitration, supra* n.23, at para. 1171. The duty of cooperation in the context of judicial dispute settlement proceedings mirrors this Court's recognition of an equivalent duty in the context of negotiation, see: *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, I.C.J. Reports 1969,* at p. 47, para. 85(a), and pp. 48-49, para. 86-87; *Fisheries Jurisdiction (United Kingdom v Iceland), Merits, Judgment, I.C.J. Reports 1974,* at p.33, para 78; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), supra* n. 24, at pp. 78-79, para. 141-142; *Pulp Mills on the River Uruguay (Argentina v Uruguay), supra* n. 23, at p. 67, para. 145-146; and *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Judgment, I.C.J. Reports* 2011, at. p. 132, para. 157. For a discussion of the duty of cooperation in the context of dispute settlement see also: A. Peters "International Dispute Settlement: A Network of Cooperational Duties" *EJIL* (2003) Vol 14 No.1, pp. 1-34.

[28] *Manila Declaration, supra* n.15, at para. I:8. See also: *Electricity Company of Sofia and Bulgaria, Order, 1939 PCIJ Ser. A/B, No 79* at p. 199; and *South China Sea Arbitration, supra* n.23, at para. 1169-1173.

The strength of that undertaking is reinforced by Article 94(2) of the Charter, which further provides a mechanism for the enforcement of the Court's judgments through the Security Council.

21. This Court has expressly confirmed that the obligation to comply with its decisions extends to decisions indicating provisional measures in a particular case. As the Court stated in the La Grand case, "orders on provisional measures under Article 41 [of the Statute] have binding effect".29 That finding has been consistently reaffirmed, including in the Court's Order on provisional measures in this case.30 As a corollary, this Court has further confirmed that a State's failure to comply with any order for provisional measures is a breach of that party's international obligations under the Charter and the Statute.31 It can further be considered a substantive breach of Article IX itself.

22. A failure to comply with provisional measures will accordingly not only aggravate the central dispute under the Convention, but may also give rise to a dispute regarding compliance with the substantive obligations contained in Article IX. It of course remains open for a respondent State to challenge the jurisdiction of the Court under Article IX, in accordance with the proper procedures of the Statute and the Rules. Any provisional measures indicated by the Court, however, remain binding on the respondent State in those circumstances. The respondent State challenging jurisdiction may not simply choose to ignore them in defiance of the Court and its accepted authority.

Existence of a legal "dispute"

23. This Court addressed the legal considerations relevant to the establishment of a dispute under Article IX of the Convention in its 2022 judgment in the preliminary

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[29] *LaGrande (Germany v United States of America), Judgment, I.C.J. Reports 2001,* at p. 506, para. 109.

[30] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation), Order, 16 March 2022*, at para. 83.

[31] See, in particular: the Court's finding in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007,* at p. 43, para. 451-458.

objections phase of *The Gambia v Myanmar Genocide case*.[32] Drawing on its previous jurisprudence, the Court confirmed that:

a. According to the established case law of the Court, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties.[33]

b. In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other".[34] The two sides must hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations.[35]

c. The Court's determination of the existence of a dispute is a "matter of substance and not a question of form or procedure".[36]

d. In principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court.[37] However, conduct of the parties subsequent to the application may be relevant for various purposes, in particular to confirm the existence of a dispute.[38]

24. In applying those considerations to the facts of a particular case, the Court may look to both the words and the actions of the parties – both before, and after, the application was submitted to the Court.

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[32] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar), Preliminary Objections, Judgment of 22 July 2022*, at para. 63-64.
[33] At para 63, citing: *Mavrommatis Palestine Concessions*, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2, at p. 11.
[34] *Ibid* citing: *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, at p. 328.
[35] *Ibid* citing: *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, at p. 270, para. 34; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, at p. 26, para. 50.
[36] At para 64, citing: *Georgia v. Russian Federation, supra* n.27 at p. 84, para. 30.
[37] *Ibid* citing: *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea, supra* n. 35, at p. 27, para. 52.
[38] *Ibid* citing: *Marshall Islands v. India, supra* n.35, at p. 272, para. 40.

25. In its past decisions, the Court has relied on evidence regarding findings and public statements of Government bodies, Government officials and political leaders. The Court has considered the nature and number of such statements, as well as where, when and by whom they were made. As the Court has consistently found, it is not necessary that such statements refer specifically to a particular treaty or its provisions in order to establish the existence of a dispute.[39] Nor is it necessary that they be made in a formal diplomatic context.

26. The Court will also look to the actions of the parties – especially where there have been no formal diplomatic exchanges between them.[40] In such cases, a party's actions may speak as loudly as – or louder than – its words. As the Court affirmed in *Land and Maritime Boundary between Cameroon and Nigeria*:[41]

> a disagreement on a point of law or fact, a conflict of legal views or interests, or the positive opposition of the claim of one party by the other need not necessarily be stated *expressis verbis*. *In the determination of a dispute, as in other matters, the position or the attitude of a party can be established by inference, whatever the professed view of that party.* (emphasis added)

No requirement for the dispute to have "crystallised" in the same terms as the pleadings, as argued by the Russian Federation

27. The Russian Federation goes beyond existing authority to argue that a dispute cannot exist unless it has "crystallised"[42] in the same terms as the pleadings at the time that the application was filed. The Russian Federation seeks to argue that, prior to filing its application, the applicant State must have alleged a breach of a specific obligation[43] in the precise terms in which that breach is subsequently described in its pleadings to the Court.[44] The Russian Federation suggests further that the dispute

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[39] *The Gambia v Myanmar, supra* n.32, at para. 72 confirming its statement *Georgia v. Russian Federation, supra* n.27, at p. 85, para. 30.

[40] *Obligations Concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016,* at p. 850, para 40.

[41] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, at p. 315, para. 89

[42] *Russian Federation's Preliminary Objections* at para 80.

[43] *Ibid* at para. 77 and 80.

[44] *Ibid* at para. 72: "the fact remains that Ukraine must demonstrate that a dispute existed with respect to each of the claims as formulated in the Memorial at the time of the filing of the Application."

must also have been formally brought to the attention of the respondent in those exact terms.[45]

28. There is no basis for such a pre-condition in the terms of Article IX of the Convention. As already noted, a significant feature of Article IX is that it does not contain any requirements regarding the prior identification or notification of a dispute. In this respect, it contrasts with compromissory clauses found in other multilateral treaties, which expressly include this pre-condition.[46]

29. Nor is there any basis in the jurisprudence of the Court. It is clear from *The Gambia v Myanmar Genocide case* that no such pre-condition exists as a matter of general law. As the Court reaffirmed in that case, the applicant State does *not* need to have previously alleged the breach of a specific provision of the Convention in order to establish the existence of a "dispute" under Article IX.[47] Further, as expressly stated in the *Marshall Islands v United Kingdom case,* "notice of an intention to file a case is not required as a condition for the seisin of the Court".[48] It is enough that, in all the circumstances, the respondent State "could not have been unaware" that there was a disagreement on a point of law or fact, a conflict of legal views or of interests between the parties.[49]

Dispute "relating to the interpretation, application or fulfilment" of the provisions of the Convention "including...the responsibility of a State for genocide"

30. Article IX of the Convention confers jurisdiction *ratione materiae* over disputes:

> 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.

31. As identified above, the words "or fulfilment" mark a departure from the standard language of compromissory clauses in multilateral agreements. They indicate a

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[45] *Ibid* at para. 76.
[46] See, e.g., Article 283 of *UNCLOS,* which requires that dispute settlement proceedings must commence with a formal exchange of views between the parties.
[47] *The Gambia v Myanmar, supra* n.32, at pp 27-28, para. 72, confirming its statement in *Georgia v. Russian Federation, supra* n.27, at p. 85, para. 30.
[48] *Marshall Islands v United Kingdom, supra* n.40, at p.849, para. 38, citing: *Land and Maritime Boundary between Cameroon and Nigeria , supra* n.41, at p. 297, para. 39.
[49] *Ibid* at at p. 850, para. 41.

deliberate intention of the Contracting Parties to confer jurisdiction on the Court to resolve a wide range of potential disputes arising under the Convention.[50] By including disputes relating to "the interpretation, application or fulfilment" of the Convention Article IX encompasses disputes about: the meaning and legal scope of the provisions of the Convention; their application; and the manner and extent to which Contracting Parties have given effect to them. Such disputes may relate to *any* of the provisions of the Convention – including the interpretation, application or fulfilment of Article IX itself.

32. It is not necessary that a dispute must have its origins *exclusively* under the Convention in order to fall within the scope of Article IX. A single political situation may give rise to multiple different legal disputes. It has been well established by this Court that acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty.[51] Likewise, this Court has repeatedly confirmed that the fact that a legal dispute may be underpinned by, or embedded within, a wider political dispute does not detract from its legal character.[52]

33. In assessing the issue of jurisdiction *ratione materiae* at the Preliminary Objections stage the Court must be satisfied that the applicant's claims are "capable of falling within the provisions" of the Convention.[53] That will require the Court to consider the interpretation of those provisions,[54] and New Zealand offers its construction of Article I of the Convention in order to assist the Court in that assessment. As noted, however,

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[50] The *travaux préparatoires* record the inclusion of these words through an amendment proposed by Belgium and the United Kingdom and its support from, amongst others, India on the grounds that the word "fulfilment" has a *"much wider meaning"* than *"application"*: see *Official records of the 3rd session of the General Assembly. legal questions : 6th Committee : summary records of meetings, 21 September -- 10 December 1948.* Also see R Kolb, *supra* n.19, at p. 453. The Oxford English Dictionary defines the verb 'to fulfil' as: "to carry out (something commanded or required); to obey, to follow (the law, a command, etc.); to accomplish (a duty, task, mission, etc.)," "[t]o achieve, to realize (a purpose, plan, end); to satisfy, to meet (a requirement, condition, standard, etc.); to perform (a function)." This definition supports a wider meaning than mere "application".

[51] See *Alleged Violations of the 1955 Treaty of Amity, supra* n.6, at p.27, para. 56. See also *Georgia v. Russian Federation, supra* n.27, at p. 70, para 113, where the Court found that there were two parallel disputes: one relating to the lawfulness of Russia's use of force, and another falling within the scope of CERD.

[52] See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran), Judgment, I.C.J. Reports 1980*, at p.20, para. 37.

[53] *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018*, at p. 319, para. 85.

[54] *Alleged Violations of the 1955 Treaty of Amity, supra* n.6, at pp. 31-32, para. 75.

it is not necessary for the Court to finally determine the construction of Article I at this Preliminary Objections stage. Any disagreement between the parties regarding the scope and content of Article I is properly a matter for the merits.[55]

The legal scope of Article I of the Convention

34. Article I of the Convention provides that:

> [t]he 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.

35. The duty to prevent and punish genocide sits at the very centre of the Convention. As with the other principles underlying the Convention, it is "recognized by civilized nations as binding on States, even without conventional obligations"[56] – and thus forms part of customary international law. Nevertheless, parties to the Convention remain bound to engage with one another through the prism of the Convention and cannot evade their Convention obligations through reliance on parallel custom.

36. The duty to prevent and punish genocide is triggered whenever a State learns of, or should normally have learned of, the commission of genocide or a serious risk that genocide will be committed.[57] When triggered, the duty requires all Parties to "employ all means reasonably available so as to prevent genocide as far as possible".[58] Article I thus contains a positive duty to act, although it is not in itself an authority for action.

37. The Article I duty to prevent and punish genocide also contains certain obligations that are not stated *expressis verbis,* but are necessarily implied, including:

    a. the obligation to refrain from committing genocide;

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[55] Consistent with the Court's approach in the *Bosnia Genocide Preliminary Objections* judgment, *supra* n.7 at p. 616, para. 32-33.
[56] *Reservations to the Genocide Convention, supra* n.13, at p. 23.
[57] *Bosnia Genocide Preliminary Objections* judgment, *supra* n.7, at p. 222, para. 431.
[58] *Bosnia Genocide case, supra* n.31, at p. 221, para. 430.

b. the obligation to invoke and discharge the duty to prevent and punish genocide only in good faith; and

c. the obligation on a State to refrain from acts, in purported reliance on the duty to prevent and punish genocide, that exceed the limits permitted by international law.

38. These implicit obligations are founded in, and form an integral part of, Article I of the Convention. They are not separate to it as the Russian Federation has asserted.[59] A dispute about "the interpretation, application or fulfilment" of any of these implicit obligations is a dispute "relating to the interpretation, application or fulfilment" of Article I itself. It thus falls within the scope of Article IX and the jurisdiction *ratione materiae* of the Court.

The obligation to refrain from committing genocide

39. In the *Bosnia Genocide* case, the Court held that, while the Convention does not expressly require States themselves to refrain from committing genocide, "the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide".[60]

40. The Court's jurisprudence clearly confirms that it has jurisdiction to consider disputes relating to this implied obligation, including by determining whether allegations of genocide made by one Contracting Party against another Contracting Party are established on the evidence.[61] Whether acts amount to "genocide" so as to trigger the application of Article I is not simply a matter of a party's subjective interpretation. The definition of "genocide" in Article II of the Convention applies and must be satisfied on the facts. That requires a consideration of whether both the *actus reus* and *mens rea* of genocide (and/or other associated punishable acts enumerated in Article III of the Convention) are made out.[62]

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[59] *Russian Federation's Preliminary Objections* at sections IV D and E.
[60] *Bosnia Genocide case, supra* n.31, at p 113, para. 166.
[61] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia) ('Croatia Genocide case'), Judgment, I.C.J. Reports 2015*, p. 3
[62] *Ibid* at p.61, para. 130.

41. Where a Contracting Party takes actions which infringe the legal rights of another state in purported reliance on the duty to prevent genocide, the Contracting Party must be prepared to defend those actions on the basis of compelling evidence that genocide has occurred, or is about to occur.[63] The *actori incumbit probatio* principle applies generally to allegations of genocide[64] so the party taking measures purportedly to prevent genocide under Article I of the Convention must be able to prove the objective basis for its determination.[65]

42. As already noted, Article IX provides that a dispute "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 Court at the request of *any* of the parties to the dispute. Accordingly, the Court has jurisdiction *ratione materiae* over such disputes whether they are submitted to the Court by the Contracting Party alleging genocide, or by the Contracting Party alleged to have committed genocide.

The obligation to invoke and discharge the duty to prevent and punish genocide only in good faith

43. Article I of the Convention is underpinned by an implicit obligation to invoke and discharge the duty to prevent and punish genocide only in good faith. That obligation arises from the general principles of international law,[66] as codified in the Vienna Convention on the Law of Treaties (VCLT), and reflected in the jurisprudence of the Court.

44. The International Law Commission has described the principle of good faith as "the fundamental principle of the law of treaties".[67] The preamble to the VCLT records that "the principles of free consent and of good faith and the *pacta sunt servanda* rule are universally recognized". Article 26 of the VCLT sets out the requirement that

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[63] *Bosnia Genocide case, supra* n.31, at p. 129, para. 208).
[64] *Croatia Genocide case, supra* n.61, at p. 73, para. 170
[65] *Bosnia Genocide case, supra* n.31, at pp. 128 – 129, para. 204, 209.
[66] See section 38(1)(c) of the Statute of the International Court of Justice.
[67] International Law Commission, *supra* n.26, p. 211, para. 1. See also Villiger *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff, Leiden/Boston, 2009) at p. 363: "[The rule of *pacta sunt servanda*] has been applied since time immemorial...and is seen today as the cornerstone of international relations. Ulpian referred to it, for Grotius it lay at the centre of the international legal order. No case is known in which a tribunal has repudiated the rule or questioned its validity."

"[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith." Consistent with this, Article 31 of the VCLT further provides that every treaty must also be "interpreted in good faith" in light of its object and purpose. It is implicit within those obligations that a party to a treaty "must abstain from acts calculated to frustrate" the treaty and its object and purpose.[68]

45. The significance of the principle of good faith has also been recognised by this Court. In the *Nuclear Tests Case*, the Court held that:[69]

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international cooperation...

Further, in the *Gabčíkovo-Nagymaros Project case,* the Court found that the obligation of good faith requires a party to apply a treaty provision "in a reasonable way and in such a manner that its purpose can be realised".[70]

46. Article I of the Convention must therefore be interpreted, applied and fulfilled in good faith in such a manner that its object and purpose can be realised. As recognised by this Court in its Advisory Opinion on *Reservations to the Genocide Convention*:[71]

> *The Convention was manifestly adopted for a purely humanitarian and civilizing purpose.* It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other *to confirm and endorse the most elementary principles of morality.* In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. *The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.* (emphasis added)

47. The good faith fulfilment of those "high ideals" entails that Contracting Parties must refrain from, *inter alia*, invoking and discharging their duty to prevent and punish genocide on a false basis to achieve purposes inconsistent with the object and purpose of the Convention and/or to interfere with the legal rights of another State.

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[68] *Ibid*, at para. 4.
[69] *Nuclear Tests Case (Australia v France) (Merits), Judgment, I.C.J. Reports 1974,* , at p.268, para. 46
[70] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), supra* n.24 , at p. 79, para. 142.
[71] *Reservations to the Genocide Convention, supra* n.13, at p. 23.

In New Zealand's view, a dispute arising out of such conduct would lie squarely within the scope of Article I and engage the jurisdiction *ratione materiae* of the Court.

The obligation to refrain from acts, in purported reliance on the duty to prevent and punish genocide, that exceed the limits permitted by international law

48. As this Court recognised in the *Bosnian Genocide case,* the duty to prevent and punish genocide must be exercised within the limits permitted by international law.[72]

49. The Court confirmed and reinforced that limitation in the provisional measures Order in this case, noting:[73]

> The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.

And further that it is therefore:

> 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 the purpose of preventing or punishing an alleged genocide.

50. Article I of the Convention accordingly implicitly constrains the actions a Contracting Party can properly take in purported discharge of its duty to prevent and punish genocide. Contracting Parties are obliged to refrain from acts, in purported reliance on the Article I duty, that exceed the limits of international law or are inconsistent with the purposes of the United Nations.

51. Article VIII of the Convention underscores that, in the first instance, parties will seek to act collectively to prevent and supress genocide through the mechanisms of the United Nations. Members of the United Nations have accepted a corresponding duty to respond to requests for action presented to them under Article VIII of the Convention.[74] As this Court has recognised, Article VIII does not exhaust a party's duty to prevent genocide.[75] Actions beyond recourse to the competent organs of the United Nations may be required – particularly where the competent organs of the

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[72] See *Bosnia Genocide case, supra* n.31, at p. 221, para. 430.

[73] *Provisional Measures Order of 16 March 2022, supra* n.30, at para. 58-60.

[74] By extension of their own duty to prevent under Article I of the Convention and international customary law, and as confirmed by UNGA resolution A/RES/60/1 (2005) at paragraphs 138 and 139.

[75] *Bosnia Genocide case, supra* n.31, at pp. 219 – 220, para. 427.

United Nations have manifestly failed to act. However, on its own the duty to prevent genocide does not provide a legal basis for the use of force in violation of Article 2(4) of the UN Charter.[76]

52. Accordingly, New Zealand considers that the Court has jurisdiction *ratione materiae* over disputes relating to acts, taken in purported discharge of the duty to prevent genocide, that exceed the limits of international law or are inconsistent with the purposes of the United Nations. In particular, the Court has jurisdiction *ratione materiae* where a Contracting Party, in purported discharge of its duty to prevent genocide, causes injury through the use of force against another Contracting Party.

53. The scope of that jurisdiction should not be misunderstood. Article IX does not confer jurisdiction in relation to disputes that do not arise from obligations founded in the Convention. In general terms, the Convention does not regulate the use of force between States, save where the requisite intent for genocide is present,[77] and it does not regulate the protection of human rights in armed conflict.[78] However, where a Contracting Party frames its own acts as justified or required by obligations founded in the Convention, then a dispute arising out of those acts will properly fall within the Court's jurisdiction *ratione materiae*.

CONCLUSION

54. It follows from the authorities described above that a dispute within the scope of Article IX of the Convention will exist wherever there is evidence that the parties fundamentally disagree on the underlying facts; their application to the Convention; the meaning and legal scope of one or more provisions of the Convention; and/or the manner and extent to which those provisions have been complied with – including any implicit obligations contained within them.[79] Such a dispute may relate to *any* of

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[76] Article 2(4) UN Charter, as elaborated by the GA in Resolution 3314 (XXIX) *Definition of Aggression.*

[77] *Legality of Use of Force (Yugoslavia v. Belgium), supra* n.10, at p. 124, para. 40.

[78] *Bosnia Genocide case, supra* n.31, at p. 104 para. 147.

[79] The words of the Court in its 1996 Judgment at the preliminary objections phase of the *Bosnia Genocide* case are particularly pertinent in this regard: "...it is sufficiently apparent...that *the Parties not only differ with respect to the facts of the case, their imputability and the applicability to them of the provisions of the Genocide Convention, but are moreover in disagreement with respect to the meaning and legal scope of several of those provisions*, including Article IX. For the Court, *there is accordingly no doubt that there exists a dispute between them relating to "the interpretation, application or fulfilment of the...Convention,*

the provisions of the Convention – including the interpretation, application or fulfilment of Article IX itself. And it may be brought before the Court by *any* party to the dispute – including a party that has been accused of genocide.

55. In particular, New Zealand considers that:

a. Through Article IX, Contracting Parties to the Convention have identified a procedure for the settlement of their disputes – submission to this Court. At the same time, they have assumed a substantive obligation to comply with that procedure reasonably and in good faith. By accepting Article IX of the Convention Contracting Parties have accordingly agreed to abide by the Court's procedures and any orders or judgments issued by it.

b. A Contracting Party's failure to comply with any order for provisional measures indicated by the Court is a breach of that Party's international obligations under the Charter, the Statute and Article IX. Such failure not only aggravates the central dispute but may give rise to a dispute regarding compliance with the substantive obligations contained in Article IX itself.

c. The existence of a "dispute" under Article IX can be determined from the words and the actions of the parties – both before, and after, the application was submitted to the Court. An applicant State does not need to have previously expressly identified a breach of a specific provision of the Convention in order to have established the existence of a "dispute".

d. In assessing the question of jurisdiction *ratione materiae* under Article IX the Court must be satisfied that the applicant's claims are capable of falling within the provisions of the Convention. But it is not necessary that a dispute must have its origins exclusively under the Convention in order to establish jurisdiction.

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including...the responsibility of a State for genocide...", according to the form of words employed by that latter provision." (*Bosnia Genocide Preliminary Objections* judgment, *supra* n.7, at pp 616-617, para. 33 emphasis added)

e. The duty in Article I of the Convention to prevent and punish genocide also contains certain obligations that are not stated *expressis verbis* but are necessarily implicit within it, including: the obligation to refrain from committing genocide; the obligation to invoke and discharge the duty to prevent and punish genocide only in good faith; and the obligation to refrain from acts, in purported reliance on the duty to prevent and punish genocide, that exceed the limits permitted by international law or are inconsistent with the purposes of the United Nations.

f. A dispute about the "interpretation, application or fulfilment" of any of these implicit obligations is a dispute "relating to the interpretation, application or fulfilment" of Article I itself. It thus falls within the jurisdiction *ratione materiae* of the Court.

g. Such a dispute may be brought to the Court by any party to the dispute. This includes a party alleged to have committed genocide, and the Court may properly determine and declare whether those allegations are established on the evidence before it.

Respectfully,

Susannah Gordon

Co-Agent of the Government of New Zealand