

**INTERNATIONAL COURT OF JUSTICE**

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**DISPUTE RELATING TO ALLEGATIONS OF GENOCIDE  
(Ukraine v Russian Federation)**

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**NEW ZEALAND'S WRITTEN OBSERVATIONS  
ON THE  
ADMISSIBILITY OF  
THE INTERVENTION PURSUANT TO ARTICLE 63 OF THE STATUTE OF THE COURT  
BY THE  
GOVERNMENT OF NEW ZEALAND**

**10 FEBRUARY 2023**

To the Registrar, International Court of Justice.

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

1. Further to the Registrar's letter No 158464 of 31 January 2023, the Government of New Zealand hereby submits its written observations on the admissibility of its intervention filed under Article 63 of the Statute of the Court on 22 July 2022.
2. In these written observations, New Zealand responds to the key arguments in the Russian Federation's written observations of 17 October 2022 ("**the Russian Federation's Observations**" "**the Observations**") in order to demonstrate the absence of any valid objection to the admission of New Zealand's Declaration of Intervention. ("**New Zealand's Declaration**" "**the Declaration**").<sup>1</sup>

#### INTRODUCTION

3. Article 63 of the Statute provides that "whenever the construction of a convention to which states other than those concerned in the case are parties is in question" each of those States "has the right to intervene in the proceedings".
4. The text of Article 63 was drawn directly from Article 84 of the Hague Convention for the Pacific Settlement of International Disputes of 1907.<sup>2</sup> Its rationale is clear: to ensure that all parties to multilateral conventions have the opportunity to defend their interest in the correct and consistent interpretation of those conventions when the Court is invited to construe contested provisions in bilateral or plurilateral disputes.<sup>3</sup>

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<sup>1</sup> New Zealand does not seek to respond to every point raised in the Russian Federation's Observations, many of which are repetitive or irrelevant to New Zealand's Declaration.

<sup>2</sup> Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th—July 24th 1920 with Annexes*, p.594

<sup>3</sup> See *Whaling in the Antarctic (Australia v Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013*, *ICJ Reports 2013* p.3, Separate Opinion of Judge Cañado Trindade at pp.28-29 (paragraphs 38-40); *Malta/Libya Continental Shelf, Application to Intervene* ICJ Rep. 1984, Dissenting Opinion of Judge Oda p. 90 at pp.100 - 103, (paragraphs 22 – 26) and the Dissenting Opinion of Sir Robert Jennings p.148 at p.156 (paragraphs 25-26).

5. As the Court has made clear in *Whaling in the Antarctic*, and consistent with earlier authority, “intervention based on Article 63 is an incidental proceeding that constitutes the exercise of a right”.<sup>4</sup> It is to be contrasted with the discretionary procedure in Article 62 of the Statute, which depends on the Court’s grant of permission upon determination that the decision in the case may affect the intervening State’s interests of a legal nature.

**The admissibility of each intervention must be assessed individually**

6. A State may exercise its right under Article 63 by submitting a declaration of intervention under Article 82(1) of the Rules of the Court.
7. As the Court further described in *Whaling in the Antarctic*, it is the role of the Court to:<sup>5</sup>
  - a. Ensure that any intervention falls within the provisions of Article 63 of the Statute; and
  - b. Verify that the conditions set forth in Article 82 of the Rules are met.

Where those requirements are satisfied, the intervention shall be admissible.<sup>6</sup>

8. That necessarily requires that the Court will review and assess each declaration of intervention individually and on its own terms to determine whether, and to what extent, the intervention is admissible. Why a State has chosen to exercise its right under Article 63, whether the construction of the convention put forward aligns with that of one or other Party to the dispute, and whether other States have also chosen to exercise their right under Article 63 are not relevant to the Court’s determination of admissibility.

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<sup>4</sup> *Whaling in the Antarctic (Australia v Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013*, ICJ Reports 2013, p.3 at p.5 (paragraph 7), citing: *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgement*, ICJ Reports 2011 (II), p.420 at p.434 (paragraph 36); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene, Judgment*, ICJ Reports 1981, p.3 at p.15 (paragraph 26); *Haya de la Torre (Colombia v Peru), Judgment*, ICJ Reports 1951, p.71 at p.76; and *S.S. “Wimbledon”, Question of the Intervention by Poland, Judgment, 1923, PCIJ Series A, No.1*, p.12.

<sup>5</sup> *Whaling in the Antarctic*, *supra* n 4 at pp.5-6 (paragraph 8).

<sup>6</sup> *Whaling in the Antarctic*, *supra* n 4 at pp.5-6 (paragraphs 7-8). See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Declaration of Intervention, Order of 4 October 1984*, I.C.J. Reports 1984, p. 215, Separate Opinion of Judges Ruda, Mosier, Ago, Sir Robert Jennings and De Lacharrière, at p.219 (paragraph. 1): “When those conditions are fulfilled, a State wishing to intervene has a right to do so, and it is not for the Court to grant or withhold permission.”

9. In making its determination the Court is not faced with a binary choice: to “admit” or “not to admit” the intervention. The Court may decide to admit all, or any part of, an intervention or to limit its scope to conform to Article 63 – as it did in the *Haya de la Torre case*.<sup>7</sup>

#### **New Zealand’s intervention meets the requirements of the Statute and the Rules**

10. New Zealand’s intervention meets the requirements of Article 63 of the Statute and Article 82 of the Rules in both its form and its substance.
11. As described in the Declaration, New Zealand’s intervention is clearly limited to the scope of Article 63 and the construction of the convention at issue in the case. Paragraph 14 of the Declaration states that:

the scope of New Zealand’s intervention is limited to the issues relating to the construction of the [Genocide] Convention that arise in the context of the present case.

Paragraphs 15 to 17 identify the provisions of the Genocide Convention that are in question in the case. And paragraphs 18 to 33 and 35 to 36 set out New Zealand’s legal interpretation of those provisions.
12. Further, New Zealand’s Declaration meets the conditions set out under Article 82 of the Rules. The Declaration was filed “as soon as possible”, less than five months after the proceedings were commenced, and before the opening of the oral hearings (which have not been set). It specifies the case and convention to which the intervention relates<sup>8</sup> and contains all of the information set out in Article 82(2)(a) to (d) of the Rules:
  - a. The basis on which New Zealand is a party to the Genocide Convention is set out in paragraph 10.
  - b. The provisions of the Genocide Convention, the construction of which New Zealand considers to be question in the case, are identified in paragraphs 15 to 17.
  - c. A statement of the construction of those provisions is set out in paragraphs 18 to 33 and 35 to 36.

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<sup>7</sup> *Haya de la Torre*, *supra* n 4 at p.77.

<sup>8</sup> *New Zealand’s Declaration*, paragraphs 4 to 9.

- d. A list of the documents in support of the intervention, which are attached to the Declaration, is set out in paragraph 34.

**New Zealand's intervention is admissible by right**

13. New Zealand submits, therefore, that its intervention, as described in the Declaration, is accordingly admissible by right.

**RESPONSE TO THE RUSSIAN FEDERATION'S SPECIFIC OBJECTIONS**

**New Zealand's position with respect to the underlying political dispute is not relevant to the question of admissibility**

14. No legal proceeding exists in a vacuum. As this Court has recognised, every legal dispute that comes before the Court has its origin in, and is underpinned by, a political dispute.<sup>9</sup> Likewise, the position of a State with respect to the underlying political dispute will always be a factor in a State's decision to apply to the Court. The Court will not refuse an application on that basis.<sup>10</sup>
15. Accordingly, the Court has consistently found that the political motivations of a State are not relevant to its ability to exercise its right under Article 63 and the question of admissibility.
16. Contrary to the Russian Federation's implication in paragraphs 13 to 14 of its Observations, the Court admitted Cuba's intervention in the *Haya de la Torre* case once it was reformulated in accordance with Article 63 – despite Peru's objection that it was “really” an attempt to appeal an earlier decision.<sup>11</sup> The Court's concern in that case

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<sup>9</sup> See, e.g., *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran)*, Judgment, *I.C.J. Reports 1980*, p.3 at p.20 (paragraph 37): “...legal disputes between sovereign States by their very nature are likely to occur in political contexts and often form only one element in a wider and long-standing political dispute between the States concerned. Yet, never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.”

<sup>10</sup> *ibid* at p.20 (paragraph 38).

<sup>11</sup> *Haya de la Torre*, *supra* n 4 at p.77. New Zealand submits, in any case, that there can be no comparison between the declaration of intervention filed by Cuba in that case and the Declaration that has been filed by New Zealand – which, as described above, is clearly limited to the scope of Article 63 and meets the

was not Cuba's underlying motivation for its intervention, but the content of its declaration of intervention. Once the scope of the intervention was reformulated to relate solely to "the subject matter of the pending proceedings" it was admitted.<sup>12</sup>

17. Likewise, in *Whaling in the Antarctic*, the Court did not entertain Japan's concerns that the "true" purpose of New Zealand's intervention in that case was to pursue a joint case with Australia.<sup>13</sup>

18. The practice and jurisprudence of the Court accordingly provide no support to the Russian Federation's contention that the Court is required to look behind a declaration of intervention to ascertain the so-called "genuine intention" of the intervenor.

19. New Zealand has been entirely open in its political support for Ukraine, both in its public statements, and in the Declaration.<sup>14</sup> At the same time, New Zealand has made clear in the Declaration that it is not taking a position before the Court on the merits of the case and instead that:

..the scope of New Zealand's intervention is limited to the issues relating to the construction of the [Genocide] Convention that arise in the context of the present case.

20. To accept the arguments raised by the Russian Federation in Section IIA of its Observations would require the Court to go behind the content of the Declaration and to assess the motives for New Zealand's intervention against an unprecedented "political and legal neutrality" test. On the Russian Federation's approach, a State would *only* be permitted to intervene under Article 63 in the unlikely situation that it:

- a. Has no position with respect to the political circumstances giving rise to the case in question; *and*

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requirements of Article 82 of the Rules. Cuba's declaration of intervention plainly fell outside the scope of Article 63 and advanced the construction of provisions of a convention that were not in dispute in the case before the Court: see paragraph 37 below.

<sup>12</sup> As the Russian Federation acknowledges at paragraph 57 of its *Observations*, the Court's revision of Article 82(2) of the Rules to include the requirement that the declaration of intervention identify the provisions of the convention the construction of which is in question, and include a statement of the construction for which the intervening State contends, was intended to implement the requirement it had set out in *Haya de la Torre*, that the intervention relate to provisions of a convention in question in the proceedings: see S Rosenne, *Intervention in the International Court of Justice* (Martinus Nijhoff, 1993), p.75.

<sup>13</sup> *Whaling in the Antarctic supra n 4* at pp.8-9 (paragraphs 16-19).

<sup>14</sup> *New Zealand's Declaration*, paragraph 11.

- b. Adopts an interpretation of the convention in question that is completely different from that of any of the Parties to the dispute; *and*
  - c. Adopts an interpretation of the convention that is completely different from that of any other State exercising its right to intervene under Article 63.
21. Article 63 would be reduced to an empty shell – a “right” in nothing more than name. The Russian Federation’s approach runs contrary to the purpose and language of Article 63 and to the previous jurisprudence of the Court. Any such restrictions would be impossible for the Court to apply in practice and would require it to entertain the type of inquiry into a State’s underlying political views that it has, rightly, always rejected.

**New Zealand’s intervention does not affect the equality of the Parties**

22. The arguments raised by the Russian Federation in Section IIB of its Observations are simply an extension of its attempt to impose a “political and legal neutrality” restriction on a State’s right under Article 63.
23. Nor are they specific to this particular case. Equivalent arguments were raised by Japan in *Whaling in the Antarctic* and dismissed by an overwhelming majority of the Court. The views expressed by Judge Owada in his separate opinion in that case, on which the Russian Federation so heavily relies, were not shared by any other members of the Court.
24. The Court clearly stated in that case that:<sup>15</sup>
- ...intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, who does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and [...] *such an intervention cannot affect the equality of the Parties to the dispute;* (emphasis added)

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<sup>15</sup> *Whaling in the Antarctic*, *supra* n 4 at p.9 (paragraph 18).

25. As the Court further found in that case, since an intervenor does not have the status of a party to the proceedings, it cannot be regarded as a “party in the same interest” as any of the Parties to the dispute.<sup>16</sup>
26. The fact that more than one State has chosen to exercise their rights under Article 63 in a given case cannot change this principle. As the Court made clear in *Whaling in the Antarctic*, any issues that may arise from the number of States exercising their rights under Article 63 do not go to the question of admissibility, but rather are issues of procedure.<sup>17</sup> To hold otherwise would be to find that the exercise of the Article 63 right by one State depends on the non-exercise of that right by other States. Such a proposition is unprincipled and has no foundation in the Statute, the Rules, or the practice or jurisprudence of the Court.
27. New Zealand acknowledges the procedural and administrative implications arising from the number of States that have exercised their rights under Article 63 in the present case. However, while the number of States exercising their rights under Article 63 may be unprecedented, it is not beyond the contemplation of the Statute. Nor is it surprising given the fundamental importance of the Genocide Convention and the *erga omnes* nature of its obligations. New Zealand notes that the Court is adept at managing a significant number of State participants in a single case in the context of its advisory proceedings.
28. The Court has demonstrated that it can deal fairly and pragmatically with any procedural issues arising in the present case and New Zealand is confident in its ability to continue to do so. Any such procedural measures, however, must not restrict New Zealand’s ability to present written or oral submissions in its own right as provided for in Article 86 of the Rules.<sup>18</sup>

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<sup>16</sup> *Whaling in the Antarctic*, *supra* n 4 at p.9 (paragraph 21). See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment*, *I.C.J. Reports 1984*, Separate Opinion of Judge Mbaye, p. 35 at pp 40-41.

<sup>17</sup> *Whaling in the Antarctic*, *supra* n 4 at p.9 (paragraph 18).

<sup>18</sup> For the sake of completeness, New Zealand notes that there is no New Zealand national currently sitting on the Court so the specific issues identified in paragraph 48 of the Russian Federation’s Written Objections do not apply.



29. The Russian Federation’s approach conflates the limited role of an intervenor under Article 63 with the role of a State with a legal interest under Article 62. The objective and scope of the two procedures – and corresponding status of the intervening State in the proceedings – is significantly different.<sup>19</sup> It is for the intervening State to decide whether it wishes to use the discretionary procedure under Article 62 or to exercise its right under Article 63.<sup>20</sup> As the Court noted in *Whaling in the Antarctic*, where a State has chosen to exercise its right under Article 63, the Court should not apply the same considerations that may apply to an application made under Article 62.<sup>21</sup>

#### **New Zealand has the right to intervene at the jurisdictional phase of proceedings**

30. The Russian Federation has filed Preliminary Objections to the jurisdiction of the Court in the present case.<sup>22</sup> The issue of whether there is a “dispute” within the terms of Article IX of the Convention is thus squarely before the Court, and the interpretation of Article IX will be directly at issue during the jurisdiction phase of the proceedings. Consistent with Article 63, New Zealand has exercised its right to put its interpretation of Article IX before the Court.<sup>23</sup>
31. Despite this, in Section IIC(i) of its Observations, the Russian Federation contends that Article 63 of the Statute does not confer a right to intervene at the jurisdictional phase of proceedings. That is wrong for three reasons. First, there is no support for that proposition in the practice of the Court. Second, there is no support for the proposition in the Statute or the Rules. And third, it is inconsistent with the purpose for which Article 63 was enacted. Were it correct, the proposition advanced by the Russian Federation would deprive States entirely of their right to intervene whenever the construction of a compromissory clause such as Article IX, or a jurisdictional treaty, is in question.

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<sup>19</sup> See: S.S. “*Wimbledon*” *supra* n 4 at p.12; *Territorial and Maritime Dispute (Nicaragua v Colombia)*, *supra* n 4 at pp.433-435 (paragraphs 35 to 39); *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *supra* n 4 at p.13 (paragraph 21) and p.15 (paragraph 26). See also the extensive discussion of this point in the separate opinion of Judge Cançado Trindade in *Whaling in the Antarctic*, *supra* n 4.

<sup>20</sup> S.S. “*Wimbledon*” *supra* n 4 at p.13.

<sup>21</sup> *Whaling in the Antarctic*, *supra* n 4 at p.6 (paragraph 7).

<sup>22</sup> See *Russian Federation’s Observations*, paragraph 2, confirming that the Russian Federation’s Preliminary Objections (which New Zealand has not seen) extend to both jurisdiction and admissibility.

<sup>23</sup> See *New Zealand’s Declaration*, paragraphs 18-27, and 35-36.

*There is no support for the Russian Federation's contention in the practice of the Court*

32. There is no “long-standing practice of the Court” militating against intervention at the jurisdictional phase, as claimed by the Russian Federation. To the contrary, States have made Article 63 declarations of intervention to the Court in only four previous cases. Those cases, considered both individually and collectively, provide no support to the contention that the Court will not admit interventions at the jurisdictional phase.
33. In *Whaling in the Antarctic*, the Court admitted New Zealand’s intervention<sup>24</sup> notwithstanding Japan’s unresolved contest to jurisdiction.<sup>25</sup> It did not – as would be expected if the Russian Federation’s contention was correct – defer consideration of the admissibility of New Zealand’s intervention until after it had addressed Japan’s jurisdictional objections.
34. In *Nuclear Tests (Request for Examination)*, New Zealand claimed that jurisdiction arose not from a convention but from paragraph 63 of the 1974 *Nuclear Tests* judgment.<sup>26</sup> France disputed that basis for jurisdiction. None of the Article 63 declarations of intervention in that case addressed the disputed question of jurisdiction at all. Further, given there was no convention at issue in the jurisdictional phase, there was no role for Article 63 intervenors in that phase. On no basis does the Court’s approach in that case support the point of principle contended by the Russian Federation.
35. In *Military and Paramilitary Activities*, the Court found El Salvador’s declaration of intervention inadmissible “inasmuch as it relates to the [jurisdictional] phase of the proceedings”. But the Court’s approach does not support the wide point of principle contended by the Russian Federation. To the contrary, it supports the proposition that a State may exercise its right under Article 63 at the jurisdictional phase where the interpretation of a compromissory clause is in question in the case.
36. A proper reading of the *Military and Paramilitary Activities* case makes clear that:

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<sup>24</sup> *Whaling in the Antarctic*, *supra* n 4 at p. 10 (paragraph 23).

<sup>25</sup> *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, *Judgment*, I.C.J. Reports 2014, p.226 at p.242 (paragraph 32).

<sup>26</sup> *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, 21 August 1995, New Zealand’s Request for an Examination of the Situation, paragraph 3.

- a. El Salvador's Article 63 declaration of intervention primarily sought to rebut Nicaragua's allegedly false allegations that El Salvador did not consider itself the subject of an armed attack by Nicaragua.<sup>27</sup> In clear contrast to New Zealand's Declaration in the present case, the declaration of intervention in that case consisted primarily of El Salvador's version of the facts relevant to the situation before the Court and was accordingly directed to the merits of the case. The basis of El Salvador's contest to jurisdiction was unclear,<sup>28</sup> but it was certainly not premised on the construction of a convention to which El Salvador was a party. The declaration of intervention did not comply with the requirements of Article 82 of the Rules – as it did not identify the provisions of any convention the construction of which El Salvador considered to be in question at the jurisdictional phase, nor did it provide a statement of the construction of those provisions for which it contended.
- b. In their separate opinions, Judges Ruda, Mosler, Ago, Sir Robert Jennings, and de Lacharrière made clear that they had found the declaration of intervention inadmissible not as a matter of legal principle, but because El Salvador had failed to identify the provisions of any convention which it considered to be in question in the jurisdictional phase of the case.<sup>29</sup> The separate opinions of Judges Oda and Singh relied on similar grounds.<sup>30</sup>
- c. Further, far from rejecting the possibility of Article 63 intervention at the jurisdictional phase, two of the separate opinions expressly confirmed that possibility. Judge Schwebel, dissenting, specifically addressed the question of

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<sup>27</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention of El Salvador, 15 August 1984.

<sup>28</sup> El Salvador's objection was to admissibility more than jurisdiction. It contended that the dispute was a multilateral dispute properly addressed in multilateral fora, and incapable of resolution through bilateral dispute settlement (section XIV, second and third paragraph on p.14; section XV). It also contended that the Court could not determine the dispute before it without adjudicating on El Salvador's rights, which it could not do in El Salvador's absence (section XIV, penultimate paragraph on p.14). On this point, see *Military and Paramilitary Activities*, *supra* n 6, Dissenting Opinion of Judge Schwebel at pp.242 – 244.

<sup>29</sup> *Military and Paramilitary Activities*, *supra* n.6, Separate Opinion of Judges Ruda, Mosier, Ago, Sir Robert Jennings and De Lacharrière at p.219: "we have not been able to find, in El Salvador's written communications to the Court, the necessary identification of such particular provision or provisions which it considers to be in question **in the jurisdictional phase of the case** between Nicaragua and the United States; nor of the construction of such provision or provisions for which it contends" (emphasis added).

<sup>30</sup> *Military and Paramilitary Activities*, *supra* n 6, Separate Opinion of Judge Oda at pp.220 – 221 noting that El Salvador's declaration of intervention: "appeared mainly directed to the merits of the case, was vague, and did not appear to satisfy the requirements of Article 82(b) and (c) of the Rules of Court for an intervention at the present stage". The Separate Opinion of Judge Singh at p.218 noted: "El Salvador's Declaration in effect appears directed to the merits of the case" and was therefore best addressed at that phase of proceedings.

whether Article 63 intervention was available at the jurisdictional phase and firmly concluded it was.<sup>31</sup> Judge Oda noted that: “Had El Salvador’s initial declaration been properly formulated... El Salvador’s declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case.”<sup>32</sup>

37. In *Haya de la Torre* there was no contest as to jurisdiction and the Court admitted Cuba’s Article 63 intervention. While the Court observed in that case that an intervention must “actually relate to the subject-matter of the pending proceedings”,<sup>33</sup> that did not amount to the imposition of a requirement that an intervention relate to the substantive, rather than jurisdictional, elements of the dispute. Instead, the Court’s observation was a response to the fact that Cuba’s declaration of intervention indicated an intention to promote a construction of provisions of the Havana Convention that were simply not in dispute in the proceedings. Cuba’s intervention was admitted on a “reduced” basis which focused only on the question of interpretation that was at issue between the parties. The case accordingly provides no support to the proposition that the Court will not admit Article 63 interventions at the jurisdictional phase.
38. Finally, the Russian Federation’s additional reliance on the *Nuclear Tests (New Zealand v France)* case, where the Court deferred consideration of Fiji’s Article 62 application for intervention, also does not assist. That case is clearly distinguishable. First, it relates to the exercise of the intervention procedure under Article 62 and not a State’s right under Article 63. As discussed at paragraph 29, the two are fundamentally different. Second, unlike New Zealand’s Declaration, Fiji’s application did not address jurisdiction at all and was entirely directed to the merits of the case.<sup>34</sup> By deferring consideration of Fiji’s application to the merits phase, the Court merely deferred consideration to the phase in relation to which the application was relevant. Unlike

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<sup>31</sup> *Military and Paramilitary Activities, supra n 6*, Dissenting Opinion of Judge Schwebel at pp.234 – 236. New Zealand adopts and concurs with his reasoning.

<sup>32</sup> *Military and Paramilitary Activities, supra n 6*, Separate Opinion of Judge Oda at p.221.

<sup>33</sup> *Haya de la Torre, supra n 4* at p.76

<sup>34</sup> *Nuclear Tests (New Zealand v. France)*, Application for Permission to Intervene submitted by the Government of Fiji, 18 May 1973.

the present case, deferral did not have the effect of depriving Fiji from making any of the points highlighted in its application.<sup>35</sup>

39. Accordingly, far from establishing a practice of the Court not to admit Article 63 interventions at the jurisdictional phase, the practice and jurisprudence of the Court suggests that such interventions will be admitted at the jurisdictional phase if: they are directed to matters of jurisdiction; and they comply with Article 63 of the Statute and Article 82 of the Rules. New Zealand's intervention meets both those requirements.

*There is no support for the Russian Federation's contention in the Statute or the Rules*

40. There is further no support for the Russian Federation's approach in the text of Article 63 of the Statute or Article 82 of the Rules.
41. Article 63 of the Statute confers on New Zealand a right to intervene in proceedings before the Court "*whenever* the construction of a convention [to which it is a party] is in question" (emphasis added). There is nothing in the text of Article 63, or elsewhere in the Statute, to suggest that "*whenever*" is to be construed narrowly to exclude the jurisdictional phase of proceedings.
42. Similarly, Article 82(1) of the Rules requires declarations of intervention to be filed "as soon as possible, and no later than the date fixed for the opening of the oral hearings". There is nothing in the text of Article 82, or elsewhere in the Rules, to suggest that "the opening of the oral hearings" is to be construed narrowly to exclude oral hearings at the jurisdictional phase.<sup>36</sup> Likewise, Article 84(1) of the Rules requires the Court to decide whether an intervention under Article 63 is admissible "as a matter of priority". There is nothing in this rule to require the Court to defer its decision on admissibility until after the jurisdictional phase of the case.

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<sup>35</sup> Professors Miron and Chinkin emphasise that *Nuclear Tests* "should not be interpreted as rejecting at large the possibility of intervention on jurisdictional issues at the jurisdictional stage": see A Miron and C Chinkin, "Article 62", in A Zimmerman, C Tams, K Oellers-Frahm and C Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p.1684 (paragraph 20).

<sup>36</sup> See *Military and Paramilitary Activities*, *supra* n 6, Dissenting Opinion of Judge Schwebel at pp.234 – 235.

43. If the negotiators of the Statute or the drafters of the Rules intended to exclude States from exercising their right under Article 63 at the jurisdictional phase of proceedings, they could easily have done so. Accordingly, the text of the Statute and the Rules strongly indicate that Article 63 intervention is available at the jurisdictional phase of proceedings.

*The Russian Federation's contention amounts to an unjustified denial of the right to intervene where the construction of compromissory clauses are in question*

44. The Russian Federation's approach is also fundamentally inconsistent with the purpose for which Article 63 was adopted.
45. As set out above at paragraph 4, Article 63 confers a right on all parties to multilateral conventions to defend their interests in the correct and consistent interpretation of those conventions when the Court is invited to construe contested provisions in bilateral or plurilateral disputes.
46. That right is particularly important in relation to a compromissory clause in a multilateral treaty, through which States express their consent to submit disputes arising under the treaty for resolution by the Court. As Judge Owada has commented as President of the Court, such clauses "are playing an increasingly crucial role as a primary method for providing the Court with jurisdiction to resolve disputes between States".<sup>37</sup> They are of such importance that they can be considered to "constitute part of the *raison d'être* of the treaty" itself.<sup>38</sup> All States Parties to the treaty thus have a vital interest in how such clauses are interpreted and applied.
47. If the Court were to exclude Article 63 interventions at the jurisdictional phase, the result would be to deprive States of their right to do so not only in relation to individual compromissory clauses, but also in relation to entire multilateral conventions addressing jurisdiction.<sup>39</sup> In circumstances where the Court has confirmed that

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<sup>37</sup> Speech by H.E. Judge Hisashi Owada, President of the International Court Of Justice, to the Legal Advisers of United Nations Member States , New York, 26 October 2010, at p.5.

<sup>38</sup> *ibid.*

<sup>39</sup> *Military and Paramilitary Activities, supra n 6* Dissenting Opinion of Judge Schwebel at p.235: "There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less

jurisdictional decisions may “create precedents affecting the position and interests of a large number of States,”<sup>40</sup> there is no principled basis for prohibiting Article 63 interventions at the jurisdictional phase.

48. Consistently with the declarations of intervention of other States exercising their right under Article 63 in this case, New Zealand’s Declaration indicates an intention to advance a certain construction of Article IX of the Convention. The Court’s construction of Article IX of the Convention will have legal significance for all parties to the Convention and is therefore of no less importance to those parties than the construction of any other provision.
49. If the Court were to refuse to admit New Zealand’s intervention at the jurisdictional phase, or defer consideration until that phase was resolved, New Zealand would be deprived of the right to advance its preferred construction of Article IX in any meaningful way. That would impose a significant limitation on the right contained in Article 63.
50. For the reasons set out above, there is no support for such a limitation in the Court’s practice and jurisprudence, or in the language of the Statute or the Rules. Article 63 of the Statute confers a right on New Zealand to intervene “whenever” the construction of a convention to which it is party is in question. Where it wishes to intervene on the construction of a compromissory clause, it must do so at the jurisdictional phase of proceedings. The jurisprudence of the Court strongly indicates that New Zealand is entitled to do so, there is considerable support for that view in the work of leading scholars,<sup>41</sup> and – as a matter of principle – it is the fair and just approach.

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than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies that have come before the Court more than once over the force and effect of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court’s jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends?”

<sup>40</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, I.C.J. Reports 1972, p.46 at pp.56-57 (paragraph 18).

<sup>41</sup> See also the views of leading scholars in support of this view cited by Ukraine in its *Written Observations on the Declaration of Intervention of New Zealand*, at footnote 10.

**The Court can admit New Zealand’s intervention without prejudging the question of jurisdiction and the existence and subject matter of the dispute**

51. At Section IIC(ii) of its Observations, the Russian Federation suggests that New Zealand’s intervention should not be admitted at this time because the Court has not determined the existence and scope of the dispute. In Section IID, the Russian Federation further suggests that the Court cannot admit New Zealand’s intervention without prejudging its decision on the Preliminary Objections and the question of jurisdiction.
52. Whether a “dispute” exists for the purposes of the Court’s jurisdiction under Article IX of the Convention, and the scope of that dispute, is a legal question that turns on both: the interpretation of the relevant provisions of the Convention; and the application of that interpretation to the facts before the Court. The interpretation of the Convention is thus integral to the Court’s determination of the question of jurisdiction and the existence and subject matter of the dispute.
53. In accordance with its right under Article 63, New Zealand has put its interpretation of the provisions of the Convention relevant to that determination before the Court. Admitting New Zealand’s intervention for that purpose does not prejudice the outcome of the Russian Federation’s Preliminary Objections or presuppose that the Court has jurisdiction to entertain the dispute. To the contrary, as set out in paragraph 49 above, if the Court were to defer consideration of New Zealand’s interpretation until *after* it had resolved the Russian Federation’s Preliminary Objections, New Zealand’s Article 63 right would be rendered meaningless.
54. There is no basis for the Russian Federation’s claim that a “hybrid” declaration of intervention (i.e., one which addresses both jurisdiction and merits) is inadmissible at the jurisdictional phase.<sup>42</sup> That claim is based on a mischaracterisation of the Court’s earlier jurisprudence, particularly its decisions in *Military and Paramilitary Activities* and *Nuclear Tests (New Zealand v France)*. As set out in paragraphs 36 and 38 above, neither case supports the proposition that admission of a so-called “hybrid”

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<sup>42</sup> *Russian Federation’s Observations*, paragraph 76.



intervention would prejudge the question of jurisdiction or the Court's determination of the existence and scope of any dispute.

55. New Zealand recognises that not all elements of the interpretation put forward in its Declaration will be relevant to the Preliminary Objections phase of the case. This point is acknowledged in paragraph 36 of the Declaration. Paragraphs 18 to 27 and 36(a) of New Zealand's Declaration set out the elements of the construction of the Convention that New Zealand anticipates will be most relevant to the Court's determination of the question of jurisdiction and the existence, and scope, of any dispute in the present case.

**New Zealand's intervention is properly limited to the construction of the provisions of the Genocide Convention that appear to it to be in contention in the case**

56. Finally, at Section IIE of its Observations, the Russian Federation alleges that New Zealand's intervention addresses matters unrelated to the construction of the provisions of the Convention.<sup>43</sup>
57. Contrary to that assertion, New Zealand's intervention is strictly limited to advancing its contended construction of the provisions of the Convention in question in the case. To the extent it addresses principles and rules of international law outside the Convention – including general principles of interpretation,<sup>44</sup> the obligation of good faith,<sup>45</sup> the peaceful settlement of disputes,<sup>46</sup> and the prohibition on aggression<sup>47</sup> – it does so entirely in accordance with orthodox methods of treaty interpretation. New Zealand considers that a proper application of both Article 31(3)(c) of the Vienna Convention on the Law of Treaties and the practice of the Court require that regard is had to these principles and rules when construing the relevant provisions of the Convention.<sup>48</sup>

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<sup>43</sup> *Russian Federation's Observations*, paragraphs 23, 85(f), 86.

<sup>44</sup> *New Zealand's Declaration*, paragraphs 18 – 20.

<sup>45</sup> *New Zealand's Declaration*, paragraph 19.

<sup>46</sup> *New Zealand's Declaration*, paragraph 25.

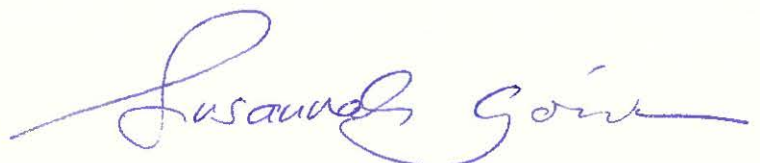
<sup>47</sup> *New Zealand's Declaration*, paragraph 31.

<sup>48</sup> *New Zealand's Declaration*, paragraph 20.

## SUBMISSIONS

58. In view of the foregoing, the Government of New Zealand respectfully submits that:
- a. New Zealand's intervention, as described in the Declaration, falls within the provisions of Article 63 of the Statute and meets the conditions in Article 82 of the Rules; and
  - b. New Zealand's intervention is accordingly admissible by right; and
  - c. There is no valid basis in the Statute or the Rules, the previous practice or jurisprudence of the Court, or other legal principle to decline to admit or to defer consideration of New Zealand's intervention.
59. The Government of New Zealand accordingly respectfully requests the Court to:
- a. Determine the question of admissibility of New Zealand's intervention under Article 63 of the Statute as a matter of urgency and not to defer that determination until after the Court has made a decision on the Russian Federations' Preliminary Objections; and
  - b. Decide either to:
    - i. Admit the New Zealand's intervention as described in the Declaration in its entirety; or
    - ii. Admit those elements of New Zealand's intervention that the Court considers to be within the scope of Article 63 of the Statute.

Respectfully,



Susannah Gordon  
Co-Agent of the Government of New Zealand