

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)

**SUPPLEMENT TO THE
DECLARATION OF INTERVENTION
SUBMITTED BY THE GOVERNMENT OF NEW ZEALAND
PURSUANT TO ARTICLE 63 OF THE STATUTE OF THE COURT
ON 28 JULY 2022**

To the Registrar, International Court of Justice.

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

INTRODUCTION

1. On behalf of the Government of New Zealand, I have the honour to submit a supplement to New Zealand's Declaration of Intervention, which was submitted on 28 July 2022 pursuant to the right to intervene as a non-party set out in Article 63(2) of the Statute of the Court, in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*.
2. In its Order of 5 June 2023, the Court decided that New Zealand's Declaration of Intervention was admissible under Article 63 of the Statute and Article 82 of the Rules at the preliminary objections stage of the proceedings.¹
3. On 2 February 2024, the Court issued its judgment in response to the Russian Federation's preliminary objections and confirmed the scope of the case that will proceed for determination on the merits.²
4. In paragraph 35 of its Declaration of Intervention, New Zealand reserved the right to supplement or amend its Declaration as it considered necessary in response to any developments in the proceedings.
5. On 18 June 2024, the Registrar invited New Zealand to indicate whether it maintains its Declaration of Intervention for the purposes of the merits stage of the proceedings. The Registrar further indicated that New Zealand may, if deemed necessary, adjust its Declaration in light of the Court's judgment of 2 February 2024.

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Order, 5 June 2023, at para. 102(1).

² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment, 2 February 2024.

6. In response to that invitation, this supplement to New Zealand’s Declaration of Intervention:
 - a. Confirms that New Zealand maintains its Declaration of Intervention at the merits stage of the proceedings pursuant to the right in Article 63(2) of the Statute of the Court; and
 - b. Adjusts New Zealand’s Declaration of Intervention in light of the Court’s judgement of 2 February 2024 and clarifies the scope of New Zealand’s intervention at the merits stage.
7. This supplement should be read together with New Zealand’s Declaration of Intervention.

MATTERS REQUIRED UNDER ARTICLE 82 OF THE RULES

8. The matters required under Article 82(5) of the Rules were addressed in New Zealand’s Declaration of Intervention. This supplement updates that information in relation to the matters at Article 82(5)(b) and (c) of the Rules, namely:
 - a. The particular provisions of the Convention on the Prevention and Punishment of the Crime of Genocide (“Convention”) that New Zealand considers to be in question at the merits stage of the proceedings; and
 - b. A statement of the construction of those provisions for which New Zealand contends.

PROVISIONS OF THE CONVENTION IN QUESTION AT THE MERITS STAGE

9. As a result of the Court’s judgment of 2 February 2024, two central questions remain to be determined by the Court at the merits stage.³

³*ibid.* at para. 151.

- a. Is there any credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine?⁴
 - b. Has the Russian Federation violated the independent obligations imposed on it by the Order indicating provisional measures issued by the Court of 16 March 2022 and, if so, what are the consequences of the Russian Federation's violation?⁵
10. Those questions require consideration of the construction and scope of:
- a. The obligation in Article I of the Convention, whereby States "undertake to prevent and punish" the crime of genocide.
 - b. The definition of the crime of genocide in Articles II and III of the Convention, in particular the evidence necessary to establish an allegation of genocide.
 - c. The duty to cooperate with the Court contained in Article IX of the Convention.

**STATEMENT OF THE CONSTRUCTION OF THOSE PROVISIONS FOR WHICH NEW ZEALAND
CONTENDS**

11. The following paragraphs update and adjust the statement of the construction of the Convention set out in paragraphs 18 to 33 of New Zealand's Declaration of Intervention, taking account of the questions that remain for determination at the merits stage.

⁴ See the request to the Court contained in para. 178(b) of the *Memorial of Ukraine*.

⁵ See the request to the Court contained in para. 178(e) of the *Memorial of Ukraine*.

General principles of interpretation and the obligation of good faith

12. New Zealand reconfirms the general principles of interpretation, including the principle that the obligations of the Convention must be interpreted and performed in good faith, which are set out in paragraphs 18 to 22 of its Declaration of Intervention.

Article I – the undertaking to “prevent and punish the crime of genocide”

The duty to prevent genocide under Article I of the Convention

13. Under Article I, parties to the Convention have confirmed that genocide is a crime under international law “which they undertake to prevent and to punish”. The undertaking to prevent genocide necessarily implies the prohibition of the commission of genocide.⁶ Contracting Parties to the Convention are thus bound not to commit genocide, through the actions of their organs or persons or groups whose acts are attributable to them.⁷
14. Article I accordingly places Contracting Parties under both a negative obligation –not to commit genocide; and a positive obligation –to do their best to ensure that genocide does not take place.⁸
15. The duty to prevent genocide in Article I applies whenever a State learns of, or should normally have learned of, the commission of genocide or a serious risk that genocide will be committed.⁹ 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 Articles II and III of the Convention applies and must be satisfied on the facts.

⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 43 at para. 166.

⁷ *Ibid.* at para. 167.

⁸ *Ibid.* at para. 432.

⁹ *Ibid.* at para. 431.

Articles II and III –the definition of genocide

Elements of the crime

16. “Genocide” is defined in Article II of the Convention. It has two constituent elements: the physical element (or *actus reus*); and the mental element (or *mens rea*).¹⁰ Both are required in order for conduct— however egregious —to amount to “genocide”.
17. Article III of the Convention confirms that conspiracy, incitement, attempt and complicity to commit genocide shall also be punishable as crimes.

The actus reus of genocide

18. Paragraphs (a) to (e) of Article II set out the acts which comprise the *actus reus* of genocide. Any one of these acts, when committed with the necessary intent, will amount to genocide.
19. The interpretation and application of these paragraphs was discussed in detail by the Court in the *Bosnia*¹¹ and *Croatia genocide cases*.¹² New Zealand considers also that the interpretation of these paragraphs can be assisted by reference to the jurisprudence of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, in accordance with the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, in particular Article 31(3)(c).¹³

¹⁰ *Ibid.* at paras. 186-189; see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p.3 at para. 130.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *supra* n.6.

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n. 10.

¹³ See the Court’s comment to this effect in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 3 July 2024, at para. 45.

The mens rea of genocide – the intent to destroy a group as such

20. The essential characteristic of genocide that distinguishes it from other serious crimes is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group as such”.¹⁴ That intent must be distinguished from other reasons or motives that the perpetrator may have.¹⁵ A discriminatory intent alone is not enough; there must be an intent to destroy the group as such, either in whole or in part.¹⁶ Great care must be taken in finding a sufficiently clear manifestation of that intent.¹⁷

Onus and standard of proof

21. The onus of proof rests with the party asserting an allegation that the crime of genocide has been committed.¹⁸ A party that has been accused of genocide cannot be expected to carry the burden of establishing that genocide has not, in fact, occurred.¹⁹
22. Genocide is a serious allegation, and proof is accordingly required at a high level of certainty.²⁰

The nature of the evidence required

23. Conclusive evidence is required to support a finding of genocide.²¹ In assessing the weight to be given to an item of evidence, the Court will consider its source, the

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n.10 at para. 132.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *supra* n.6 at paras. 187 and 189.

¹⁶ *Ibid.* at para. 187.

¹⁷ *Ibid.* at para. 189.

¹⁸ *Ibid.* at paras. 204-206. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n. 10 at para. 172.

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n. 10 at para. 172, citing *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 639 at paras. 54 and 55.

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *supra* n. 6 at paras. 209-210.

²¹ *Ibid.* at para. 209.

process by which it has been generated, and the quality or character of the item.²² An item of evidence that is not probative in itself may be taken into account by the Court where it corroborates evidence from other sources.²³

24. In the absence of direct evidence, intent may be inferred from certain types of conduct.²⁴ The systemic nature, scale, intensity, disproportionality and impact of a State's actions may give rise to the reasonable inference of an intent to destroy the targeted group in whole or in part.²⁵

Article IX – the duty to comply with provisional measures ordered by the Court

25. Article IX provides that “disputes...relating to the interpretation, application or fulfilment” of the Convention shall be referred to the Court at the request of any party to the dispute.
26. As described in paragraphs 22 to 25 of New Zealand's Declaration of Intervention, Article IX gives effect to the parties' pre-existing obligation under Articles 2(3) and 33(1) of the United Nations Charter and customary international law²⁶ to settle their disputes by peaceful means. It must be interpreted and applied in a way that achieves that obligation.²⁷
27. Through Article IX, Contacting Parties have voluntarily agreed that disputes in relation to the Convention may be submitted to the Court – thus freely accepting the jurisdiction of the Court.²⁸ That acceptance necessarily implies the assumption of a

²² *Ibid.* at para. 213 and 227. See also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n. 10 at para. 190.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, *supra* n. 10 at para. 457.

²⁴ *Ibid.* at para. 143.

²⁵ *Ibid.* at paras. 145-148.

²⁶ *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p.14 at para. 290.

²⁷ Article 103 of the *United Nations Charter*; Article 31(3)(c) of the *Vienna Convention on the Law of Treaties*.

²⁸ See J G Merrills and E De Brabandere, *Merrills' International Dispute Settlement* (7th ed, Cambridge University Press, Cambridge, 2022) at p. 273: “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.” Where a State considers that a particular dispute does not fall within the scope of Article IX, or is otherwise

duty to cooperate with the Court and its procedures. That duty requires a party to a dispute to comply with any decisions that the Court may issue in the proceedings.²⁹ This includes orders with respect to provisional measures.³⁰ Such orders remain binding on the parties from the date on which the provisional measures are indicated by the Court, until the date the Court reaches a final decision to dispose of the case.³¹

28. The duty to cooperate with the Court contained in Article IX is analogous to the duty to cooperate with international criminal tribunals under Article VI of the Convention.³² It also mirrors the established duty to co-operate in the context of negotiation.³³
29. The duty to cooperate with the Court contained in Article IX is further supported by the principle of good faith.³⁴ As with any other treaty provision, Article IX must be interpreted and applied reasonably and in good faith, so that its objective may be realised.³⁵ That objective – to facilitate the peaceful settlement of disputes under the auspices of the Court – cannot be achieved if a Party defies the Court’s decisions.

inadmissible, it may raise its objection in accordance with the procedures set out in Articles 79, 79bis and 79ter of the *Rules of the Court*.

²⁹ Article 94(1) of the *United Nations Charter*.

³⁰ See, in particular: the Court’s finding in *La Grand (Germany v United States of America)*, Judgment, I.C.J. Reports 2001, p. 466 at para. 109 that: its ‘orders on provisional measures under Article 41 [of the Statute] have binding effect’. That finding has been consistently reaffirmed, including in the present case: *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Provisional Measures, Order, Order of 16 March 2022, I.C.J. Reports 2022, p. 211 at para. 84.

³¹ See: *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Judgment, 31 January 2024 at para. 392; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *supra* n. 6 at para. 468.

³² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, *supra* n. 6.

³³ *North Sea Continental Shelf cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, Judgment, I.C.J. Reports 1969, p.3 at paras. 85(a) and 86-87. See also: *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p.7, at paras. 141-142; *Pulp Mills on the River Uruguay (Argentina v Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14 at 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, p. 70 at para. 157.

³⁴ See *South China Sea Arbitration, Philippines v China*, PCA Case No. 2013/19, Award (12 July 2016) at para. 1171

³⁵ Articles 26 and 31(1) *Vienna Convention on the Law of Treaties*; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *supra* n. 33 at para. 142; International Law Commission, *Yearbook of the International Law Commission, 1966, Vol II*, at p. 211, paras. 2 and 4.

30. A failure by a party to abide by any order for provisional measures is accordingly a breach of that party's international obligations under Article IX of the Convention, as well as its obligations under Articles 2(3), 33(1) and 94(1) of the United Nations Charter. That breach incurs international legal responsibility, including the obligation to make full reparation for the injury caused by the breach by restitution, compensation or satisfaction as the Court may judge to be appropriate.³⁶

CONCLUSION

31. On the basis of the information set out above, New Zealand confirms that it maintains its Declaration of Intervention at the merits stage of these proceedings pursuant to the right in Article 63(2) of the Statute of the Court. New Zealand reserves its right to further supplement or amend its Declaration, and any associated Written Observations submitted with respect to it, as it considers necessary in response to any further developments in the proceedings.

Respectfully,



Susannah Gordon

Ambassador of New Zealand to The Netherlands

Co-Agent of the Government of New Zealand

³⁶ *Factory at Chorzów, Jurisdiction, Judgment No. 8, 1927, P.C.I.J., Series A, No. 9*, at p. 21. For a detailed discussion of this principle see: International Law Commission *Draft Articles on International State Responsibility for Internationally Wrongful Acts: With Commentaries* (United Nations, 2008) at pp. 91-94 and 95-109.