INTERNATIONAL COURT OF JUSTICE

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

(UKRAINE V. RUSSIAN FEDERATION)

THE RUSSIAN FEDERATION'S WRITTEN OBSERVATIONS ON ADMISSIBILITY OF THE DECLARATIONS OF INTERVENTION SUBMITTED BY FRANCE, GERMANY, ITALY, LATVIA, LITHUANIA, NEW ZEALAND, POLAND, ROMANIA, SWEDEN, THE UNITED KINGDOM AND THE UNITED STATES

17 OCTOBER 2022

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I. INTRODUCTION

1. With reference to the Registrar's Letter No. 156881 of 21 July 2022; Letter No. 156889 of 22 July 2022; Letter No. 156924 of 28 July 2022; Letter No. 156947 of 5 August 2022; Letter No. 157028 of 5 September 2022; Letter No. 157039 of 8 September 2022; Letter No. 157045 of 9 September 2022; Letter No. 157075 of 13 September 2022; Letter No. 157082 of 13 September 2022; Letter No. 157097 of 15 September 2022; Letter No. 157103 of 15 September 2022; as well as the Registrar's Letter No. 157025 of 31 August 2022, the Russian Federation hereby submits its written observations on the admissibility of the declarations of intervention (the "Declarations") filed by the French Republic, the Federal Republic of Germany, the Italian Republic, the Republic of Latvia, the Republic of Lithuania, New Zealand, the Republic of Poland, Romania, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland and the United States of America (the "Declarants") in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (*Ukraine* v. *Russian Federation*).

2. On 26 February 2022, Ukraine filed an Application instituting proceedings against the Russian Federation (the "Application") invoking Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention" or the "Convention"). On 1 July 2022, almost three months ahead of the time-limit set by the Court,[1] Ukraine filed its Memorial. On 1 October 2022, the Russian Federation submitted preliminary objections to the jurisdiction of the Court and admissibility of the Application (the "Preliminary Objections"). By an order dated 7 October 2022, the Court fixed 3 February 2023 as the time-limit within which Ukraine may submit its observations and submissions on the Preliminary Objections.

3. After Ukraine filed the Application, forty-seven States[2] and the European Union made two public statements, dated 20 May 2022 and 13 July 2022, indicating that they

[1] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Fixing of time-limits: Memorial and Counter-Memorial, Order of 23 March 2022.

[2] Albania, Andorra, Australia, Austria, Belgium, Bosnia and Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia, Moldova, Monaco,

intended to intervene in these proceedings in order to support Ukraine in its case against the Russian Federation (the "Joint Statements").[3] Among those States, several also made unilateral declarations further confirming their political aim to support Ukraine against the Russian Federation in these proceedings – some openly admitting that they intended to work "hand in hand" with Ukraine's legal team.[4] As of 17 October 2022, a total of twenty-one States have filed, as per the Joint Statements, "declarations of intervention" invoking Article 63 of the Statute. Additionally, the European Union filed a "memorial" invoking Article 34(2) of the Statute and Article 69(2) of the Rules of Court.[5]

4. These written observations address the admissibility of the eleven Declarations referred to in paragraph 1 above only as the Court fixed a different time-limit for the Russian Federation to present its observations concerning the remaining declarations.

5. Article 63 of the Statute provides that

> "1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.
>
> 2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it."

6. Furthermore, Article 82 of the Rules of Court stipulates that

> "1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional

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Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, and the United States.

[3] Joint statement on Ukraine's application against Russia at the International Court of Justice, 20 May 2022, available at: https://www.auswaertiges-amt.de/en/newsroom/news/-/2532254 (Annex 1); Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, 13 July 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4509 (Annex 2). The number of States may grow because the European Union invited other States to join this statement later.

[4] As of 17 October 2022, at least Canada, Lithuania, New Zealand, Poland, Romania and Sweden have made such statements. *See* below, ¶¶17-18.

[5] The Court has not yet sought the views of the Parties concerning the admissibility of the document filed by the European Union.

circumstances a declaration submitted at a later stage may however be admitted.

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

(a) particulars of the basis on which the declarant State considers itself a party to the convention;

(b) identification of the particular provisions of the convention the construction of which it considers to be in question;

(c) a statement of the construction of those provisions for which it contends;

(d) a list of the documents in support, which documents shall be attached.

3. Such a declaration may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute."

7. As will be further developed throughout these written observations, Article 63 of the Statute has a limited object of allowing a State to intervene in a contentious case, as a non-party, for purposes of the "construction" (*i.e.* interpretation) of the provisions of a multilateral treaty, to which it is a party, that are in question in that case. Before granting a State the status of intervener, the Court must first determine the admissibility of the declaration of intervention, which must fall within the provisions of and be compatible with both the terms and the object and purpose of Article 63 of the Statute, as well as the formal requirements of Article 82 of the Rules of Court. In determining whether a declaration is admissible, the Court must equally take into account the principles of equality of the parties and the requirements of good administration of justice, reciprocity, as well as the circumstances of each specific case, and in particular whether the respondent State raised preliminary objections.

8. This case is exceptional. Never in the Court's history has there been an attempt by a large number of States to massively intervene in a case, invoking Article 63 of the Statute, as part of a collective political strategy, with the stated purpose of supporting an applicant against a respondent and in close consultation and coordination with the applicant itself. These circumstances raise several serious questions regarding admissibility and propriety of the Declarations, which the Court should not take lightly if the integrity of the judicial process is to be maintained. The Russian Federation is therefore compelled to object to the admission of the Declarants as interveners and requests the Court to decide that their Declarations are inadmissible.

9. These written observations show that the Declarations are inadmissible on the following grounds:

(a) **Section A** demonstrates that the interventions are not genuine: their real object is not the construction of the relevant provisions of the Genocide Convention, as required by Article 63 of the Statute, but rather pursuing a joint case alongside with Ukraine as *de facto* co-applicants rather than non-parties.

(b) **Section B** shows that the participation of the Declarants in these proceedings would result in a serious impairment of the principle of equality of the parties to the detriment of the Russian Federation and would be incompatible with the requirements of good administration of justice.

(c) **Sections C** and **D** explain that the Court cannot, in any event, decide on the admissibility of the Declarations before it has made a decision on the Preliminary Objections, and that the Declarations address matters that presuppose that the Court has jurisdiction and/or that Ukraine's Application is admissible.

(d) **Section E** shows that the Declarations should be equally declared inadmissible because the Declarants seek to address issues unrelated to the "construction" of the Genocide Convention, such as the interpretation and application of other rules of international law and several questions of fact, which is incompatible with the limited object of Article 63. Furthermore, allowing the Declarants to intervene on such matters at this stage would prejudge the question of the Court's jurisdiction *ratione materiae*.

(e) Finally, in **Section F** the Russian Federation objects to the admissibility of the intervention by the United States because of the reservation that the latter made to Article IX of the Genocide Convention.

10. The Russian Federation wishes to highlight that these written observations are presented only for the purposes of addressing matters of intervention and are to be considered without prejudice to its Preliminary Objections, which the Russian Federation maintains in full.

II. ARGUMENTS

A. THE INTERVENTIONS ARE NOT GENUINE: THEIR REAL OBJECT IS NOT THE CONSTRUCTION OF THE CONVENTION BUT PURSUING A JOINT CASE WITH UKRAINE

11. It is well established that, before the Court confers the status of intervener on a State, it needs to ascertain the admissibility of the declaration of intervention by determining whether "the declaration falls within the provisions of Article 63" of the Statute. As the Court stated in *Whaling in the Antarctic*:

> "… the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a 'declaration' to that end to confer *ipso facto* on the declarant State the status of intervener; … such right to intervene exists only when the declaration concerned falls within the provisions of Article 63; … therefore, the Court must ensure that such is the case before accepting a declaration of intervention as admissible …"[6]

12. In that case, the Court specified the "limited object" of an intervention under Article 63, recalling also that the latter concerns only third States that are not parties to the proceedings:

> "… in accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention."[7]

13. Furthermore, the Court has indicated on various occasions that the object of an intervention under Article 63 of the Statute must be limited to submitting views concerning the construction or interpretation of the treaty provisions which are in question. In *Haya de la Torre*, for example, Peru challenged the admissibility of Cuba's request to intervene on the basis that it was not an "intervention in the true meaning of the term", but rather an attempt to appeal matters that had already been determined by the Court in its 1950 judgment in the *Asylum* case.[8] The Court agreed that Cuba's

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[6] *Whaling in the Antarctic, (Australia* v. *Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, pp. 5-6, ¶8.

[7] *Ibid.*, p. 5, ¶7.

[8] *Haya de la Torre Case*, Judgment of June 13th, 1951, I.C.J. Reports 1951, p. 76.

request to intervene was not a "genuine intervention" insofar as it concerned matters that had been decided in the previous case, stating that:

> "… the Court observes that every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings. The subject-matter of the present case differs from that of the case which was terminated by the Judgment of November 20th, 1950: it concerns a question – the surrender of Haya de la Torre to the Peruvian authorities – which in the previous case was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the abovementioned Judgment.
>
> In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities.
>
> On that point, the Court observes that the Memorandum attached to the Declaration of Intervention of the Government of Cuba is devoted almost entirely to a discussion of the questions which the Judgement of November 20th, 1950, had already decided with the authority of *res judicata,* and that, to that extent, it does not satisfy the conditions of a genuine intervention. However, at the public hearing on May 15th, 1951, the Agent of the Government of Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention, an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.
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> Reduced in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute …"[9] [Emphasis added]

14. It follows that, for an intervention to be admissible under Article 63 of the Statute, the Court must first and foremost ascertain that the object of the intervention is in fact limited to submitting observations on the construction or interpretation of the multilateral treaty in question, and more particularly the specific provisions that form part of the subject-matter of the particular case. To do so, the Court needs to consider the text of the declaration and the context within which it was filed to establish the "genuine intention" of the State concerned, thus establishing whether the conditions of a genuine intervention are satisfied.

[9] *Ibid.*, pp. 76-77.

15. In this case, the Joint Statements show that the real purpose of the Declarants is not to submit their own views regarding the construction or interpretation of the relevant provisions of the Genocide Convention, as required by Article 63 of the Statute, but rather to side with, advocate for, or pursue a joint case with Ukraine. The 20 May Joint Statement reads:

> "We, the undersigned, welcome Ukraine's application against Russia before the International Court of Justice (ICJ), which seeks to establish that Russia has no lawful basis to take military action in Ukraine on the basis of unsubstantiated allegations of genocide.
>
> …
>
> Reaffirming our commitment to accountability and the rules-based international order, we hereby express our joint intention to explore all options to support Ukraine in its efforts before the ICJ and to consider a possible intervention in these proceedings.
>
> We strongly believe that this is a matter that is rightfully brought to the ICJ, so that it can provide judgement on Russia's allegations of genocide as basis for its unprovoked and brutal invasion of Ukraine. As the principal judicial organ of the United Nations, the ICJ is a pillar of the rules-based international order and has a vital role to play in the peaceful settlement of disputes.
>
> We call upon the international community to explore all options to support Ukraine in its proceedings before the ICJ."[10]

16. The 13 July Joint Statement, for its part, indicates that:

> "We reiterate our support for Ukraine's Application instituting proceedings against the Russian Federation before the International Court of Justice under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which seeks to establish that Russia has no lawful basis to take military action in Ukraine on the basis of unsubstantiated allegations of genocide.
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> …
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> It is in the interest of all States Parties to the Genocide Convention, and more broadly of the international community as a whole, that the Convention not be misused or abused. That is why the signatories of the present declaration which are Parties to the Genocide Convention intend to intervene in these proceedings.
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> …
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> ... we reiterate that Russia must be held accountable for its actions. In this regard, we consider that Russia's violations of international law engage its

[10] Joint statement on Ukraine's application against Russia at the International Court of Justice, 20 May 2022, available at: https://www.auswaertiges-amt.de/en/newsroom/news/-/2532254 (Annex 1).

> international responsibility, and that the losses and damage suffered by Ukraine as a result of Russia's violations of international law require full and urgent reparation by Russia, in accordance with the law of State responsibility.
>
> We once again call upon the international community to explore all options to support Ukraine in its proceedings before the ICJ."[11]

17. A press release by the Ministry of Foreign Affairs of Romania, dated 18 May 2022, sheds further light on the arrangements behind this joint political effort, as well as on Ukraine's close involvement in the latter:

> "The Romanian démarche to intervene in this process comes at the express request of the Ukrainian side.
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> …
>
> In the context of these proceedings, Romania will coordinate with other like minded States that have taken a similar decision and will cooperate closely with Ukraine's representatives involved in the proceedings at the ICJ."[12] [Emphasis added]

18. Other Declarants and other signatories to the Joint Statements have made similar statements:

    (a) Lithuania has stated that it "hopes that Russia's responsibility for the violation of international law is established and that reparation for the damage done to Ukraine will be guaranteed", and that "Lithuanian lawyers are working hand-in-hand with Ukrainian lawyers seeking to strengthen Ukraine's legal struggle."[13]

[11] Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, 13 July 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4509 (Annex 2).

[12] Ministry of Foreign Affairs of Romania, Press release, Romania Has Decided to Intervene in favour of Ukraine at the International Court of Justice in Proceedings against the Russian Federation, 18 May 2022, available at: https://www.mae.ro/en/node/58706#null (Annex 3). *See* also Ministry of Foreign Affairs of Romania, Press release, Consultations of Foreign Minister Bogdan Aurescu with Ukrainian Foreign Minister, Dmitry Kuleba, 22 April 2022, available at: http://mae.gov.ro/node/58483 (Annex 4), where Ukraine's Foreign Minister, Dmitry Kuleba, stated that: "Romania and Bogdan personally, have vast experience in international adjudication, in the prosecution of international crimes, at international level, so, yes, we discussed how we can use the ICJ - International Court of Justice, the International Criminal Court, to bring Russia to account for everything it has done, and we will be happy to learn, to work with Romania on this." [Emphasis added].

[13] Ministry of Justice of the Republic of Lithuania, Press release, Lithuania formally intervenes in a case at the International Court of Justice, 13 September 2022, available at: https://tm.lrv.lt/en/news/lithuania-formally-intervenes-in-a-case-at-the-international-court-of-justice (Annex 5).

(b) New Zealand has stated that it seeks to join this case "against Russia" and that it is "prepared to play its part in assisting Ukraine and has already done so through a range of diplomatic, military and economic measures".[14]

(c) Poland has stated that its declaration "is part of Poland's consistent policy of firmly condemning all unlawful actions by Russia and is an expression of [its] support and solidarity for Ukraine".[15]

(d) Sweden has admitted that it intends to "put forward positions that are in line with those of Ukraine".[16]

(e) Canada stated that it "supports Ukraine's application against Russia before the International Court of Justice" and "stand[s] with Ukraine".[17]

19. These statements are clear evidence of a collective political strategy by a group of forty-seven States and the European Union, in close coordination with Ukraine, to intervene in this case with the object of assisting, strengthening or bolstering Ukraine's claims before the Court. The Declarants have already expressed their pre-determined position concerning several matters relating to the Court's jurisdiction and the merits in this case, including the Russian Federation's alleged international responsibility. Thus, under the guise of intervening under Article 63 of the Statute, the Declarants effectively seek to side with the arguments that Ukraine may put forward. Their aim is, in other words, to become *de facto* co-applicants and pursue a joint case with Ukraine. This is not the purpose for which Article 63 was designed.

20. In line with the Declarants' true intentions expressed in their joint and unilateral statements, the Declarations dwell extensively on matters that are not relevant to the

[14] New Zealand Government, Press release, NZ to join International Court of Justice case against Russia, 30 June 2022, available at: https://www.beehive.govt.nz/release/nz-join-international-court-justice-case-against-russia (Annex 6).

[15] Ministry of Foreign Affairs of the Republic of Poland, Press release, Poland filed a declaration of intervention to the International Court of Justice in Ukraine's case against Russia, 16 September 2022, available at: https://www.gov.pl/web/diplomacy/poland-filed-a-declaration-of-intervention-to-the-international-court-of-justice-in-ukraines-case-against-russia (Annex 7).

[16] Ministry for Foreign Affairs of Sweden, Press release, Sweden participating in two court cases concerning the war in Ukraine, 9 September 2022, available at: https://www.government.se/press-releases/2022/09/sweden-participating-in-two-court-cases-concerning-the-war-in-ukraine/ (Annex 8).

[17] Justin Trudeau, Prime Minister of Canada, Twitter, 20 May 2022, available at: https://twitter.com/justintrudeau/status/1527745602611814400?lang=en (Annex 9).

"construction" of the provisions of the Genocide Convention invoked by Ukraine (which are the limited object of interventions under Article 63), but rather to the purported "application" of the Convention to this Case and even its "fulfilment", as would an applicant in a regular contentious case.

21. Indeed, the Declarants address issues such as the existence or otherwise of a dispute between the Russian Federation and Ukraine; whether the Russian Federation has violated the Court's order on provisional measures; whether there is evidence that genocide has occurred or may occur in Ukraine; and whether the Russian Federation has acted in good faith or somehow abused a "right" under the Convention. The Declarants even intend to address matters that are governed by rules of international law other than the Convention,[18] such as the use of force, *jus in bello*, and territorial integrity.[19] None of these issues may fall within Article 63 of the Statute in the context of this case – they do not concern the "construction" of the Convention, but its possible application, as well as rules of international law falling outside the scope of the latter,[20] in the light of the specific facts of this case – and their consistent inclusion in the Declarations confirms the real intention of the States concerned to act as *de facto* co-applicants with Ukraine.

22. The memorial which the European Union filed invoking Article 34(2) of the Statute and Article 69(2) of the Rules of Court on its own initiative, without being so requested by the Court, sheds further light on the range of matters unrelated to the interpretation of the Genocide Convention that the Declarants wish to address or put on the record if they obtain the status of interveners, pursuant to the Joint Declarations. In this respect, the EU's memorial could be said to address everything but the construction of the Convention and is irrelevant to the present proceedings.

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[18] *See* A. Miron, C. Chinkin, *Article 63*, in A. Zimmermann, K. Oellers-Frahm *et al. (eds.)*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), p. 1758 ("Article 63 applies only to conventions, not to other sources of international law such as customary international law or to instruments that are not conventions, such as resolutions of international institutions.").

[19] *See* also Section E below.

[20] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984, Dissenting Opinion of Judge Schwebel, p. 239 ("Article 63 is not concerned with the application of provisions of a convention … but their construction.").

23. That the genuine intention of the Declarants is not in accordance with Article 63 of the Statute is further evidenced by the fact that, in their Declarations, the Declarants have consistently expressed that they possess a legal interest in light of the *erga omnes* character of the obligations under the Convention.[21] The Court has indicated that, unlike Article 62 of the Statute, a State that seeks to intervene under Article 63 is not required to show that it has "an interest of a legal nature".[22] But the express references to a "legal interest" and *erga omnes* obligations by the Declarants in these proceedings is telling. Together with the fact that they already openly stated their preconceived belief that the Russian Federation is responsible for a violation of the Convention or other rules of international law (without having even considered, presumably, the Memorial or the Preliminary Objections), and that their aim is to secure a finding by the Court of the Russian Federation's responsibility, these references confirm their intention to act as *de facto* co-applicants alongside with Ukraine at the behest of the latter, as opposed to genuine interveners under Article 63 of the Statute.

24. Another telling sign of the Declarants pursuing a joint effort with Ukraine is that the positions and arguments presented in their Declarations are, in substance and sometimes even in form, virtually – and in some cases, literally – identical to those presented in Ukraine's Application and even its Memorial (which should have been unavailable to the Declarants until their Declarations have been admitted). In effect, the Declarations restate Ukraine's positions, and even where, on a few occasions, the Declarants advance new arguments, they are still in the same vein as those of Ukraine.

25. Finally, the Russian Federation notes that the core statements that many of the Declarants seek to advance by intervening in these proceedings manifestly contradict what the same Declarants previously stated in the context of the *Legality of Use of Force* cases, which were also brought before the Court invoking Article IX of the Genocide Convention.

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[21] Declaration of France, ¶8; Declaration of Germany, ¶12; Declaration of Italy, ¶14; Declaration of Latvia, ¶46; Declaration of Lithuania, ¶17; Declaration of New Zealand, ¶12, Declaration of Poland, ¶22; Declaration of Romania, ¶11; Declaration of Sweden, ¶11; Declaration of the United Kingdom, ¶11; Declaration of the United States, ¶9.

[22] *Whaling in the Antarctic, (Australia* v. *Japan),* Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 5, ¶7.

26. In that case, the Declarants sought to justify their armed attack against Yugoslavia on the basis of an alleged necessity to prevent a genocide allegedly committed by Yugoslavia.[23]

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[23] The US President Bill Clinton, when explaining the initiation of the airstrikes in Yugoslavia in 1999, stated that "[t]his was genocide in the heart of Europe, not in 1945, but in 1995… We must apply that lesson in Kosovo, before what happened in Bosnia, happens there, too." *See* CNN, *Transcript: Clinton addresses nation on Yugoslavia's strike* (24 March 1999), available at: https://edition.cnn.com/ALLPOLITICS/stories/1999/03/25/cl inton.transcript/ (Annex 14). Subsequently, Clinton added that: "NATO stopped war crimes. NATO stopped deliberate, systematic efforts at ethnic cleansing and genocide." *See* The New York Times, *CRISIS IN THE BALKANS: THE PRESIDENT; Clinton Underestimated Serbs, He Acknowledged*, (26 June 1996), available at: https://www.nytimes.com/1999/06/26/world/crisis-in-the-balkans-the-president-clinton-underestimated-serbs-he-acknowledges.html (Annex 15).

The US President's spokesman further stated that "[w]e see potential evidence of genocide and that evidence will continue to be collected [for possible use in war crimes trials]." *See* CNN, *Clinton 'Disturbed' by Reports of Serb Atrocities* (30 March 1999), available at: http://edition.cnn.com/US/9903/30/us.kosovo.01/ (Annex 16).

The spokesperson for the US Department of State James Rubin commented that "[W]e have very clear indicators that genocide is unfolding in Kosovo." *See* US Department of State, Daily Press Briefing No. 40, Briefer: James P. Rubin, 30 March 1999, available at: https://1997-2001.state.gov/briefings/9903/990330db.html (Annex 10).

The US Ambassador-at-Large for War Crimes Issues David Scheffer stated that "On Monday, March 29th, spokesman Rubin from this podium described what we concluded were ethnic cleansing, war crimes, crimes against humanity and indicators of genocide occurring in Kosovo… [W]e believe that it creates the basis for stating that there are indicators of genocide unfolding in Kosovo." *See* US Department of State, On-the Record Briefing on Atrocities in Kosovo released by the Office of the Spokesman, Washington, DC, 9 April 1999, available at: https://1997-2001.state.gov/policy_remarks/1999/990409_scheffer_kosovo.html (Annex 11).

Similarly, the UK Prime Minister Tony Blair referred to genocide in justifying his country's participation in the operation against Yugoslavia: "We fought this conflict… because we believe in justice, because we believed it was wrong to have ethnic cleansing and racial genocide here in Europe towards the end of the 20th century, and we didn't fight it to have another ethnic minority [the Kosovan Serb minority] repressed." *See* The Washington Post, *Kosovo's Cruel Realities* (4 August 1999), available at: https://www.washingtonpost.com/archive /opinions/1999/08/04/kosovos-cruel-realities/28f9e16b-1d00-44d4-a85c-d2c22952209c/ (Annex 17).

The UK Foreign Secretary Robin Cook shared the above assessment in his discussion with his US counterpart, Madeleine Albright: "In 1945 when we looked at the Europe that we inherited, it was a Europe scarred by genocide, by mass deportation of peoples, by ethnic confrontation and ethnic aggression. The tragedy is that we witness all of those again in Kosovo today." *See* US Department of State, Secretary of State Madeleine K. Albright and UK Foreign Secretary Robin Cook Press Conference, Washington, D.C., 22 April 1999, available at: https://1997-2001.state.gov/statements/1999/990422a.html (Annex 12).

The UK Defence Secretary George Robertson stated: "[w]e are confronting a regime which is intent on genocide." *See* CNN, *NATO, British Leaders Allege 'Genocide' in Kosovo* (29 March 1999), available at: http://edition.cnn.com/WORLD/europe/9903/29/refugees.01/ (Annex 18).

In a similar vein, German Chancellor Gerhard Schroeder stated that "the genocide in Yugoslavia cannot be met with pacifism" and that Germany must stand by the ethnic Albanian "victims of expulsion, rape and murder". *See* The New York Times, *An Echo of Kosovo in Bonn* (13 April 1999), available at: https://archive.nytimes.com/www.nytimes.com/library/world/europe/041399kosovo-germany.html (Annex 19).

Poland's Prime Minister also supported the NATO bombing campaign as aimed to prevent genocide in Kosovo stating that "[t]here is no question that what is going in Kosovo is genocide." *See* Buffalo News, *Polish Leader Voices Support for Bombing* (24 April 1999), available at: https://buffalonews.com/news/polish-leader-voices-support-for-bombing/article_9316d186-aed3-5f6a-a1fe-8c6d10b8a18f.html (Annex 20).

At the UN General Assembly meeting in September 1999 the Foreign Minister of Poland also characterised NATO's intervention in Kosovo as the step to prevent ethnic cleansings and genocide: "'We have come to

27. In the course of the Court's proceedings in *Legality of Use of Force*, NATO Member States – including the United States, Germany and Italy – also referred to the prevention of genocide as the excuse for their armed intervention:

> "These NATO operations are the only current constraint on the actions of forces under the control of the Federal Republic of Yugoslavia in Kosovo. Provisional measures directed against NATO States could be misinterpreted as restricting or casting doubt on the propriety of those operations. The result of this could be to increase, and not to constrain, the risk of acts of genocide, and to make more difficult a diplomatic solution to the crisis"[24] [Emphasis added]
>
> "It is a matter of common knowledge, as demonstrated in the Preliminary Objections… that the military operations against the FRY were undertaken in an attempt to rescue the Kosovo Albanians from being subjected to atrocities, including genocidal acts, and from being driven out of their ancestral lands."[25] [Emphasis added]
>
> "It is accordingly clear that the Atlantic Alliance was compelled to intervene to prevent an ongoing genocide and has never had the least intention of embarking upon a genocide of its own.
>
> …
>
> There can be no doubt that any interruption of the action by the ten NATO member States would cause immediate and irreparable harm to the Kosovar Albanian population. The Yugoslav special forces would pursue their actions with still greater intensity, with the result that, very shortly, the genocide of that population would be complete.
>
> …
>
> A group of States, who - much against their will - have felt compelled to intervene against a State to halt genocide being carried out against a minority living on the territory of that State, are being called upon to defend themselves before this Court against the accusation, as defamatory as it is absurd, that they are themselves committing genocide. The Court will not be deceived by a diversionary tactic of this kind."[26] [Emphasis added]

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accept that absolute sovereignty and total non-interference are no longer tenable.' There could be no sovereign right to ethnic cleansing and genocide. 'What should not repeat itself is the unacceptable inaction which occurred in the past. Rwanda demonstrates what Kosovo might have become, had we not intervened in 1999 and Kosovo demonstrates what Rwanda might have been, had we intervened in 1994.'" *See* United Nations, Press release, Speakers in General Assembly Urge Even-Handed Approaches to Crises, 29 September 1999, available at: https://press.un.org/en/1999/19990929.ga9616.doc.html (Annex 13).

[24] *Legality of Use of Force (Yugoslavia v. the United States of America)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, p. 25, ¶4.4.

[25] *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections, Verbatim Record of Public sitting, 20 April 2004, p. 23, ¶44.

[26] *Legality of Use of Force (Yugoslavia v. Italy)*, Request for the indication of provisional measures, Verbatim Record of Public sitting,11 May 1999, p. 14, ¶3.C, p. 16, ¶5, p. 17, ¶7.

28. More importantly, NATO members States also made it clear during the proceedings that the Genocide Convention and the rules of international law relating to the use of force are distinct and should not be confused. Thus, for example:

(a) France observed that

> "[t]he Court is…without jurisdiction to rule on the issues concerning alleged violations of the United Nations Charter and of certain principles and rules of international humanitarian law applicable in armed conflict, as those issues do not fall within the provisions of Article IX of the 1948 Genocide Convention."[27]

(b) Similarly, according to Germany,

> "[b]y enunciating in a long list all the breaches of rules of international law which all ten NATO member States impleaded before the Court have allegedly committed, [Yugoslavia] openly admits that even according to its own judgment the bulk of the dispute lies outside the confines of the Genocide Convention."[28]

(c) In the same vein, the United Kingdom stated that

> "[j]urisdiction under Article IX would not extend to disputes regarding alleged violation of other rules of international law, such as the provisions of the United Nations Charter relating to the use of force and the Geneva Conventions and Additional Protocols of 1997 relating to the conduct of armed conflict."[29]

(d) The United States also stated that

> "Further, the provisional measure requested by the Applicant would be inappropriate, even if a credible allegation of violation of the Convention had been made, since the measure requested calls for the cessation of all acts of force and is therefore clearly outside the scope of the Convention."[30]

29. However, when the Declarants seek to intervene in these proceedings at the behest of Ukraine, they expressly reject their previous positions:

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[27] *Legality of Use of Force (Yugoslavia v. France)*, Preliminary Objections of the French Republic, p. 11, ¶14. *See* also *Legality of Use of Force (Yugoslavia v. France)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 10 May 1999, p. 13, ¶7.

[28] *Legality of Use of Force (Yugoslavia v. Germany)*, Preliminary Objections of the Federal Republic of Germany, p. 39, ¶3.28.

[29] *Legality of Use of Force (Yugoslavia v. United Kingdom)*, Preliminary Objections of the United Kingdom, p. 68, ¶5.02.

[30] *Legality of Use of Force (Yugoslavia v. the United States of America)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 12 May 1999, p. 9.

(a) Italy now claims that Article IX of the Convention establishes the Court's jurisdiction over the "disputes concerning the fulfilment of the convention through the unilateral use of military force for the stated purpose of preventing and punishing alleged genocide"[31] and that the State may not use "forcible or military measures to "punish" a State or a people."[32] That is exactly the opposite of what Italy's Agent said at the oral hearing on provisional measures in *Legality of Use of Force*.[33]

(b) Germany contends that "Article IX of the Genocide Convention thus also covers disputes which relate to situations in which one State party of the Convention alleges that another State party is committing acts of genocide on its territory and where, relying on such accusations, the former State party then uses military force against the latter."[34] This position likewise contradicts what Germany argued in its Preliminary Objections in *Legality of Use of Force*.

(c) In the same vein, the United States currently claims that use of force "on the pretext of preventing or punishing genocide" falls into the Court's jurisdiction under Article IX of the Convention.[35] This is contrary to what the US Agent orally submitted to the Court in *Legality of Use of Force*.

(d) According to the United Kingdom, a State like the Russian Federation cannot use force to prevent genocide[36] and the Court has the jurisdiction to review whether such use of force "was allowed or required by Article I of the Genocide Convention."[37] However, the same use of force to prevent genocide is apparently permissible and unreviewable by the Court when it is done by the NATO Member States.

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[31] Declaration of Italy, ¶41.

[32] *Ibid*., ¶48.

[33] *Legality of Use of Force (Yugoslavia v. Italy)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, pp. 13-14, 16-17, ¶¶3.C, 5, 7.

[34] Declaration of Germany, ¶51.

[35] Declaration of the United States, ¶31.

[36] Declaration of the United Kingdom, ¶¶63-65.

[37] *Ibid*., ¶42.

30. As explained in the Preliminary Objections, the Russian Federation does not consider that the Genocide Convention is a legal basis for the use of force – matters related to the use of force are regulated by the UN Charter and relevant rules of customary international law, rules which are the legal basis of the special military operation. However, the sudden apparent change of legal positions that can be seen in the Declarants' conduct, albeit they may consider that it serves their immediate goal to provide Ukraine political support before the Court in these proceedings, further confirms that they do not intend to provide their own views concerning the construction of the Convention.[38]

31. In light of the above, it must be concluded that the real object of the Declarations is not the construction or interpretation of the Genocide Convention pursuant to Article 63 of the Statute but advocating side-by-side with Ukraine as *de facto* co-applicants. Thus, the Declarations do not satisfy the conditions of a genuine intervention under Article 63 of the Statute and thus do not fall within its terms. For these reasons, all the Declarations filed pursuant to the Joint Statements should be declared inadmissible.

B. THE INTERVENTIONS WOULD BE INCOMPATIBLE WITH THE PRINCIPLE OF EQUALITY OF THE PARTIES AND THE REQUIREMENTS OF GOOD ADMINISTRATION OF JUSTICE

32. In addition, conferring on the Declarants the status of interveners would seriously impair the principle of equality of the parties before the Court and be contrary to the requirements of good administration of justice. A coordinated mass intervention before the Court with the stated purpose of advocating for one of the parties against the other would inescapably put the latter in a seriously disadvantaged position, thereby affecting the integrity of the judicial process as a whole. In these unprecedented circumstances, the Court should find the Declarations inadmissible.

33. It is well established in the Court's jurisprudence that "the principle of equality of the parties follows from the requirements of good administration of justice",[39] and that "equality of the parties must be preserved when they are involved, pursuant to Article 2,

[38] *See* also Section E below.

[39] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of October 23rd, 1956, I.C.J. Reports 1956, p. 86.

paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means."[40] The Court has also stressed that "the safeguarding of the rights of respondent States is equally an essential part of 'the good administration of justice'".[41] These principles find application in different contexts,[42] and they require, as a minimum, guaranteeing equality of arms between the parties. It falls upon any court of law to ensure that these basic rights are respected in every case before it without exception.

34. The issue of prejudice to the rights of a respondent State in a situation where a third State joins a case under Article 63 of the Statute in a coordinated effort with an applicant first attracted the attention of the Court in *Whaling in the Antarctic*, where Judge Owada stated that

> "… when considering the admissibility of a request for intervention, whether it is filed pursuant to Article 62 or Article 63 of the Statute of the Court, the Court, should it find it necessary under the particular circumstances of the case, is in a position to examine and determine *proprio motu* whether such intervention would be in keeping with the principles of ensuring the fair administration of justice, including, *inter alia*, the equality of the Parties in the proceedings before the Court … The Court has the discretion to rule such a declaration inadmissible if its admission should unduly compromise fundamental principles of justice underlying its jurisdiction or the fairness of the proceedings. The Court has the ability to exercise this discretion with respect to intervention, whether it be under Article 63 or under Article 62."[43]

35. Judge Owada then expressed a concern that admitting New Zealand's intervention would cause prejudice to Japan because Australia and New Zealand effectively sought to pursue a joint case against Japan:

> "… although Japan does not raise a formal objection to the intervention, it seems evident that it is deeply concerned that New Zealand's intervention

[40] *Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste* v. *Australia)*, Provisional Measures, Order of 3 March 2014, I.C.J. Reports 2014, p. 153, ¶27.

[41] *Barcelona Traction, Light and Power Company, Limited, Preliminary Objections*, Judgment, I.C.J. Reports 1964, p. 43.

[42] *Certain Activities Carried out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)*, Joinder of Proceedings, Order of 17 April 2013, Separate Opinion of Judge Cançado Trindade, I.C.J. Reports 2013, p. 179, ¶20. *See* also *Ibid.*, ¶21 ("… the incidence or application of this general principle has enabled international tribunals to secure the procedural equality of the contending parties").

[43] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, Declaration of Judge Owada, p. 11, ¶1.

> could have consequences that would affect the equality of the Parties to the dispute and thus the fair administration of justice.
>
> …
>
> Japan pointed to the fact that 'by pursuing what may be in effect a joint case under the rubric of an Article 63 intervention [the interveners] could avoid some of the safeguards of procedural equality under the Statute and Rules of the Court.'
>
> …
>
> It is regrettable that a State party to a case before the Court and a State seeking to intervene in that case pursuant to Article 63 of the Statute should engage in what could be perceived as active collaboration in litigation strategy to use the Court's Statute and the Rules of Court for the purpose of promoting their common interest, as is candidly admitted in their Joint Media Release of 15 December 2010."[44]

36. Judge Owada's concern related to the intervention of just one State. However, even that intervention led to a situation where Japan had less than two months to submit a 96-page long document in response to New Zealand's submissions (consisting of 84 pages), only weeks before the oral hearings on the merits of Australia's claims.[45] During the oral hearings, Japan was not allocated additional time to respond to New Zealand's arguments,[46] and it noted with regret that New Zealand had gone beyond what is allowed by Article 63 of the Statute by addressing questions of fact and acting in "collusion" with Australia as "parties of the same interest", thereby prejudicing Japan in the proceedings.[47]

37. In that case, Japan did not object to the admissibility of New Zealand's declaration and the Court limited itself to noting that an "intervention cannot affect the equality of the Parties to the dispute", but only insofar as the intervention "is limited to submitting observations on the construction of the convention in question".[48] At the same time, Judge Owada considered that

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[44] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, Declaration of Judge Owada, p. 12, ¶¶4-5.

[45] New Zealand submitted its Written Observations on 4 April 2013, whereas Japan had to file its Written Observations on 31 May 2013. The oral hearings started on 26 June 2013.

[46] *Whaling in the Antarctic (Australia v. Japan)*, Verbatim Record of Public Sitting, 26 June 2013, p. 17.

[47] *Whaling in the Antarctic (Australia v. Japan)*, Verbatim Record of Public Sitting, 15 July 2013, pp. 27-28, ¶¶32-34. See also Verbatim Record of Public Sitting, 16 July 2013, p. 32, ¶9.

[48] *Whaling in the Antarctic, (Australia* v. *Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 9, ¶18.

> "… this statement is an oversimplified and overly categorical approach to the issue of intervention. The reasoning of the Order is based on a highly questionable proposition, as a general statement of the law, that simply because the scope of intervention under Article 63 is 'limited to submitting observations on the construction of the convention in question'… it therefore follows that such intervention 'cannot affect the equality of the parties to the dispute' … This in my view is *a non sequitur*. The Order, however, does not attempt to explain the rationale behind such a conclusion …
>
> In particular by intervening pursuant to Article 63 of the Statute, thus enabling Australia to preserve its right to appoint a judge *ad hoc*; a right that would have been waived had New Zealand intervened as a party pursuant to Article 62 of the Statute (see Rules of Court, Art. 36 (1)).":[49]

38. Judge Xue expressed similar concerns regarding inequality of the parties in *The Gambia v. Myanmar*, where the applicant instituted proceedings on behalf of an international organisation:

> "When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. This is particularly true if several judges on the bench are nationals of member States of the international organization concerned. With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement.":[50]

39. The matter of several parties aligning to represent the same interest is dealt with in the Statute and the Rules of Court. Article 31(5) of the Statute reads:

> "Should there be several parties in the same interest, they shall, for the purpose of the preceding provisions, be reckoned as one party only. Any doubt upon this point shall be settled by the decision of the Court."

40. This rule is further reflected in Article 36 of the Rules of Court, which provides that

> "1. If the Court finds that two or more parties are in the same interest, and therefore are to be reckoned as one party only, and that there is no Member of the Court of the nationality of any one of those parties upon the Bench, the Court shall fix a time-limit within which they may jointly choose a judge *ad hoc*.

[49] *Whaling in the Antarctic, (Australia* v. *Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, Declaration of Judge Owada, p. 9, ¶¶3-4.

[50] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (the Gambia v. Myanmar)*, Judgment, 22 July 2022, Dissenting Opinion of Judge Xue, pp. 2-3, ¶10.

> 2. Should any party amongst those found by the Court to be in the same interest allege the existence of a separate interest of its own, or put forward any other objection, the matter shall be decided by the Court, if necessary after hearing the parties."

41. Thus, the Statute and Rules of Court proceed from an assumption that having the same interest entails procedural consequences aimed at ensuring equality of the parties. In the *South West Africa* cases, the Court explained that "all Governments which, in proceedings before the Court, come to the same conclusion, must be held to be in the same interest."[51] This constitutes, as rightly noted by Rosenne, "a fundamental rule regarding the composition of the Court".[52] Judge Kreća also observed in *Legality of Use of Force* that the Court considered NATO Member States in those proceedings to be parties "in the same interest":

> "As regards Belgium, Canada and Italy, the Court adopted the relevant decision 'pursuant to Article 31, paragraph 5, of the Statute, *taking into account the presence on the Bench of judges of British, Dutch and French nationality*' … The interpretation of this explanation of the Court's decision inevitably leads to the conclusion that the Court considered not only Belgium, Canada and Italy as parties in the same interest, but also France, the Netherlands and the United Kingdom."[53]

42. It is also necessary to highlight, in this context, Article 32 of the Rules of Court, concerning the relinquishment by the President of the Court of his or her functions when he or she is a national of one of the parties in light of the critical importance of those functions for the conduct of proceedings and the decision-making of the Court in the form of the casting vote:

> "If the President of the Court is a national of one of the parties in a case he shall not exercise the functions of the presidency in respect of that case. The same rule applies to the Vice-President, or to the senior judge, when called on to act as President."

43. This clearly points towards the need to ensure equality of the parties with regard to issues such as the nationality of the Judges and the composition of the Court.

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[51] *South West Africa Cases (Ethiopia* v. *Union of South Africa; Liberia* v. *Union of South Africa)*, Order of 20 May 1961, I.C.J. Reports 1961, p. 14. *See* also *Customs Régime between Germany and Austria*, PCIJ Series A/B No. 41, Order of 20 July 1931, p. 89.

[52] S. Rosenne, Some Reflections on Intervention in the International Court of Justice, *Netherlands International Law Review*, Vol. 34 (1987), pp. 85-86.

[53] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, Separate Opinion of Judge *ad hoc* Kreća, pp. 420-421, ¶72.

44. As shown in Section A, the intention of the Declarants in this case is beyond doubt: they intend to advocate side-by-side with Ukraine as part of a coordinated political strategy. Conferring the status of interveners on the Declarants would therefore create an extremely anomalous situation: the Russian Federation would be forced to respond not only to the arguments advanced by Ukraine (as would normally be the case), but effectively to Ukraine and the eleven Declarants acting as *de facto* co-applicants, both in writing and orally. As of 17 October 2022, ten more States have filed their declarations of intervention, to which the Russian Federation will respond separately.

45. This situation is exacerbated by the fact that at least 26 other States that partake in this political endeavour have stated their intention to intervene with the same objective. It is known that those States will submit additional declarations of intervention and even coordinate their efforts with Ukraine in order to make submissions at the most inconvenient time for the Russian Federation, which would result in an unmanageable procedure both for the latter and for the Court. This in fact has already occurred when several States filed declarations of intervention, pursuant to the Joint Statements, at the time when the Russian Federation had to prepare its Preliminary Objections, thereby causing considerable difficulties.

46. In light of the above, it must be concluded that inequality that the Russian Federation is already facing and would face to a much larger extent, should the Declarants be admitted in this case, would clearly surpass the situations that the Court has faced in the past. As already noted, forty-seven States have made clear their intention to intervene in the proceedings to support Ukraine's arguments before the Court, pursuant to the Joint Statements. The Declarants and ten other States have already sought to give effect to this political endeavour at the behest of Ukraine. Similarly, the European Union, which lacks standing to intervene under Article 63, filed a memorial invoking Article 34(2) of the Statute.

47. In practice, taking into account Japan's experience in *Whaling in the Antarctic*, the Russian Federation would be forced to respond to numerous lengthy written pleadings by the interveners supporting Ukraine at different and critical stages of the proceedings,

as well as to many statements at any oral phase.[54] Such an unwieldy procedure can only result in unduly overwhelming the Russian Federation, undermining its capacity to properly discharge its duties to the Court, and severely impairing equality of arms between the Parties.

48. Furthermore, the Russian Federation notes that 7 out of the 16 Judges of the Court (including the President of the Court) are nationals of the States that have announced their intention to intervene to support Ukraine in these proceedings (Australia, France (two judges including judge *ad hoc* Daudet), Germany, Japan, Slovakia, and the United States). The Russian Federation believes that the Judges will uphold their impartiality and neutrality in accordance with Article 20 of the Statute. However, multiple interventions and public statements made by such States undoubtedly put undue and unnecessary pressure on the Judges and the Court as a whole, and concerns regarding conflicts of interests may also arise. Because the Declarants effectively seek to act as *de facto* co-applicants with Ukraine (or as parties "in the same interest", as they openly admit[55]), the Court should not allow Article 63 of the Statute to be used as a vehicle to circumvent the procedural safeguards in the Statute and the Rules of Court to maintain equality of the parties, in particular, in terms of the composition of the Court, to the detriment of the Russian Federation. This would irretrievably upset the balance between the Parties.

49. In these circumstances, when a massive number, scope and volume of the interventions is on a completely unprecedented scale, running entirely against the Court's previous practice of admitting only one intervener per case, and rarely at that; as well as the explicit support given by the interveners to one party to the proceedings to the detriment of the other party, it is manifest that admitting the Declarants would result in an impairment of the principle of equality of the parties, contrary to the requirements of good administration of justice. The Declarations should accordingly be declared inadmissible.

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[54] As things stand at present, if the Court confers the status of interveners to all the States that have filed declarations invoking Article 63, the Russian Federation will have to respond to 21 different pleadings, in addition to those of Ukraine. This number is likely to rise in the near future, depending on how Ukraine coordinates actions with the other signatories of the Joint Statements.

[55] *See* above, ¶¶17-18.

C. IN ANY EVENT, THE COURT CANNOT DECIDE ON THE ADMISSIBILITY OF THE DECLARATIONS BEFORE IT CONSIDERS THE RUSSIAN FEDERATION'S PRELIMINARY OBJECTIONS

i. The long-standing practice of the Court militates against admitting declarations of intervention prior to the resolution of preliminary objections

50. The Court has never in its almost 80 years of jurisprudence allowed intervention at the preliminary stage of the proceedings in which its jurisdiction or the admissibility of an application was challenged. In particular:

(a) In *Military and Paramilitary Activities*, the Court found El Salvador's intervention inadmissible inasmuch as it related to the phase of the proceedings in which the Court was to consider the United States' preliminary objections against Nicaragua's application.[56]

(b) In *Nuclear Tests*, the Court deferred the consideration of Fiji's application for intervention until the Court had considered France's preliminary objections to jurisdiction and admissibility of New Zealand's application.[57] Although Fiji invoked Article 62 of the Statute as a ground to intervene, scholars find this difference immaterial and consider this case as a relevant authority to interventions under Article 63 of the Statute as well.[58]

(c) *In Nuclear Tests (Request for Examination)*, the Court did not consider the declarations of intervention filed by Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia under Articles 62 and 63 of the Statute before the Court had ruled on the admissibility of New Zealand's original request for an examination of the situation.[59]

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[56] *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. 216, ¶¶2-3, (ii).

[57] *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p. 325.

[58] *See, e.g.*, J. Sztucki, Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadoran Incident in *The American Journal of International Law*, Vol. 79 (4) (1985), p. 1012.

[59] *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*, I.C.J. Reports 1995, pp. 306-307, ¶¶67-68.

51. In the three cases where the Court and its predecessor allowed intervention under Article 63 of the Statute, they did so within the main phase of the proceedings because the jurisdiction was not challenged in a separate stage:

(a) In *Haya de la Torre*, where the Court eventually allowed Cuba to intervene after trimming the intervention significantly, Peru did not file any preliminary objections against Colombia's application. As a result, there was no separate stage for preliminary objections.[60]

(b) In *Whaling in the Antarctic*, where the Court allowed New Zealand to intervene, Japan did not request the Court to conduct a separate phase on preliminary objections and instead raised its jurisdictional objections in the Counter-Memorial.[61]

(c) In *Wimbledon*, where the Permanent Court of International Justice ("PCIJ" or the "Permanent Court") allowed Poland to intervene under Article 63 of the PCIJ Statute, there was no separate stage on preliminary objections because the German Government accepted the PCIJ's jurisdiction under Articles 380 to 386 of the Treaty of Versailles and submitted its counter-case to the case of the four applicant Governments.[62]

52. Thus, the Court's practice is consistent in not allowing interventions at the jurisdictional phase of the proceedings. In *Military and Paramilitary Activities* – a landmark case concerning interventions under Article 63 of the Statute, where the declaration of intervention by El Salvador was dismissed by a near unanimity (14 votes to 1) – some of the Judges later explained this decision in the following terms:

(a) Judge Lachs noted that "there was no adequate reason to grant El Salvador the right of intervention at the jurisdictional stage."[63]

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[60] *Haya de la Torre Case*, Judgment of June 13th, 1951: I.C.J. Reports 1951, p. 71.

[61] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, pp. 242-243, ¶¶32-33.

[62] *Case of the S.S. "Wimbledon",* Judgment, 28 June 1923, P.C.I.J., Series A, No. 1, pp. 12-13; *Case of the S.S. "Wimbledon",* Judgment, 17 August 1923, PCIJ, Series A, No. 1, p. 17.

[63] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Separate Opinion of Judge Lachs, p. 171.

(b) Judge Sette-Camara indicated that the intervention was "untimely, because of the fact that the Court was entertaining the jurisdictional phase of the proceedings."[64]

(c) Judge Ni called the intervention "premature".[65]

53. Even commentators who have entertained the theoretical possibility of interventions at the jurisdictional phase of the proceedings admit that the Court has not supported such a possibility and that the issue has not been settled in the interveners' favour.[66]

ii. <u>The Court has not yet established the existence of the alleged dispute, its subject-matter and the provisions of the Convention that may be in question</u>

54. As explained in Section A above, in order for an intervening State to enjoy the right of intervention under Article 63 of the Statute, "the construction of a convention" must be "in question", and the declaration of intervention must relate to the construction of the specific provisions of the convention that form part of the subject-matter of the dispute before the Court.

55. The requirement of a "construction… in question" means that a State can intervene in a case only if it seeks to interpret a provision of the convention over which the Parties express diverging views as to their interpretation in that case. The intervener needs to

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[64] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Separate Opinion of Judge Sette-Camara, p. 195.

[65] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, Separate Opinion of Judge Ni, p. 294.

[66] As noted by Sztucki (J. Sztucki, Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadoran Incident in *The American Journal of International Law*, Vol. 79 (4) (1985), p. 1015), when deciding upon the intervention of El Salvador "up to eight judges might have regarded any intervention at this [jurisdictional] stage as inadmissible", adding that "had "the Court" (i.e., a majority) contemplated the possibility of Salvadoran intervention in the jurisdictional phase, the question of the applicability of Article 84, paragraph 2 of the Rules probably would not have arisen." In his opinion:

"As far as unwillingness to admit intervention under Article 63 in the jurisdictional phase in general is concerned, it can be based on the doctrinal proposition that "intervention is merely incidental to the main proceedings." On this premise, the very idea of one incident of proceedings (intervention) being related to another incident (preliminary objections) may appear inconceivable and unacceptable to a juridical mind, as incompatible with the general principles of judicial process. It is also true that the drafters of the Statute did not think in terms of the procedural consequences of phased proceedings, although they themselves laid the groundwork for them; they related all incidents to "cases" as such, i.e., implicitly to the merits."

In the view of Professor Rosenne (S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff, 1993), p. 89), "[t]he question whether an intervention under Article 63 can be admitted in any incidental interlocutory proceedings cannot therefore be regarded as settled with any finality."

prove this requirement irrespective of whether it has received a notification from the Registrar.[67]

56. Article 82 of the Rules of the Court further specifies this requirement as follows:

> "2. The declaration … shall contain:
>
> …
>
> (b) identification of the particular provisions of the convention the construction of which it considers to be in question;
>
> (c) a statement of the construction of those provisions for which it contends."

57. In *Haya de la Torre,* which gave root to Article 82, the Court held that

> "every intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquired that character, in law, if it actually relates to the subject-matter of the pending proceedings."[68]

58. The Court then differentiated the subject-matter of *Haya de la Torre* from that of the *Asylum* case, which was decided by the Judgment of 20 November 1950, as follows:

> "it [the subject-matter of the present case] concerns a question - the surrender of Haya de la Torre to the Peruvian authorities - which in the previous case was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the abovementioned Judgment."[69] [Emphasis added]

59. When applying this principle, the Court stated:

> "In these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities."[70] [Emphasis added]

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[67] S. Forlatti, THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY? (Springer, 2014), p. 185. *See* also the United States' reaction to El Salvador's intervention (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Letter from the Agent of the United States of America to the Registrar of the International Court of Justice Submitting the Observations of the United States on the Declaration of Intervention of El Salvador, p. 469): "While a State may have the right to intervene in any case concerning the interpretation of a treaty to which it is a party, the intervention must relate to the questions of treaty interpretation which are in issue before the Court." [Emphasis added]

[68] *Haya de la Torre Case*, Judgment of June 13th, 1951: I.C.J. Reports 1951, p. 76.

[69] *Ibid.*, pp. 76-77.

[70] *Ibid.*, p. 77.

60. Thus, Cuba's right to intervene did not concern just a general interpretation of a convention invoked in *Haya de la Torre*, but was limited by the Court to the interpretation of the specific provisions that were in dispute between the parties. In turn, the Court determined the subject-matter of the proceedings by examining the Submissions of the Parties[71] (in that case the existence of a dispute, the jurisdiction of the Court and the admissibility of the Application was not challenged in a separate phase of the proceedings).

61. According to Article 40(1) of the Statute, "the subject of the dispute … shall be indicated" in the application. Article 38(2) of the Rules of Court further requires that "the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based." As Judge Guillaume noted in his declaration in the *Mutual Assistance in Criminal Matters* case:

> "Usually, the claims, the subject of the Application and the subject of the dispute are one and the same.
>
> …
>
> I would therefore be inclined to take the view that, once the subject of an application has been defined in accordance with Article 40 of the Statute and Article 38 of the Rules of Court, any submissions which fall outside that subject are inadmissible."[72]

62. This is consistent with the view of the Court in the *Fisheries Jurisdiction* case:

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[71] *Haya de la Torre Case*, Procedure Orale, Seances Publiques, tenues au Palais de la Paix, la Haye, du 15 au 17 mai et le 13 juin 1951, sous la presidence de M. Basdevant, President, Observations de M. Gilbert Gidel (Conseil du Gouvernement du Perou) a la Séance Publique du 15 Mai 1951, Matin, pp. 141-142:

"Mais les conclusions prises par la Colombie le 11 décembre 1950 cessent d'être valables le jour où ce gouvernement, ce 7 février 1951, prend dans son Mémoire de nouvelles conclusions qui ne font plus état de la Convention de La Havane … Et alors, Messieurs, quelle peut être dans ces conditions la valeur d'une déclaration d'intervention qui est faite le 15 février 1951, et qui est fondée sur la participation à une convention que la Colombie, c'est-à-dire la Partie même qui a provoqué cette déclaration, a d'ores et déjà, huit jours avant l'émission de la déclaration d'intervention, éliminée du corps des conclusions sur lesquelles elle demande à la Cour qu'il lui plaise de statuer?" ("But the submissions made by Colombia on December 11, 1950, ceased to be valid on the day when that government, on February 7, 1951, included in its Memorial new submissions which no longer referred to the Havana Convention. … And then, Gentlemen, what can be in these conditions the value of a declaration of intervention which is made on February 15, 1951, and which is based on the participation in a convention that Colombia, that is to say the very party which provoked this declaration, has already, eight days before the issuance of the declaration of intervention, been eliminated from the body of the conclusions on which it asks the Court to rule?").

[72] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, Declaration of Judge ad hoc Guillaume, p. 291, ¶¶14-15.

> "there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties."[73] [Emphasis added]

63. Subsequently, in *Military and Paramilitary Activities*, the applicability of Article 82 of Rules of Court was confirmed in the individual opinions of a number of Judges when dismissing El Salvador's declaration of intervention:

(a) Judge Oda noted that El Salvador's declaration of intervention "did not appear to satisfy the requirements of Article 82, paragraph 2 (b) and (c), of the Rules of Court for an intervention at the present stage".

(b) Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharrière noted that they "ha[d] 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".

(c) Even Judge Schwebel, who alone voted against the dismissal of the declaration, agreed that it "did not adequately meet the specifications set forth in Article 82, paragraph 2, of the Rules of Court".

64. It thus follows that, unless the Court has examined the submissions of the Parties and confirmed that the Court has jurisdiction to hear the applicant's claims and that such claims are admissible, it cannot be certain if there is "a dispute" or "a question" regarding "the construction of a convention", or what provisions of the Convention are "the subject-matter" of a dispute or are "in question", and whether "the question" relates to the interpretation of that provision of a convention.

65. Thus, if the respondent State files preliminary objections to challenge the Court's jurisdiction or the admissibility of the applicant's claims, the Court's decision on these preliminary issues will set important ramifications on the admissibility of any intervention under Article 63 of the Statute. Specifically, the Court will first have to

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[73] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, p. 450, ¶¶37-38.

examine the submissions of the original parties and establish (*i*) whether there is a dispute between such original parties, (*ii*) what the real nature of such dispute, if any, is; and (*iii*) what provisions of the relevant convention, if any, are in question.

66. In this case, the Russian Federation raised preliminary objections that challenge the existence of a dispute between the Parties under the Genocide Convention. The Preliminary Objections also show that, alternatively and in any event, Ukraine misrepresented the nature of the dispute between the Parties; that Ukraine inappropriately introduced new claims in the Memorial that it had not raised in the Application. The Russian Federation also raised a number of additional objections with regard to the admissibility of Ukraine's claims.

67. If, after considering the Preliminary Objections, the Court finds that there is no dispute between the Parties under the Convention or that it cannot entertain Ukraine's claims for jurisdictional or admissibility reasons, it cannot give a binding interpretation of any provision of the Convention in line with Article 63 of the Statute, either for the original Parties or for the intervening States.

68. For these reasons, the Declarations are not to be considered at the jurisdictional phase of these proceedings.

D. THE DECLARATIONS ADDRESS IN EFFECT MATTERS, WHICH PRESUPPOSE THAT THE COURT HAS JURISDICTION AND/OR THAT UKRAINE'S APPLICATION IS ADMISSIBLE

69. In an attempt to overcome the procedural obstacles mentioned in Section C above and to put the Declarations before the Court at the preliminary objections stage, the Declarants allege that they seek to intervene to interpret provisions of the Convention that in their view relate not only to merits but also to the Court's jurisdiction.[74] However, the Declarants' claim to "assist the Court in determining its jurisdiction"[75] in favour of Ukraine is to no avail, for a separate reason.

70. In *Military and Paramilitary Activities*, the Court ordered the parties to provide their Memorial and Counter-Memorial on the questions of jurisdiction and admissibility on

[74] Declaration of Latvia, ¶¶15-20; Declaration of Lithuania, ¶18; Declaration of the United Kingdom, ¶¶17-20; Declaration of New Zealand, ¶¶23-27.

[75] Declaration of Latvia, ¶19.

30 June 1984 and 17 August 1984 respectively. On 15 August 1984, El Salvador filed its Declaration of intervention under Article 63 of the Statute. El Salvador argued that it sought to discuss the admissibility of Nicaragua's application and interpret various conventions on which Nicaragua had based its plea of jurisdiction. El Salvador summarised the Declaration as follows:

> "ln this intervention, presented by El Salvador on the basis of Article 63 of the Statute of the Court and Article 82 of the Rules of Court, El Salvador places on record its valid points of view regarding the interventionist attitude of Nicaragua and regarding the Court's lack of jurisdiction over this case and its inadmissibility."[76] [Emphasis added]

71. Rejecting El Salvador's Declaration, the Court found that

> "[d]eclaration… of the Republic of El Salvador, which relates to the present phase of the proceedings, addresses itself also in effect to matters… which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States of America and that Nicaragua's Application against the United States of America in respect of that dispute is admissible."[77]

72. Thus, despite El Salvador's assertions that the Court did not have jurisdiction to consider Nicaragua's application, the Court found that the content of its declaration presupposed the opposite. At the same time, the Court decided not to hear El Salvador further to clarify its position on the intervention and held that El Salvador's declaration was "inadmissible inasmuch as it relate[d] to the current [jurisdictional] phase of the proceedings".[78]

73. It is illustrative that while the Court rejected El Salvador's intervention by its Order of 4 October 1984, the oral proceedings on the issues of jurisdiction and admissibility were opened on 8 October 1984. Thus, the Court clearly showed its reluctance to take El Salvador's arguments into account while deciding on its jurisdiction and the admissibility of Nicaragua's application.

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[76] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention of Republic of El Salvador, p. 18, ¶XVI.

[77] *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. 216.

[78] *Ibid.*, p. 216, ¶¶2-3, (ii).

74. Separate opinions of the Judges sitting in the intervention phase of the case further confirm that interventions under Article 63 of the Statute cannot be admitted at the jurisdictional stage, in particular if they "*in effect* appear[] directed" to the merits:

(a) Judge Oda considered that "El Salvador's Declaration of Intervention… appeared mainly directed to the merits of the case."[79]

(b) Judge Singh also noted that "El Salvador's Declaration *in effect* appears directed to the merits of the case – an observation with which I do agree and which has also weighed with the Court."[80]

75. In contrast, in *Nuclear Tests* the Court considered it impossible to rule on Fiji's request to intervene, which Fiji filed under Article 62 of the Statute and devoted exclusively to the merits of the case, until the Court resolved the issues of jurisdiction and admissibility. The Court found that Fiji's request

> "by its very nature presupposes that the Court has jurisdiction to entertain the dispute between New Zealand and France and that New Zealand's Application against France in respect of that dispute is admissible …"[81]

76. The choice of words used by the Court in this Order is instructive. In *Military and Paramilitary Activities*, the Court found that El Salvador's hybrid declaration of intervention (concerning both jurisdiction and merits) presupposed *in effect* that the Court had jurisdiction. In the case of the fully substantive request of Fiji, the Court found that it presupposed the Court's jurisdiction *by its very nature*. Therefore, even if a declaration contains arguments ostensibly related to jurisdiction, the presence of arguments related to the merits or presupposing that the Court has jurisdiction makes it inadmissible at the jurisdictional stage of the proceedings.

77. Interestingly, the only Declarant in this case which attempts to address the precedent set in *Military and Paramilitary Activities* substantively – Latvia – considers that "a key

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[79] *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, Separate Opinion of Judge Oda, p. 220, ¶2.

[80] *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, Separate Opinion of Judge Nagendra Singh, p. 218.

[81] *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p. 325, ¶1.

element that led to the rejection of El Salvador's declaration of intervention in that case was that the Court and Judges perceived it as primarily [sic] or even exclusively directed at the merits of the case."[82] Accordingly, Latvia agrees that a declaration of intervention which is *primarily* directed at the merits of the case (as the vast majority of the Declarations, including Latvia's own) should be dismissed. Furthermore, Latvia ignores other reasons for rejecting El Salvador's declaration – that it presupposed the Court's jurisdiction and admissibility of Nicaragua's application, as well as a violation of Article 82 of the Rules of Court.

78. Other Declarants in this case make only passing comments as to the admissibility of their Declarations at the stage of preliminary objections and have little if anything to respond to the Court's position in the abovementioned case:

(a) Lithuania claims that "an Article 63 intervention is possible at each stage of the proceedings",[83] without giving any authority in support of this claim. Lithuania's argument is significantly weakened by its own admission that the matters referred to in its Declaration "appertain to the merits of the case".[84]

(b) France, New Zealand, Romania and the United States do not substantiate why they are entitled to intervene in the case at the preliminary objections stage. The only authority referred to by Germany[85] and Italy[86] to support admissibility of intervention at the preliminary objections stage is the Dissenting Opinion of Judge Schwebel in *Military and Paramilitary Activities*, which does not match with the majority opinion in that case.[87]

(c) Poland refers to the abovementioned Dissenting Opinion of Judge Schwebel and to Article 82(1) of the Rules of Court, according to which "a declaration [for intervention] shall be filed as soon as possible."[88] However, this provision is of

[82] Declaration of Latvia, ¶20.

[83] Declaration of Lithuania, ¶18.

[84] *Ibid.*, ¶17.

[85] Declaration of Germany, ¶26.

[86] Declaration of Italy, ¶23.

[87] *See* above, ¶52.

[88] Declaration of Poland, ¶11.

no aid to Poland's case. Article 82(1) has no bearing on the phase in which a declaration may be filed; rather, it is aimed at ensuring that declarations, like all other written submissions, are available to the Court with sufficient time so that they can be properly considered without disrupting the regular course of the proceedings (*e.g.,* by filing a declaration days before the beginning of the oral phase of a case). Article 82(2) explicitly gives the Court discretion to decide on the admissibility of interventions under Articles 62 and 63 of the Statute whenever *the Court* deems it appropriate in view of the circumstances of the case, including doing so at a later stage.

(d) The United Kingdom claims that "Article 63, paragraph 1, permits a State to intervene '[w]henever' the construction of a convention to which it is a party is in question."[89] In fact, the right of a State to intervene is governed by Article 63(2), which does not say that intervention can take place "whenever". Both the Rules of Court and the Court's practice[90] clearly indicate that it is for the Court to decide when, if at all, to admit declarations of intervention under Article 63. The United Kingdom's reference to Article 82(1) of the Rules of Court, which requires that declarations of intervention be filed "as soon as possible" is also irrelevant, as explained above.

79. Furthermore, a careful analysis of the Declarations shows that they address matters, which presuppose that the Court has jurisdiction to entertain the dispute.

80. ***First***, the overwhelming majority of the Declarants' submissions is directly aimed at what they consider Ukraine's arguments on the substance of the alleged dispute. Arguments labelled as relevant to the Court's jurisdiction take just a few paragraphs in the Declarations. The Declarants openly admit that the matters raised in their Declarations appertain, in their view, "to the merits of this case."[91]

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[89] Declaration of the United Kingdom, ¶16.

[90] Rules of Court, Article 84(1). *See*, e.g., *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, pp. 5-6, ¶8.

[91] Declaration of Lithuania, ¶17; Declaration of the United Kingdom, ¶16; Declaration of Italy, ¶24; Declaration of Sweden, ¶41; Declaration of the United States, ¶¶16-17.

81. ***Second***, the Declarations effectively presuppose that there is a dispute between the Parties under the Genocide Convention and that the Court has jurisdiction to entertain the dispute and/or that the Application of Ukraine is admissible:

(a) Germany argues that "the Court has jurisdiction to declare the absence of genocide and the violation of a good faith performance of the Convention resulting in an abuse of the law."[92]

(b) Poland indicates that "the Court has jurisdiction to declare the absence of genocide and the violation of good faith performance of the Convention, resulting in an abuse of the law."[93]

(c) Italy "contends that the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the entire Convention show that a dispute regarding acts carried out by one State against another State based on claims of genocide which the latter State deems unsubstantiated falls under the notion of 'dispute between Contracting Parties relating to the interpretation, application or fulfilment of the present Convention'".[94]

(d) Latvia points out that "the Court will have jurisdiction over any claim by the latter State seeking a declaration that the former State's accusations are without legal and factual foundation."[95]

(e) The United Kingdom "contends that Article IX of the Genocide Convention does grant the Court jurisdiction to make a declaration of an applicant State's compliance with its obligations under the Convention, provided that this is a matter in dispute between the parties to the case".[96]

(f) The United States concludes that "where a Contracting Party commits aggression against another Contracting Party on the pretext of preventing or punishing genocide, and the Contracting Party subjected to aggression denies that it is

[92] Declaration of Germany, ¶45.

[93] Declaration of Poland, ¶35.

[94] Declaration of Italy, ¶41.

[95] Declaration of Latvia, ¶44.

[96] Declaration of the United Kingdom, ¶32.

responsible for genocide, it is plain that the parties disagree as to the interpretation, application, or fulfilment of the Genocide Convention, including with respect to the responsibility of a State for genocide or the other acts enumerated in Article III, within the meaning of Article IX."[97]

(g) Sweden asserts that "the language used in Article IX of the Convention clearly suggests that a State accused of committing genocide has the same right to submit a dispute to the Court as the State making the accusation. Sweden furthermore holds that the term 'dispute' is sufficiently broad as to encompass a disagreement over the lawfulness of the conduct of an applicant State, and importantly contends that the threshold for when a dispute 'relating to the interpretation, application or fulfilment' of the Convention has arisen cannot be set so low that, by denying the existence of such a dispute and invoking other norms under international law to justify its actions, a respondent State can unilaterally bar the Court from establishing jurisdiction in accordance with Article IX."[98]

(h) Romania argues that "the jurisdiction of the Court could not be negated on the argument that the Court has been called to find that the applicant has not breached the provisions of the Convention contrary to the allegations of the respondent."[99]

82. Accordingly, the Declarations are written in a way that presupposes that the Court has jurisdiction over the alleged dispute and that the Application is admissible. If the Court allows the Declarants to intervene now, it would essentially prejudge the preliminary objections that the Russian Federation raised within a separate phase of the proceedings, and the outcome of such phase overall.

83. For these reasons, the Declarations are inadmissible inasmuch as they relate to the jurisdictional phase of the proceedings.

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[97] Declaration of the United States, ¶31.

[98] Declaration of Sweden, ¶39.

[99] Declaration of Romania, ¶30.

E. THE DECLARANTS SEEK TO ADDRESS ISSUES UNRELATED TO THE CONSTRUCTION OF THE CONVENTION AND THEIR ADMISSION WOULD PREJUDGE QUESTIONS RELATING TO THE COURT'S JURISDICTION *RATIONE MATERIAE*

84. As noted above, intervention under Article 63 of the Statute is limited to the construction or interpretation of the treaty provisions in question in a contentious case. This is clear from the plain text of Article 63, as well as from the Court's jurisprudence.[100] Any declaration of intervention purporting to address any matter that is not confined to this limited object must consequently be declared inadmissible.

85. In this case, in line with the stated purpose to advocate side-by-side with Ukraine as reflected in the Joint Statements, the Declarations contain numerous references to issues that are unrelated to the construction of the provisions of the Convention. Notably:

(a) France intends to address questions relating to the existence of a dispute between the Russian Federation and Ukraine;[101] and the relevance of the principle of good faith for the application of the Convention "dans la diversité de ses déclinaisons".[102]

(b) Germany refers to matters relating to the existence of a dispute between the Russian Federation and Ukraine;[103] whether there is evidence that genocide has been committed or may be committed in Ukraine;[104] issues relating to the doctrine of abuse of rights;[105] and issues relating to the use of force.[106]

(c) Italy refers to questions relating to the existence of a dispute between the Russian Federation and Ukraine;[107] good faith in the application of the Convention and the

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[100] *See* above, ¶¶13-14.

[101] Declaration of France, ¶¶26-27.

[102] *Ibid.*, ¶24.

[103] Declaration of Germany, ¶¶29-30.

[104] *Ibid.*, ¶38.

[105] *Ibid.*, ¶44.

[106] *Ibid.*, ¶36.

[107] Declaration of Italy, ¶28.

doctrine of abuse of rights;[108] whether evidence that genocide has occurred or may occur in Ukraine exists;[109] and issues relating to the use of force.[110]

(d) Latvia alleges that it "will not address application".[111] Yet it then states that it intends to address issues relating to the existence of evidence that genocide has occurred or may occur in Ukraine; the doctrine of abuse of rights;[112] and the legality of the use of force.[113] In this respect, Latvia expressly admits that "the content of the rule prohibiting unlawful unilateral use of force … is to be determined by taking into account other relevant rules of international law" rather than legal provisions of the Convention.[114]

(e) Lithuania refers to the Russian Federation's alleged violation of the Court's order on provisional measures; to the question whether evidence that genocide has occurred or may occur in Ukraine exists; to the alleged violation of the prohibition of the use of force under the UN Charter; and expressly admits that, in Lithuania's view, these matters "appertain to the merits of this case".[115]

(f) New Zealand likewise intends to address alleged violations of Article 2(4) of the UN Charter; the "customary norm of unilateral humanitarian intervention"; the Russian Federation's alleged violation of the Court's order on provisional measures; and the doctrine of abuse of rights.[116]

(g) Poland refers to issues relating to the existence of a dispute between the Russian Federation and Ukraine;[117] whether evidence that genocide has occurred or may

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[108] *Ibid.*, ¶¶31-34.

[109] *Ibid.*, ¶¶34, 45-47.

[110] *Ibid.*, ¶41.

[111] Declaration of Latvia, ¶12.

[112] *Ibid.*, ¶¶32, 36, 38, 45-47.

[113] *Ibid.*, ¶¶37-38, 49, 50-54.

[114] *Ibid.*, ¶50.

[115] Declaration of Lithuania, ¶¶15-17, 20, 24.

[116] Declaration of New Zealand, ¶¶31, 33 and 36.

[117] Declaration of Poland, ¶25.

occur in Ukraine exists;[118] the doctrine of abuse of rights;[119] and matters relating to the use of force.[120]

(h) Romania intends to address issues relating to the existence of a dispute between the Russian Federation and Ukraine;[121] good faith in the application of the Convention;[122] and issues relating to the UN Charter and other rules of customary international law, including on the use of force and territorial integrity.[123]

(i) Sweden indicates that its intervention is limited to "issues of interpretation under the Convention" and does not intend to cover "the application of its Articles" to the case,[124] yet it then refers to questions relating to the existence of a dispute between the Russian Federation and Ukraine;[125] whether evidence of genocide in Ukraine exists;[126] the doctrine of abuse of rights;[127] and matters related to the use of force.[128]

(j) The United Kingdom's Declaration concerns almost exclusively matters such as the existence or otherwise of a dispute between the Russian Federation and Ukraine concerning the Convention;[129] whether there is evidence that genocide has occurred or may occur in Ukraine;[130] the doctrine of abuse of rights;[131] and the legality of the use of force, war crimes, crimes against humanity.[132]

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[118] *Ibid.*, ¶¶38, 40

[119] *Ibid.*, ¶30.

[120] *Ibid.*, ¶¶30, 35, 42.

[121] Declaration of Romania, ¶¶25-26.

[122] *Ibid.*, ¶20, 22.

[123] *Ibid.*, ¶¶22, 31, 43.

[124] Declaration of Sweden, ¶14.

[125] *Ibid.*, ¶¶27-31.

[126] *Ibid.*, ¶¶45-46, 51-52.

[127] *Ibid.*, ¶¶33, 37, 44.

[128] *Ibid.*, ¶33, 48.

[129] Declaration of the United Kingdom, ¶¶44-47.

[130] *Ibid.*, ¶¶48-58.

[131] *Ibid.*, ¶¶53-58.

[132] *Ibid.*, ¶¶59-62.

(k) Finally, the United States also intends to address matters related to the use of force and territorial acquisition.[133]

86. None of the abovementioned issues concern the "construction" of the Convention in accordance with the limited object of Article 63 of the Statute. The existence of a dispute constitutes, as is clear from the Court's case law, an evidentiary question that must be determined taking into account the facts specific to each case, and in particular the conduct of the parties. A State genuinely seeking to intervene under Article 63 should not be concerned by such an issue, which is relevant only for the parties between which a dispute may (or may not) exist.

87. The same is true for the question whether genocide has occurred or may occur in Ukraine, which requires most importantly a fact-intensive assessment which would belong to the merits stage of the proceedings should the Court find that it has jurisdiction to entertain Ukraine's claims. It would be for the Parties, and not for the Declarants, to carry out such factual analysis taking into account the relevant rules on burden of proof.

88. As explained in the Preliminary Objections, the doctrine of abuse of rights, if a rule of international law at all, would constitute a general principle of law in the sense of Article 38(1)(c) of the Statute, distinct from the Genocide Convention, having its own requirements and conditions for application, and does not concern the construction of the Convention. It is not for a genuine intervener under Article 63 of the Statute to seek to determine the existence and content of a general principle of law or a rule of customary international law; this falls upon the party invoking the relevant rule.

89. The Declarants' several references to rules of international law related to matters such as the use of force, *jus in bello*, war crimes, territorial integrity and territorial acquisition, are similarly incompatible with the limited object of Article 63 of the Statute. An intervener under Article 63 must limit itself to the construction of the convention in question; it cannot make impermissible incursions into the interpretation or application of other rules of international law that are distinct from the treaty in question and derive from different sources.

[133] Declaration of the United States, ¶¶29, 31.

90. As regards the alleged violation of the Court's order on provisional measures, the Russian Federation fails to see how this could even remotely relate to the construction of the Genocide Convention, as required by Article 63.

91. The Russian Federation must recall that, in this case, serious questions arise regarding the Court' jurisdiction *ratione materiae* under the Genocide Convention. As explained in the Preliminary Objections, in its Memorial (which differs significantly from the Application) Ukraine in essence requests the Court, *inter alia*, to establish the international responsibility of the Russian Federation for the violation of several rules of conventional and customary international law other than the Genocide Convention itself, such as those relating to the use of force, *jus in bello*, self-determination, territorial integrity, and the recognition of States.

92. These incidental proceedings are not the place to enter into the details of the Preliminary Objections, which can only be decided once the Court has fully heard both Parties. At the same time, because the Declarants, like Ukraine in its Memorial, intend to address the interpretation or application of several rules of international law other than the Genocide Convention, if the Court grants them the status of interveners it would effectively be prejudging the central question of the scope of its jurisdiction *ratione materiae* in this case by accepting that those other rules are somehow relevant to the "construction" of the Convention for purposes of Article 63 of the Statute. It goes without saying that the Court must avoid such a situation, since the determination of the admissibility or otherwise of an intervention under Article 63 should not prejudge jurisdictional issues to the detriment of one of the Parties.

93. The Declarants seek to address issues that are not related to the "construction" of the Genocide Convention, as required by Article 63, and consequently their declarations must be considered inadmissible.

94. Furthermore, admitting the Declarants as interveners at this jurisdictional stage of the proceedings would clearly result in prejudging questions relating to the Court's jurisdiction *ratione materiae*, which should not occur under any circumstances. Accordingly, as a minimum the Declarations must be declared inadmissible at the jurisdictional phase, or alternatively, their consideration should be postponed until the Court has determined the scope of its jurisdiction *ratione materiae*.

F. THE UNITED STATES' INTERVENTION IS INADMISSIBLE FOR FAILING TO FALL WITHIN THE PROVISIONS OF ARTICLE 63 OF THE STATUTE AS A RESULT OF ITS RESERVATION TO ARTICLE IX OF THE GENOCIDE CONVENTION

95. When the United States ratified the Convention, it made the following reservations:

> "(1) That with reference to article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.
>
> (2) That nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States."

96. In *Legality of Use of Force (Yugoslavia v. United States)*, the Court held that as a result of this reservation, Article IX "manifestly does not constitute a basis of jurisdiction" and removed the case from the General List.[134]

97. Despite this reservation to the compromissory clause in the Convention that Ukraine relies upon to found the Court's jurisdiction in this case, the United States has filed a Declaration of Intervention under Article 63 of the Statute. In so doing, the United States presents the Court with what Rosenne termed a "rarely encountered"[135] circumstance. Indeed, Rosenne and other publicists have considered whether in such a situation intervention is admissible as an open question.[136] The Russian Federation submits that the United States' Declaration is inadmissible because it fails to fall within the provisions of Article 63 of the Statute as a result of its reservation to Article IX of the Genocide Convention. Several considerations lead to this conclusion.

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[134] *Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 924, ¶25

[135] S. Rosenne, Some Reflections on Intervention in the International Court of Justice, *Netherlands International Law Review*, Vol. 34 (1987), p. 84.

[136] S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), p. 75; S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4th ed., Martinus Nijhoff Publishers, 2006), p. 1470; M. Shaw (*ed.*), ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2015 (5th ed., Brill-Nijhoff, 2016), p. 1524; A. Miron, C. Chinkin, *Article 63*, in A. Zimmermann, K. Oellers-Frahm *et al.* (*eds.*), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), p. 1757, ¶33.

i. <u>The term "convention" in Article 63 must be taken to mean a convention whose provisions to be interpreted and whose compromissory clause affording the Court jurisdiction are in force or shared between the intended intervener and the parties to the particular case, after any existing reservations have been given effect to</u>

98. The basis for intervention according to Article 63 of the Statute is "the construction of a convention to which states other than those concerned in the case are parties is in question". For purposes of Article 63 of the Statute, the term "convention" must be taken to mean a treaty whose provisions are to be interpreted and whose compromissory clause relied upon to found the Court jurisdiction are in force or shared between the intended intervener and the parties to the particular case, after any existing reservations have been given effect to. This reading follows from the text of Article 63 of the Statute, which includes the phrase "in question", in light of the law of treaties, and as interpreted in *Free Zones*[137] and *Haya de la Torre*.[138]

99. It is well known that the law on reservations to treaties was inaugurated by the Court's *Reservations to the Convention on Genocide*[139] advisory opinion, which has been codified in Articles 19-22 of the 1969 Vienna Convention on the Law of Treaties ("VCLT"). The essential effect of this approach, as Article 21 of the VCLT demonstrates, is that different reservations to a treaty may lead to different effective contents of the treaty to be in force between and among the various parties, effectively resulting in many different treaties between and among them. If the provisions to be interpreted and the compromissory clause of a convention, because of reservations, are not in force between the parties to the case and the intended intervener, there would have been in effect no "convention" with a common component in force between the parties to the case and the intended intervener to be interpreted by the Court, i.e., "in question" in a particular case, such as this one.

100. As described in the ILC Guide to Practice on Reservations to Treaties:

> "To the extent that an established reservation excludes the legal effect of certain provisions of a treaty, the author of that reservation has neither rights

[137] *See* below, ¶104.

[138] *See* above, ¶¶13-14.

[139] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, I.C.J. Reports 1951, p. 15.

> nor obligations under those provisions in its relations with the other parties with regard to which the reservation is established. Those other parties shall likewise have neither rights nor obligations under those provisions in their relations with the author of the reservation"[140]

101. If the provisions to be interpreted and/or the compromissory clause of a convention, because of reservations, are not in force between the parties to the case and the intended intervener, there would have been in effect no "convention" with a common component in force between, the parties to the case and the intended intervener to be interpreted by the Court, i.e., "in question" in a particular case, such as this one. That is to say, the convention between the parties is not the same as the "convention" between the parties and the intended intervener, or between each party and the intended intervener. Adopting this reading of the term "convention" finds support in the object and purpose of Article 63 of the Statute. The *raison d'être* of Article 63 of the Statute, emerging from the text as well as the redrafting history, is to protect an interest *sui generis*—which in case of Article 63 of the Statute is embodied in participation in a particular treaty—that may be affected by an interpretation put to a treaty by the Court in a particular case. This follows from the Report of the Advisory Committee of Jurists at The Hague to draft the PCIJ Statute,[141] as well as the report made by the representative of France to, and adopted by, the Council of the League of Nations on the draft PCIJ Statute.[142] Manley O. Hudson, as commentator, noted in this regard that:

> "Perhaps Article 63 may be considered as a special application of the general principle laid down in Article 62, and the fact that a State is a party to a convention to be construed may be regarded as establishing that State's legal interest so that a judgment by the Court will not ordinarily be required."[143]

102. As subsequently observed by Rosenne,

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[140] Guide to Practice on Reservations to Treaties (adopted by the International Law Commission at its sixty-third session, in 2011), Guideline 4.2.4, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_8_2011.pdf.

[141] Permanent Court of International Justice, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, June 16th-July 24th 1920, with Annexes, pp. 745-746.

[142] Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, January 1921, pp. 45, 50.

[143] M.O. Hudson. PERMANENT COURT OF INTERNATIONAL JUSTICE, 1920-1942: A TREATISE (The Macmillan Company, 1943), p. 422.

> "intervention under Article 63 is a form of intervention to protect an interest of a legal nature, not which may be affected by the decision in the case but in a more limited sense that it may be affected by the interpretation given by the Court to the multilateral treaty in question."[144]

103. Without the provisions to be interpreted and the compromissory clause of a treaty commonly in force between the parties in a case and an intended intervener, there is no basis for such special interest, even in this limited sense, that an intended intervener seeks to protect.

104. The adoption of this reading of the term "convention" is reflected in the PCIJ's *Free Zones* case, which was instituted by special agreement, but involved the interpretation of a provision in the Treaty of Versailles. The Permanent Court noted that

> "States Parties to the Treaty of Versailles were not specially notified under Article 63 of the Statute, which was considered as inapplicable in this case; but their attention was drawn to the right which they no doubt possessed to inform the Court, should they wish to intervene in accordance with the said Article, in which case it would rest with the Court to decide."[145]

105. Rosenne explained that

> "This suggests that even where the 'construction of a convention to which states other than those concerned in the case are parties is in question', the Court will have regard not merely to the convention as a whole, but to the particular provision or provisions in question; and if those provisions do not concern States which are not parties to the litigation, it will prima facie assume that they are not entitled to file a declaration of intervention."[146]

106. In light of the cardinal importance of consent in international dispute settlement, the compromissory clause in a treaty is a component *sine qua non* for establishment of the special interest in the limited sense described above.

107. A State that has made a reservation to the compromissory clause in a treaty, which clause is relied upon to found the Court's jurisdiction, has in effect immunised itself from any effect from a judicial interpretation of the treaty by the Court, as the only

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[144] S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), p. 73; S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4th ed., Martinus Nijhoff Publishers, 2006), p. 1466; M. Shaw (*ed.*), ROSENNE'S LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2015 (5th ed., Brill-Nijhoff, 2016), p. 1520.

[145] *Case of the Free Zones of Upper Savoy and the District of Gex*, Judgment of 7th June 1932, PCIJ Series A/B, No. 46, p. 100.

[146] S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), p. 35.

possible forum for binding third party settlement of disputes, and, thus, has no special interest to be protected through Article 63 of the Statute.

108. The above problem is well illustrated by the United States' attempt to intervene under Article 63 of the Statute in this case. The United States not only maintains a reservation to Article IX of the Genocide Convention, but also seeks to intervene in respect of the interpretation of this very provision, among others. Its Declaration states in paragraph 11 that "[t]he United States, as a non-party to this case, intends to present its views to the Court on the issues of construction of the Convention relevant to the determination of the case, including the construction of the compromissory clause in Article IX, in accordance with Article 63 of the Statute."

109. The Russian Federation further notes that the second reservation of the United States is a broad one that in essence subordinates the interpretation and application of the Convention to its own internal law. At the time the reservation was made, some States raised concerns about this reservation, noting that internal law should not be used as a justification for failure to perform a treaty in accordance with Article 27 of the VCLT.[147] To the extent that the United States considers that its own interpretation of the Convention prevails over everyone else's, it is not difficult to doubt the veracity of the United States' statement in its Declaration that it "recognizes that … the judgment in this case will be equally binding upon the United States".[148] This applies not only with respect to Article IX, but also the other provisions of the Convention referred to in the Declaration.[149]

[147] Convention on the Prevention and Punishment of the Crime of Genocide, Objections of Denmark, Estonia, Finland, Greece, Ireland, Italy, the Netherlands, Norway, Sweden, the United Kingdom, available at: https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-1&chapter=4.

[148] Declaration of the United States, ¶11.

[149] *Ibid*.

ii. Article 63 of the Statute implies the requirement of a jurisdictional link between the parties to the main case and an intended intervener, which link is missing as a result of the intended intervener's reservation to the compromissory clause, on which the Court's jurisdiction is founded

110. A view exists that Article 63 of the Statute does not include a jurisdictional link requirement between the parties to the main case and an intended intervener giving one the impression that acceptance of the Statute itself is sufficient consent to the institution of intervention under Article 63. But the text of Article 63 in light of the object and purpose of the Article, as confirmed by the structure of the Statute, implies the requirement of such a jurisdictional link. That jurisdictional link is missing as a result of the reservation to the compromissory clause, on which the Court's jurisdiction is founded, by the intended intervener, such as the United States in this case.

111. The earliest predecessor of Article 63 first emerged in the work of the Institut de Droit International, where a jurisdictional link requirement was included in the text of Article 16 of its 1875 *Règlement* for international arbitral procedure: "L'intervention spontanée d'un tiers n'est admissible qu'avec le consentement des parties qui ont conclu le compromis."[150] The explicit consent or jurisdictional link requirement dropped out from the text of draft Article 61 [now 63] of the draft Statute of the PCIJ done by the Advisory Committee of Jurists at The Hague.[151]

112. However, the consent or jurisdictional link requirement was still applicable to this Article since the entire draft Statute contained a system of compulsory jurisdiction whereby the acceptance of the Statute would in itself be sufficient expression of consent to jurisdiction over matters within the scope of that Statute,[152] intervention matters included.

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[150] *See* Institut de Droit international, *Annuaire de L' Institut de Droit international I-1877*, p. 131, available at: https://www.idi-iil.org/app/uploads/2017/04/1877-vol_1_Sessions-de-Gen%C3%A8ve-1874-et-de-La-Haye-1875.pdf.

[151] 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. 746.

[152] *Ibid.*, p. 729.

113. Subsequently, the Assembly of the League of Nations did not make any substantive changes to this Article, which now is Article 63.[153] But the Assembly eventually abandoned the compulsory jurisdiction system and replaced it with an "additional act" system that would require an act additional to the Statute to express consent to the Court's jurisdiction over a particular case or category of cases, embodied in Article 36.[154] This system has been inherited by the current Statute of the Court.

114. The issue of how this change would affect the issue of jurisdiction over intervention under Article 63 of the Statute has been never considered by the Court. It cannot be the right approach to suggest that the abandonment of the compulsory jurisdiction system means abandoning the consent requirement for purposes of Article 63 of the Statute, since the consent system is the cornerstone of the jurisdiction of the Court; it has only been replaced with an "additional act" system. It is consistent with the object and purpose of Article 63 of the Statute as expressed in the entire system of the Statute as well as the entire drafting history that the "additional act" system applies also to Article 63 intervention, providing for a jurisdictional link requirement.

115. Reading Article 63 of the Statute in the framework of the current Statute as containing a jurisdictional link requirement is furthermore consonant with subsequent important multilateral treaty practice, i.e., the decision to require consent of the parties (1) in a conciliation proceeding to the participation of any third party under Article 3 of the Annex to the VCLT, (2) in a conciliation proceeding to the participation of any third party under Article 10 of the Annex to the 1986 Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations; (3) in an arbitral proceeding to the participation of any third party under Article 4 of that Annex (1986), and (4) in a conciliation proceeding to the participation of any third party under Article 4 of Annex V to the 1982 United Nations Convention on the Law of the Sea. Such practice subsequent to the adoption of Article 63 of the Statute is a reflection of the endorsement of the jurisdictional link requirement.

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[153] Permanent Court of International Justice, Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court, January 1921, p. 266.

[154] *Ibid.*, p. 263.

116. In any event, Rosenne finds one of the only two "clear and safe situations" where he could offer an opinion on the jurisdictional link requirement, as follows:

> "where the intervention is made under Article 63 of the Statute, and if the convention in question contains a compromissory clause conferring jurisdiction on the Court in circumstances there defined, and the case is instituted on the basis of that compromissory clause, then it is submitted that the intervening State, which *ex hypothesi* is a party to that convention, must not have made an established reservation affecting the compromissory clause."[155]

117. Article 63 and the structure of the Statute should be interpreted to require at least that the intended intervener must have not made a reservation to the very compromissory clause that is relied upon to found the jurisdiction of the Court over the very case in which intervention is sought.

118. In this case, the United States has maintained a reservation to Article IX of the Genocide Convention, the very compromissory clause that the applicant relies upon to found the jurisdiction of the Court in this case. As a result, there is no jurisdictional link between the intended intervener, the United States, and the Parties to this case, or between the United States and this case. As a result, the Declaration of the United States does not fall within the provisions of Article 63 of the Statute and, as a result, is inadmissible.

iii. <u>Interventions under Article 63 must conform to the principle of reciprocity</u>

119. Reciprocity, like equality of the Parties, is a long-standing principle of international law, and is considered "an essential element of jurisdiction", not limited to Article 36(2) of the Statute,[156] but "inherent in the very notion of the jurisdiction of the Court."[157] The issue of reciprocity in relation to intervention was brought up as early as 1922 by Judge Anzilotti, who believed that the right of intervention could only exist either in virtue of an agreement between the two original parties or when the parties to the case, as well as

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[155] S. Rosenne, Some Reflections on Intervention in the International Court of Justice, *Netherlands International Law Review*, Vol. 34 (1987), p. 84; S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), p. 110.

[156] H. Thirlway, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE (OSAIL, 2013), pp. 782-783; S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4th ed., Martinus Nijhoff Publishers, 2006), p. 713.

[157] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (4th ed., Martinus Nijhoff Publishers, 2006), p. 736.

those who desired to intervene, had accepted the optional clause with regard to the compulsory jurisdiction of the Court. His reasoning was that "the legal grounds on which this view was based were reinforced by practical considerations; States would hesitate to have recourse to the Court if they had reason to fear that third parties would intervene in their cases."[158]

120. Anzilotti's position received immediate support from Judge Huber, who stated that

> "Articles 62 and 63 were justified only on the condition that the obligation to have recourse to the Court… were equally applicable in the case of all the States which had acceded to the Statute… [T]he Articles in question should be considered as only referring to the case where all the interested parties had accepted the compulsory jurisdiction of the Court."[159]

121. Anzilotti's remarks were, in particular, understood as requiring that the intervener should be under an obligation to accept the jurisdiction of the Court, *ratione personae* in relation to all or each of the principal parties to the case, and *ratione materiae* as regards the subject-matter of the case.[160]

122. Rosenne supported Anzilotti's view and opined "that what is involved is not merely an obligation to recognize the jurisdiction of the Court and the final and binding quality of its judgment, but also an obligation to comply with the decision of the Court". In his opinion, importantly:

> "the only clear and safe situations [with regard to interventions] that I can see are: (a) where the case is brought on the basis of declarations accepting the jurisdiction under Article 36, paragraphs 2 or 5 of the Statute, and the State wishing to intervene has made a similar declaration; then it would seem to be essential that no question of reciprocity should arise, as that would only introduce innumerable complications into the case; and (b) where the intervention is made under Article 63 of the Statute, and if the convention in question contains a compromissory clause conferring jurisdiction on the Court in circumstances there defined, and the case is instituted on the basis of that compromissory clause, then it is submitted that the intervening State, which *ex hypothesi* is a party to that convention, must

[158] Permanent Court of International Justice, Preparation of the Rules of the Court, Minutes of Meetings held during the Preliminary Session of the Court, Sixteenth Meeting, 23 February 1922, p. 87.

[159] *Ibid.*, p. 91.

[160] S. Rosenne, Some Reflections on Intervention in the International Court of Justice in *Netherlands International Law Review*, Vol. 34 (1987), pp. 81-84.

> not have made an established reservation affecting the compromissory clause."[161] [Emphasis added]

123. The issue of reciprocity is, by nature, closely connected to the concept of jurisdictional link. The following explanation had been given of the Court's approach to the matter of intervention when it was engaged in preparing the revised Rules of 1978 by Judge Lachs:

> "The question has arisen as to whether a State possessing no jurisdictional links with the Court may intervene…. States instituting proceedings must be assured that no other State will intervene in their dispute without having any jurisdictional link, and thus be immune to reciprocal action."[162] [Emphasis added]

124. Judge Jiménez de Aréchaga observed:

> "Otherwise, unreasonable consequences would result, in conflict with basic principles such as those of the equality of the parties before the Court and the strict reciprocity of rights and obligations among the States which accept its jurisdiction. A State which cannot be brought before the Court as a respondent by another State can neither become an applicant vis-à-vis that State nor an intervener against that same State, entitled to make independent submissions in support of an interest of its own."[163] [Emphasis added]

125. Judge Aréchaga derived this position, which he also confirmed in his opinion in the *Continental Shelf* case, from the "fundamental principle of reciprocity of rights and obligations between the States parties which have accepted the compulsory jurisdiction of the Court", which "is expressly proclaimed in respect of declarations of acceptance of the Court's jurisdiction under Article 36 (2), but … has a wider scope and applies *a fortiori* to the jurisdiction deriving from Special Agreements which submit to the Court particular disputes between two States"[164] (notably, special agreements fall under Article 36(1) of the Statute alongside compromissory clauses in conventions).

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[161] *Ibid*., p. 84. *See* also S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), p. 75.

[162] M. Lachs, *The Revised Procedure of the International Court of Justice*, in F. Kalshoven *et al. (eds.)*, ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER IN MEMORY OF HARO F. VAN PANHUYS (1980), (as cited in S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff Publishers, 1993), pp. 77-78.

[163] *Nuclear Tests (Australia v. France)*, Application to Intervene, Order of 20 December 1974, I.C.J. Reports 1974, Declaration of Judge Jiménez de Aréchaga, p. 533.

[164] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, I.C.J. Reports 1984, Separate Opinion of Judge Jiménez de Aréchaga, p. 60, ¶16.

126. The United States is cognisant of the obstacle to its intervention. In the declaration, it claims that this reservation "does not inhibit the right of the United States to intervene under Article 63 as to the correct construction of the Genocide Convention", citing in support the decision of the PCIJ in the *Wimbledon* case concerning intervention of Poland.[165] The only argument that the United States offers in support of the relevance of this case to the present proceedings is a reference by the Permanent Court to Article 63 of the PCIJ Statute.

127. However, the principal difference between Poland's intervention in *Wimbledon* and the United States' attempted intervention in this case lies in the fact that, unlike the United States, Poland recognised the compulsory jurisdiction of the judicial body competent to resolve disputes under the relevant treaty. Poland cited its participation in the Treaty of Versailles in support of its intervention, first under Article 62 and then under Article 63 of the PCIJ Statute.[166] As the Permanent Court held in its Judgment of 17 August 1928, it possessed "jurisdiction instituted by the League of Nations to deal with, amongst other matters, any violation of Articles 380 to 386 of the Treaty of Versailles or any dispute as to their interpretation".[167] To this jurisdiction Poland did not make any objections or reservations, thus making its intervention in the *Wimbledon case* fundamentally different from the United States' attempt to intervene, and of no assistance to the United States.

128. Thus, it is not possible to reconcile the principles of reciprocity with the situation when a State, which has accepted the compulsory jurisdiction of the Court under a treaty, is faced with interventions from States that have not accepted such jurisdiction.

129. As demonstrated above, it is unfair for an intended intervener to take side with the applicant in this case; this unfairness takes on a greater dimension when the United States attempts to intervene despite its lack of a jurisdictional link with the case. An

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[165] Declaration of the United States, ¶8, fn 11.

[166] *Case of the S.S. "Wimbledon",* Judgment, 28 June 1923, P.C.I.J., Series A, No. 1, pp. 12-13.

[167] *Case of the S.S. "Wimbledon",* Judgment, 17 August 1923, P.C.I.J., Series A, No. 1, p. 20. *See* also *ibid*., citing Article 386, Paragraph I of the Treaty: "In the event of violation of any of the conditions of Articles 380 to 386, or of disputes as to the interpretation of these articles, any interested Power can appeal to the jurisdiction instituted for the purpose by the League of Nations."

interpretation of Article 63 of Statute that causes such unjustness cannot be a correct one.

130. This unjustness if not barred by the Court can acquire a global dimension. The United States would be free to join any case against any other State party in respect of any matter under the Convention, while no other State party to the Convention would be allowed to bring a case against the United States without the latter's consent, thereby also excluding the possibility of interventions in such cases if they did not align with the interests of the United States.

131. For the above reasons, the United States' Declaration is inadmissible.

III. SUBMISSIONS

132. In view of the foregoing, the Russian Federation respectfully requests the Court:

(a) to dismiss each of the Declarations on the ground of inadmissibility; if not

(b) to dismiss each of the Declarations as inadmissible inasmuch as they relate to the jurisdictional phase of the proceedings;

(c) to defer consideration of admissibility of the Declarations until after the Court has made a decision on the Russian Federation's Preliminary Objections.

Agent of the Russian Federation

Alexander V. SHULGIN

The Hague, 17 October 2022

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Agent of the Russian Federation

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Alexander V. SHULGIN

The Hague, 17 October 2022

INDEX OF ANNEXES

Mass media articles