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 AUSTRALIA, AUSTRIA, DENMARK, ESTONIA, FINLAND, GREECE, IRELAND, LUXEMBOURG, PORTUGAL AND SPAIN

15 NOVEMBER 2022

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I. INTRODUCTION

1. With reference to the Registrar's Letter No. 157115 of 16 September 2022; Letter No. 157127 of 19 September 2022; Letter No. 157145 of 22 September 2022; Letter No. 157152 of 22 September 2022; Letter No. 157203 of 29 September 2022; Letter No. 157223 of 30 September 2022; Letter No. 157265 of 7 October 2022; Letter No. 157346 of 12 October 2022; Letter No. 157358 of 13 October 2022; Letter No. 157364 of 13 October 2022, the Russian Federation hereby submits its written observations on the admissibility of the declarations of intervention (the "Declarations") filed by Australia, the Republic of Austria, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, the Hellenic Republic, the Republic of Ireland, the Grand Duchy of Luxembourg, the Portuguese Republic, and the Kingdom of Spain (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 intended to intervene in these proceedings in order to support Ukraine in its case against the

[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, p. 2.

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

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 15 November 2022, a total of twenty-three 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 ten Declarations referred to in paragraph 1 above only. The Russian Federation has already submitted its written observations on the declarations of France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the United Kingdom and the United States on 17 October 2022. As for the remaining declarations, the Russian Federation intends to present its observations within the limits fixed by the Court.

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 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:

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[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] *See* below, ¶¶16-21.

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

> *(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;
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> *(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, 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 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 reference to Article IX of the Convention is of no assistance for the purposes of intervention at the jurisdictional stage of the proceedings. The Declarants cannot intervene on Article IX of the Convention *per se*.

(e) **Section F** 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*.

10. The Russian Federation wishes to highlight that these written observations are presented only for the purposes of addressing matters of intervention, which are incidental to the main proceedings, 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*:

> "[T]he 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:

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

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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.

> "[T]he 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. This limited object of intervention under Article 63 was also recalled by Rosenne:

> "[The] 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 the more limited scenes that it may be affected by the interpretation given by the Court to the multilateral treaty in question."[10]

15. 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 (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 real intention of the

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

[10] S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff, 1993), p. 73.

State concerned, thus establishing whether the conditions of a "genuine intervention" are satisfied.

16. In this Case, the Joint Statements show that the real intention of the Declarants is not to express 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.
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> …
>
> 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."[11]

17. 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.
>
> …
>
> 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.
>
> …

[11] 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).

> ... 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 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."[12]

18. 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.
>
> …
>
> 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."[13] [Emphasis added]

19. Other signatories of the Joint Statements, including the Declarants, have also made statements revealing the real aim of their interventions. For example:

    (a) Australia asserts that its Declaration is "supporting Ukraine's claims" and that it "stand[s] with Ukraine in bringing these proceedings against Russia before the International Court of Justice."[14]

[12] 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).

[13] 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].

[14] Minister for Foreign Affairs of Australia, Further actions in response to Russia's illegal invasion of Ukraine, 2 October 2022, available at: https://www.foreignminister.gov.au/minister/penny-wong/media-release/further-actions-response-russias-illegal-invasion-ukraine (Annex 5).

(b) Denmark indicated that it seeks to intervene "to support Ukraine's accusations"[15] and that it is "happy to see that already 12 nations support Ukraine".[16] It further stated that Denmark "must support Ukraine - both in the combat zone and now here in the courtroom - and that is why we are entering the case."[17]

(c) Ireland, using language reminiscent of that employed by Ukraine, stated that it intends to argue "that the ICJ does have jurisdiction in this case."[18]

(d) A press release by Estonia stated that the latter submitted its declaration of intervention "alongside" the other signatories of the Joint Statements.[19]

(e) Spain noted that, by seeking to intervene, it "joins other Member States of the European Union, along with the United States and Canada, among others, that have filed similar declarations."[20]

(f) Lithuania stated that "Lithuanian lawyers are working hand-in-hand with Ukrainian lawyers seeking to strengthen Ukraine's legal struggle."[21]

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[15] Ministry of Foreign Affairs of Denmark, Twitter, 20 September 2022, 10:47 AM, available at: https://twitter.com/DanishMFA/status/1572130256542375938 (Annex 6). *See* also Permanent Representation of Denmark to NATO, Twitter, 20 September 2022, available at: https://twitter.com/DK_NATO/status/1572217446064349186 (Annex **7**).

[16] Ministry of Foreign Affairs of Denmark, Twitter, 20 September 2022, 5:54 PM, available at: https://twitter.com/DanishMFA/status/1572237755177910276 (Annex 8).

[17] Via Ritzau, *Foreign Minister Jeppe Kofod: Russia's false accusations of genocide must go to court* (19 September 2022), available at: https://via.ritzau.dk/pressemeddelelse/udenrigsminister-jeppe-kofod-ruslands-falske-anklager-om-folkedrab-skal-for-domstolen?publisherId=2012662&releaseId=13659910 (Annex 20).

[18] Department of Foreign Affairs of Ireland, Press release, Minister Coveney on Ireland's intervention at the International Court of Justice in Ukraine v Russia, 21 September 2022, available at: https://www.dfa.ie/news-and-media/press-releases/press-release-archive/2022/september/minister-coveney-on-irelands-intervention-at-the-international-court-of-justice-in-ukraine-v-russia.php (Annex 9).

[19] Permanent Mission of Estonia to the UN, Press release, Estonia submits a declaration of intervention to International Court of Justice in the case of Ukraine versus Russia, 24 September 2022, available at: https://un.mfa.ee/estonia-submits-a-declaration-of-intervention-to-international-court-of-justice-in-the-case-of-ukraine-versus-russia/ (Annex 10).

[20] Ministry of Foreign Affairs, European Union and Cooperation of Spain, Press statement, Spain files a Declaration of Intervention with the International Court of Justice in the case of Ukraine vs. Russia, 29 September 2022, available at: https://www.exteriores.gob.es/en/Comunicacion/Comunicados/Paginas/2022_COMUNICADOS/20220929_COMU062.aspx (Annex 11).

[21] 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 12).

(g) New Zealand 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."[22]

(h) Poland 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."[23]

(i) Sweden admitted that it intends to "put forward positions that are in line with those of Ukraine."[24]

20. Furthermore, the three Baltic States – Estonia, Latvia and Lithuania –, in an official statement made at the United Nations General Assembly, noted that the Declarants, themselves included, do not have "any interests of their own" in making the interventions, being allegedly motivated by the desire to "assist the Court as to interpretation, application [sic] and fulfillment [sic] of the Genocide Convention".[25] Since such "assistance" is, in accordance with the Declarants' own avowed purpose and the actual contents of their Declarations, entirely in favour of Ukraine, this disavowal of any legitimate individual interest in the interpretation of the Convention is particularly telling.

21. In response, Ukraine "express[ed] sincere gratitude to those countries who decided to stand beside [it] in the World Court", noting that they will "continue working closely on the case".[26]

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[22] 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 13).

[23] 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 14).

[24] 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://web.archive.org/web/20220921194249/https://www.government.se/press-releases/2022/09/sweden-participating-in-two-court-cases-concerning-the-war-in-ukraine/ (Annex 15).

[25] Permanent Mission of Lithuania to the United Nations in New York, Statement on behalf of the Baltic States at the 77th Session of the United Nations General Assembly, 27 October 2022, available at: https://www.urm.lt/missionny/en/news/statement-on-behalf-of-the-baltic-states-at-the-united-nations-77th-session-of-the-united-nations-general-assembly (Annex 16).

[26] UN Web TV, General Assembly: 21st plenary meeting, 77th session, 27 October 2022, available at: https://media.un.org/en/asset/k1z/k1z9kavn6u (Annex 17).

22. 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, acting in the same interest as the Applicant,[27] 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.

23. 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 "construction" of the provisions of the Genocide Convention that may be in question (the limited object of genuine 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 regular contentious proceedings.

24. Indeed, the Declarations 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 Genocide Convention. The Declarants even intend to address matters that are governed by rules of international law other than the Convention,[28] such as the use of force, *jus in bello*, and territorial integrity.[29] 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

[27] *See* further Section B below.

[28] *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").

[29] *See* further Section F below.

application, as well as rules of international law falling outside the scope of the latter,[30] 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.

25. 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 may 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.

26. 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.[31] 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".[32] But the express references to a "legal interest" and *erga omnes* obligations by the Declarants in these proceedings are 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.

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[30] *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").

[31] Declaration of Australia, ¶26; Declaration of Austria, ¶14; Declaration of Denmark, ¶9; Declaration of Estonia, ¶¶13-14; Declaration of Finland, ¶¶10-11; Declaration of Greece, ¶14; Declaration of Ireland, ¶10; Declaration of Luxembourg, ¶10; Declaration of Portugal, ¶11; Declaration of Spain, ¶10.

[32] *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.

27. The same interest of the Declarants and Ukraine is also evident from the fact 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 the submissions presented in Ukraine's Application and even its Memorial (which should be unavailable to the Declarants until and if their Declarations are admitted). In effect, the Declarations restate Ukraine's positions, and even where, on a few occasions, the Declarants advance apparently new arguments, they are still in the same vein as those of Ukraine.

28. In addition, many of the Declarations are drafted in identical or almost identical terms.[33] The Declarants themselves admit that their Declarations are very similar and even propose that, should they be admitted to the proceedings, their interventions may be grouped together with similar interventions.[34] The predisposition of some of the Declarants to be grouped together, without having first carefully considered all the relevant arguments put before the Court, further confirms that they act at the behest of Ukraine and intend to essentially repeat the latter's arguments, as opposed to providing their own views on the construction of the Genocide Convention as required by Article 63 of the Statute.

29. Finally, the Russian Federation notes that the core statements that Portugal and Spain seek to advance by intervening in these proceedings manifestly contradict what they 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.

30. In that case, the NATO member States referred to the prevention of genocide as the excuse for their armed attack against Yugoslavia both in public statements and in the course of the Court's proceedings.[35] Notably, NATO members States also made it clear

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[33] For a comparison of the Declarations, see Annex 24.

[34] Declaration of Austria, ¶8; Declaration of Denmark, ¶14; Declaration of Estonia, ¶21; Declaration of Greece, ¶19; Declaration of Luxembourg ¶17; Declaration of Spain, ¶15.

[35] The Spanish Prime Minister stated that "Spain, a NATO member, fully backs the operation in Yugoslavia" and "that "[e]thnic cleansing, genocide and incompatible coexistence cannot be the rules we live by." *See* Harvard Crimson, *Spain's PM Lauds NATO* (27 April 1999), available at: https://www.thecrimson.com/article/1999/4/27/spains-pm-lauds-nato-spains-prime/ (Annex 21).

The Prime Minister of Portugal also explained NATO's activity in Kosovo with reference to ethnic cleansing: "Our enemy is extreme nationalism, religious fundamentalism, racism, xenophobia, ethnic cleansing. That is why we are active in Kosovo. That is why we must be active in Kosovo, we must succeed in Kosovo." *See* Meeting of the North Atlantic Council at the level of Heads of State and Government, Statement by the Prime Minister of

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) Portugal observed that:

> "The rights claimed by the Federal Republic of Yugoslavia are not rights arising out of the Genocide Convention, but are said to arise from other international agreements, such as the United Nations Charter, the Geneva Conventions, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. - this claim fails because the alleged breach by the Portuguese Republic could not be the subject of a judgment in the exercise of the jurisdiction provided by Article IX of the Genocide Convention and, accordingly, could not be the subject of any provisional measures within a jurisdiction based on the said Convention."[36]
>
> "A dispute may indeed exist, but it relates to whether or not the international norms on the use of force, International Humanitarian Law and Security Council Resolution 1244 (1999) were respected. It does not relate to acts of genocide, and it is manifest that no such acts occurred."[37] [Emphasis added]

(b) Spain's agent indicated:

> "I completely agree with the views expressed on this issue by several of my colleagues representing other States, who have argued that the Court should not accept the applicant State's reliance on this Convention as a basis for jurisdiction. Such reliance is clearly fraudulent and artificial and has no relevance to the present case or to the conduct of the Kingdom of Spain and its allies. The dispute here is not one about the application of the Convention, and it is evident that the request for provisional measures has not been conceived with the aim of safeguarding the rights protected by the Convention."[38] [Emphasis added]

Portugal, Antonio Guterres, 23 April 1999, available at: https://www.nato.int/docu/speech/1999/s990423s.htm (Annex 18).

The Prime Minister of Denmark likewise indicated: "Therefore, this fight - NATOs fight in Kosovo and FRY is a fight for humanity. A fight for all of us. It is the fundamental question of rights for human beings instead of rights of states. Because - as the Secretary General of the United Nations have indicated - the United Nations Pact must never be a hiding place for mass murders." *See* Meeting of the North Atlantic Council at the level of Heads of State and Government, Statement by the Prime Minister of Denmark, Poul Nyrup Rasmussen, 23 April 1999, available at: https://www.nato.int/docu/speech/1999/s990423p.htm (Annex 19).

See also *Legality of Use of Force (Yugoslavia v. Spain)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, CR 99/22 (translation), pp. 3, 5-6. *Legality of Use of Force (Yugoslavia v. Portugal)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, pp. 11-13, ¶¶3.1.4, 4.1.2.2.

[36] *Legality of Use of Force (Yugoslavia v. Portugal)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, p. 9, ¶2.1.2.2.4.

[37] *Legality of Use of Force (Yugoslavia v. Portugal)*, Preliminary Objections of the Portuguese Republic, p. 37, ¶125.

[38] *Legality of Use of Force (Yugoslavia v. Spain)*, Request for the indication of provisional measures, Verbatim Record of Public sitting, 11 May 1999, CR 99/22 (translation), pp. 8-9.

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

(a) Portugal argues that "the Court has jurisdiction under Article IX of the Convention" over the issue of "the use of force by the Russian Federation",[39] thereby seeking to extend the Court's jurisdiction over the use of force under the Convention. This is the opposite of what Portugal claimed in *Legality of Use of Force*.

(b) Spain now claims that "the jurisdiction of the Court extends to disputes concerning the unilateral use of military force for the stated purpose of preventing and punishing alleged genocide."[40] This contradicts Spain's position in *Legality of Use of Force*, where Spain stated that use of force does not affect the rights of a State under the Genocide Convention.

32. 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 ground of the special military operation. However, the sudden apparent change of legal positions that can be seen in the conduct of Portugal and Spain (as well as other NATO interveners, as noted in the Written Observations of 17 October), 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.[41]

33. It may be noted that even researchers from intervening States agree that the real interest of the Declarants lies not in the construction of the Convention, but in bolstering Ukraine's claim against Russia, "especially in advocating for the ICJ's exercise of its jurisdiction".[42] They recognise that Article 63 is "not intended for taking sides", but in

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[39] Declaration of Portugal, ¶¶30-31.

[40] Declaration of Spain, ¶25.

[41] *See* also Section F below.

[42] *See* I. Marchuk, A. Wanigasuriya, Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ, *Journal of Genocide Research* (2022) (Annex 23), pp. 7, 11 ("Interestingly, the declarations have predominantly flown in from European and "Western" states and there is a notable absence of states from the Global South… The ongoing war has been portrayed by Ukraine and Western states as a battle against Russia's assault on the rules-based international order, which Russia views as being unipolar and skewed in favour of the West. Given this, the overwhelming support from a particular portion of

the present case the aim of the Declarants would be to transform Article 63 into a mechanism to "communally condemn breaches of international obligations".[43] It is further suggested by the authors that the massive character of the interventions would put pressure on the Court to accept them.[44]

34. 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. Accordingly, 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

35. 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 under Article 63 of the Statute 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.

states for Ukraine at the ICJ does not come as a surprise…. The interventions… are symbolic in that they display a united "Western" and European stance in condemning Russian actions in Ukraine and show how the intervening nations stand in solidarity with Ukraine. The interventions also symbolize the united stance of the states submitting the declarations especially in advocating for the ICJ's exercise of its jurisdiction in the present case").

[43] *See* J. McIntyre, *Less a Wave Than a Tsunami*, Völkerrechtsblog (11 October 2022), available at: https://voelkerrechtsblog.org/less-a-wave-than-a-tsunami (Annex 22) ("It is clear that all of the interveners come in support of Ukraine. The present case tends to suggest that although intervention was not intended to be a mechanism for 'taking sides', Article 63 interventions can be a way for States to communally condemn breaches of international obligations deemed of sufficient importance").

[44] *See* I. Marchuk, A. Wanigasuriya, Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ, *Journal of Genocide Research* (2022) (Annex 23), p. 11 (also quoting Juliette McIntyre) ("…this concurrence on the issue of the exercise of jurisdiction by the intervening states may have a positive impact on the ICJ's analysis of the scope of its jurisdiction, thus allowing Ukraine's case to proceed swiftly to the merits stage… the overwhelming concurrence between the intervening states in arguing their right to intervene, may have created a situation where it is difficult for the Court to refuse to consider the declarations on technical grounds and deny admissibility").

36. 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",[45] and that "equality of the parties must be preserved when they are involved, pursuant to Article 2, paragraph 3, of the Charter, in the process of settling an international dispute by peaceful means."[46] 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'."[47] These principles find application in different contexts,[48] 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.

37. 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:

> "[W]hen 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."[49]

38. 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:

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[45] *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.

[46] *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.

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

[48] *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").

[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. 11, ¶1.

> "Although Japan does not raise a formal objection to the intervention, it seems evident that it is deeply concerned that New Zealand's intervention 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."[50]

39. 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.[51] During the oral hearings, Japan was not allocated additional time to respond to New Zealand's arguments,[52] 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.[53]

40. 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".[54] At the same time, Judge Owada stated:

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[50] *Ibid.*, p. 12, ¶¶4-5.

[51] 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.

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

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

[54] *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.

> "In my view, 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))."[55]

41. 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."[56]

42. 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."

43. 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*.
>
> 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

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[55] *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, ¶¶3-4.

[56] *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.

any other objection, the matter shall be decided by the Court, if necessary after hearing the parties

44. Thus, the Statute and Rules of Court proceed from an assumption that having the same interest entails important 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."[57] Judges Bedjaoui, Guillaume and Ranjeva further explained, summing up the Court's jurisprudence on the matter, that:

> "(a) *Governments which, before the Court, present the same submissions must be regarded as being in the same interest. The arguments advanced by the parties are not very important in this respect, the submissions alone being determinative* (settled jurisprudence);
>
> (b) when *objections to jurisdiction and admissibility* are submitted in *limine litis*, in the initial phase of proceedings the attitude of the parties to these objections must be evaluated. Thus if the parties submit that the Court has jurisdiction, they must be regarded as being in the same interest (*Fisheries Jurisdiction* cases);
>
> (c) *It is for the Court to decide independently of the attitude of the parties* (*North Sea Continental Shelf* case);
>
> (d) *This solution applies whether the applications are joined* (*South West Africa* and *North Sea Continental Shelf* cases) *or remain separate* (*Fisheries Jurisdiction* cases)."[58]

45. This constitutes, as rightly noted by Rosenne, "a fundamental rule regarding the composition of the Court."[59] Judge Kreća also observed in *Legality of Use of Force* that

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[57] *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*, Order of 20 July 1931, PCIJ Series A/B No. 41, p. 89.

[58] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, Preliminary Objections, Judgment, Joint declaration of Judges Bedjaoui, Guillaume and Ranjeva, I.C.J. Reports 1998, p. 39.

[59] S. Rosenne, Some Reflections on Intervention in the International Court of Justice, *Netherlands International Law Review*, Vol. 34 (1987), pp. 85-86. *See* also S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff, 1993), p. 118 ("The normal practice of the Court has been to reach the determination that the States concerned are parties in the same interest on the basis of its examination of the submissions of the parties in that particular phase. If the submissions are the same or closely similar, whether in cases that have been formally joined or cases which are parallel and are being heard in common, the States concerned will be regarded as being 'in the same interest' for the purposes of Article 31"); R. Kolb, THE INTERNATIONAL COURT OF JUSTICE (Hart Publishing, 2013), p. 129 ("The application of the words 'same interest' is not really possible if the interpretation is a formalistic one. As to the 'material' approach to interpretation, if the opinion relates to a legal question currently pending between States, the arguments they put forward will make it possible to determine to what extent, if indeed at all, they are making common cause"). *See* also P. H. Koojimans and F. Lusa Bordin, *Article 31*, in A. Zimmermann *et al*. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (OUP, 2019), pp. 610-614.

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."[60]

46. 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."

47. 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.

48. As shown in Section A, the intention of the Declarants in this case is beyond doubt: their aim is to advocate side-by-side with Ukraine as part of a coordinated strategy. Conferring the status of intervening parties 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 ten Declarants acting as *de facto* co-applicants, both in writing and orally. The Russian Federation already objected to admissibility of eleven similar declarations on 17 October 2022. As of 15 November 2022, two more States have filed declarations of intervention, to which the Russian Federation will again have to respond separately.

49. This situation is exacerbated by the fact that at least 24 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

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

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. In light of the above, it must be concluded that the 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.

50. 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.[61] This would essentially provide Ukraine and the Declarants several additional rounds of pleadings to the detriment of the Russian Federation. 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.

51. 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[62]), the Court should not allow Article 63 of the Statute to be used as a vehicle to

[61] 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 23 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.

[62] *See* above, ¶¶16-21.

circumvent the procedural safeguards in the Statute and the Rules of Court to maintain the equality of the parties, including in terms of the composition of the Court, to the detriment of the Russian Federation. This would irretrievably upset the balance between the Parties.

52. 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.

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

53. 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.[63]

(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.[64] Although Fiji

[63] *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).

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

invoked Article 62 of the Statute, scholars find this difference immaterial and consider this case as a relevant authority for interventions under Article 63 of the Statute as well.[65]

(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.[66]

54. 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.[67]

(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 raised its jurisdictional objections in the Counter-Memorial.[68]

(c) In *Wimbledon*, Germany did not file preliminary objections.[69]

55. 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

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

[66] *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.

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

[68] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, I.C.J. Reports 2014, pp. 242-243, ¶¶32-33.

[69] *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.

intervention of El Salvador was dismissed by a near unanimity (14 votes to 1) – some of the Judges 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."[70]

(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."[71]

(c) Judge Ni called the intervention "premature."[72]

56. 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.[73] In this Case the Court has no reason to depart from its jurisprudence.[74]

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[70] *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.

[71] *Ibid.*, Separate Opinion of Judge Sette-Camara, p. 195.

[72] *Ibid.*, Separate Opinion of Judge Ni, p. 204.

[73] As noted by Sztucki, 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." *See* J. Sztucki, Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadoran Incident, *American Journal of International Law*, Vol. 79 (4) (1985), pp. 1009, 1015-1016.

In the view of Professor Rosenne, "[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." *See* S. Rosenne, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE (Martinus Nijhoff, 1993), p. 89.

[74] *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 292, ¶28 ("[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases"). *See* also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment, I.C.J. Reports 2008, pp. 428-429, 437, ¶¶53, 76 ("it will not depart from its settled jurisprudence unless it finds very particular reasons to do so"), ¶54 (or "compelling reasons" to do so). *See* also Y. Shany, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (OUP, 2014), p. 82 ("The interpretation and application of jurisdictional authorizations and conditions delineate the general powers of the court, reflecting a category-based designation by the mandate providers of future cases for adjudication. Such a construction leaves no room for treating differently similar cases that raise essentially identical jurisdictional problems").

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>

57. As explained in Section A above, in order for a 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.[75]

58. 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 prove this requirement irrespective of whether it has received a notification from the Registrar.[76]

59. 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."

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

> "[E]very 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."[77]

61. 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:

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[75] *See* above, ¶¶14-15.

[76] 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 <u>must relate to the questions of treaty interpretation which are in issue before the Court</u>.") [<u>Emphasis</u> added]

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

> "[I]t [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."[78] [Emphasis added]

62. 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."[79] [Emphasis added]

63. 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[80] (in that case the existence of a dispute, the jurisdiction of the Court and the admissibility of the Application were not challenged in a separate phase of the proceedings).

64. 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."

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

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

[80] *Haya de la Torre Case*, Oral Proceedings, Public Sittings, held at the Peace Palace, The Hague, from May 15th to 17th and on June 13th, 1951, the President, M. Basdevant, presiding, Observations of Mr. Gilbert Gidel (Counsel of the Government of Peru) at the Public Sittings of 15 May 1951, Morning, pp. 141-142:

"Mais les conclusions prises par la Colombie le 13 décembre 1950 cessent d'être valables le jour où ce gouvernement, le 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?").

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."[81]

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

> "[T]here 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."[82] [Emphasis added]

66. 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."[83]

(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."[84]

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[81] *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.

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

[83] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, Separate Opinion of Judge Oda, I.C.J. Reports 1984, p. 220, ¶2.

[84] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharrière I.C.J. Reports 1984, p. 219, ¶3.

(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."[85]

67. 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.

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

69. In this case, the Russian Federation raised Preliminary Objections that challenge, *inter alia*, 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; and 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.

70. 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.

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[85] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, Dissenting Opinion of Judge Schweberl, I.C.J. Reports 1984, p. 224.

71. The content of the Declarations is itself a good illustration that it has not yet been determined which provisions of the Convention are in question in this case. Each Declaration advances a different position in this regard:

(a) Australia claims that the Court shall consider Articles I, II, IV, and IX;[86]

(b) Austria states that Articles I, II, III and IX are in question;[87]

(c) Denmark considers that Articles I, II, III, VIII and IX are in question;[88]

(d) Estonia reckons that Articles I, II-IV, VIII and IX are relevant;[89]

(e) Finland notes that only Articles I, VIII and IX are in question;[90]

(f) Greece indicates no Articles of the Convention which it considers to be in question, apart from Article IX;[91]

(g) Ireland states that Articles I and IX of the Convention are in question;[92]

(h) Luxembourg asserts that it "focuses on the interpretation of the Article IX of the Convention… and will add… certain considerations which are relevant to the merits of the case."[93] It further refers to Articles I, IV, VI and VIII.[94]

(i) Portugal claims that only Article I and IX of the Convention are in question, and that Article I must be interpreted in light of Articles II, III and VIII;[95]

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[86] Declaration of Australia, ¶22.

[87] Declaration of Austria, ¶16.

[88] Declaration of Denmark, ¶17.

[89] Declaration of Estonia, ¶17.

[90] Declaration of Finland, ¶17.

[91] Declaration of Greece, ¶24.

[92] Declaration of Ireland, ¶15.

[93] Declaration of Luxembourg, ¶15.

[94] *Ibid.*, ¶¶38 *et seqq*., 43, 46.

[95] Declaration of Portugal, ¶19.

(j) Spain states that it "focuses on the construction of Article IX"[96] at the same time referring to Articles I, III, IV and V.[97]

72. Finally, the Russian Federation notes that the Declarants have purportedly reserved a "right" to amend or supplement the Declarations or to file new declarations at later stages of these proceedings.[98] While the permissibility of such course of action is doubtful,[99] the inclusion of this reservation further attests to the fact that as the Declarations are premature and the Court is still to determine which provisions of the Genocide Convention may be in question, after having ruled on the Preliminary Objections. These purported reservations additionally cause considerable confusion and unpredictability, as they do not allow to understand the full scope of the Declarations and the issues that the Declarants may wish to address should they be accepted as intervening parties. In fact, in *Military and Paramilitary Activities,* the Court specifically referred to a similar reservation made by El Salvador ("El Salvador reserves the right in a later substantive phase of the case to address the interpretation and application of the conventions to which it is also a party relevant to that case") as another reason why El Salvador's declaration of intervention was inadmissible at jurisdictional phase of the proceedings.[100] 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

73. 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

[96] Declaration of Spain ¶13.

[97] *Ibid.*, ¶¶24, 26.

[98] *See*, for example, Declaration of Australia, ¶12; Declaration of Austria, ¶17; Declaration of Denmark, ¶17; Declaration of Estonia, ¶22; Declaration of Finland, ¶17; Declaration of Greece, ¶17; Declaration of Ireland, ¶27; Declaration of Luxembourg, ¶16; Declaration of Portugal, ¶45; Declaration of Spain, ¶13.

[99] The present Written Observations are without prejudice to the admissibility of an attempt to supplement or amend a declaration of intervention, or to submit new declarations of intervention, in the light of Article 63 of the Statute and Article 82 of the Rules of Court.

[100] *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.

view relate not only to the merits but also to the Court's jurisdiction;[101] some of the Declarants claim to address issues of jurisdiction only.[102] However, the Declarants' attempt to argue the Court's jurisdiction in favour of Ukraine is to no avail, for a separate reason.

74. 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 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:

> "In 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."[103] [Emphasis added]

75. Rejecting El Salvador's declaration, the Court found that:

> "Declaration of Intervention 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."[104]

76. 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".[105]

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[101] Declaration of Australia, ¶¶28-42; Declaration of Denmark, ¶¶16, 18-30; Declaration of Estonia, ¶¶17, 25-38; Declaration of Finland, ¶¶13, 27-33; Declaration of Ireland, ¶¶15, 20-25; Declaration of Luxembourg, ¶15, 19-35; Declaration of Portugal, ¶¶19, 21-31.

[102] Declaration of Austria, ¶16; Declaration of Greece, ¶17; Declaration of Spain, ¶13.

[103] *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.

[104] *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.

[105] *Ibid.*, p. 216, ¶(ii).

77. 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.

78. 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."[106]

(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."[107]

79. 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."[108]

80. 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

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[106] *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.

[107] *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.

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

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.

81. The Declarants 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 cases.[109] Their arguments may be summarised as follows:

(a) The Declarants state that the language of Article 63 does not prohibit intervention in the case at the jurisdictional stage of the proceedings.[110] As shown above, such assertion overlooks the Court's pronouncements in *Military and Paramilitary Activities*, and the Declarants fail to advance any support for their argument. The authors cited by the Declarants do not provide a comprehensive analysis of *Military and Paramilitary Activities*. It is also telling that some of the Declarants refer to the Dissenting Opinion of Judge Schwebel in *Military and Paramilitary Activities*, who was the only Judge (of fifteen) to support El Salvador's Declaration at the jurisdictional stage of the proceedings.[111]

(b) Some of the Declarants refer to Article 82 of the Rules of Court, according to which a declaration for intervention shall be filed "as soon as possible".[112] However, this provision is of no aid to the Declarants' case either. 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

[109] Ireland appears to provide nothing in support of its Declarations at the jurisdictional stage of this Case.

[110] Declaration of Australia, ¶10; Declaration of Austria, ¶16, footnote 14; Declaration of Denmark, ¶13; Declaration of Estonia, ¶15; Declaration of Finland, ¶14; Declaration of Greece, ¶25; Declaration of Luxembourg, ¶14; Declaration of Portugal, ¶18; Declaration of Spain, ¶12.

[111] Declaration of Austria, ¶16, footnote 14; Declaration of Estonia, ¶15; Declaration of Finland, ¶14, footnote 7; Declaration of Greece, ¶25; Declaration of Luxembourg, ¶14; Declaration of Spain, ¶12.

[112] Declaration of Denmark, ¶13; Declaration of Estonia, ¶15; Declaration of Finland, ¶14; Declaration of Greece, ¶25; Declaration of Luxembourg, ¶14; Declaration of Spain, ¶12.

of the Statute whenever *the Court* deems it appropriate in view of the circumstances of the case, including doing so at a later stage.

82. Furthermore, a careful analysis of the Declarations shows that they address matters, which presuppose that the Court has jurisdiction to entertain the dispute or that Ukraine's Application is admissible.

83. *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. The Declarants openly admit that the matters raised in their Declarations appertain, in their view, to the merits of this case.[113]

84. *Second*, the arguments advanced in the Declarations effectively presuppose that there is a dispute between the Parties under certain provisions of the Genocide Convention and that the Court has jurisdiction to entertain that dispute and that Ukraine's claims are admissible:

(a) Australia argues that "a dispute as to whether a party to the Convention has acted in good faith in taking action in purported compliance with its duty "to prevent and punish" genocide under Article I also falls within the scope *ratione materiae* of Article IX". It also states that "Article IX confers jurisdiction on the Court to consider whether any conduct by a State party is compatible or incompatible with that State party's obligations under the Convention, including conduct involving the threat or use of force."[114]

(b) Austria states that "[o]pposing views between State Parties regarding allegations of genocide plainly constitute a dispute not only about the interpretation and application of the Genocide Convention but also as to whether or not the accused State has "fulfilled" the Convention",[115] that "the plain wording of Article IX vests the Court with jurisdiction to grant a negative declaration establishing the non-violation of the Genocide Convention";[116] and that "the object and purpose of the

[113] Declaration of Australia, ¶27; Declaration of Denmark, ¶16; Declaration of Estonia, ¶17; Declaration of Luxembourg, ¶36; Declaration of Portugal, ¶17.

[114] Declaration of Australia, ¶¶40, 44(c).

[115] Declaration of Austria, ¶33.

[116] *Ibid*., ¶39.

Convention strongly militates in favour of an interpretation of Article IX according to which disputes relating to the interpretation, application and fulfilment include disputes about abusive allegations of genocide contradicting the letter and spirit of the Convention."[117]

(c) Denmark asserts that the Court "also has jurisdiction *ratione materiae* to declare the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of the law."[118]

(d) Estonia likewise states 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."[119]

(e) Finland contends that "an accused State may seek a "negative" declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual foundation"[120] and that "article IX of the Genocide Convention provides a basis for the Court's jurisdiction in a dispute concerning false claims of genocide when they amount to abusive invoking of article I of the Convention."[121]

(f) Greece argues that "whenever there is a dispute between two or more States Parties concerning whether a State Party has engaged in conduct contrary to the Convention, the State party accused of such conduct has the same right to submit the dispute to the Court as the State that has made the accusation, and the Court will be in a position to exercise its jurisdiction."[122]

(g) Ireland starts with stating that "[i]n Ireland's view these criteria [for existence of dispute] are clearly met in the present case."[123] It further points out that "a dispute in which an allegation of commission of genocide, or failure to prevent genocide,

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[117] *Ibid*., ¶45.

[118] Declaration of Denmark, ¶¶23, 30.

[119] Declaration of Estonia, ¶38.

[120] Declaration of Finland, ¶31.

[121] *Ibid*., ¶33.

[122] Declaration of Greece, ¶36.

[123] Declaration of Ireland, ¶22.

is made by one Contracting Party to the Convention against another Party, which the latter denies, is a dispute that comes within the scope of Article IX"[124] and that "the Court's jurisdiction may be engaged either by the Contracting Party alleging the commission of, or failure to prevent, genocide as it may be by the Contracting Party against which such an allegation is made."[125]

(h) Luxembourg states that "the context of Article IX confirms that the jurisdiction of the Court goes beyond disputes between States on responsibility for acts of alleged genocide, but also covers disputes between States on the absence of genocide and the violation of an execution in good faith of the treaty, resulting in an abuse of the law."[126]

(i) Portugal contends that "there is a dispute about the interpretation, application or fulfilment of the Convention when one State Party alleges that another State Party has committed genocide",[127] that "[t]he Court also has jurisdiction *ratione materiae* to declare the absence of genocide, when a State makes false allegations that are not based on existing facts, and that there has been a violation of performance in good faith of the obligations under the Convention resulting in an abuse of its provisions."[128] It further concludes with a direct statement that "a dispute exists between the parties to the case regarding the application, interpretation, and fulfilment of the Genocide Convention, and that the Court has jurisdiction under Article IX of the Convention."[129]

(j) Spain claims that a "State accused of committing genocide has the same right to submit the dispute to the Court as the State making the accusation. In particular, such a State may seek a "negative" declaration from the Court that the allegations from another State that it was responsible for genocide are without legal and factual foundation"[130] and that "the Court's jurisdiction goes beyond disputes between

[124] *Ibid*., ¶23.

[125] *Ibid*., ¶25.

[126] Declaration of Luxembourg, ¶31.

[127] Declaration of Portugal, ¶26.

[128] *Ibid*., ¶28.

[129] *Ibid*., ¶31.

[130] Declaration of Spain, ¶26.

States about the responsibility for alleged genocidal acts, but also covers disputes between States about the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of the law."[131]

85. Similarly, the Declarants that seek to address Article IX of the Convention, and more particularly the question whether Ukraine can bring before the Court a *reverse compliance* or "non-violation" claim,[132] presuppose that Ukraine's claim in this regard is admissible, a matter dealt with in the Russian Federation's Preliminary Objections.

86. 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.

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

E. THE REFERENCE TO ARTICLE IX OF THE CONVENTION IS OF NO ASSISTANCE FOR THE PURPOSES OF INTERVENTION AT THE JURISDICTIONAL STAGE OF THE PROCEEDINGS. THE DECLARANTS CANNOT INTERVENE ON ARTICLE IX OF THE CONVENTION *PER SE*

88. The Declarants attempt to circumvent the jurisprudence of the Court set out in Sections C and D above by referring to Article IX of the Genocide Convention as a provision "in question" in this Case and stating that they wish to participate at the jurisdictional phase of the proceedings in order to support Ukraine's position. However, this approach is of no assistance to the Declarants.

89. The Declarants, invoking Article IX of the Convention, are in fact seeking to use this reference as a gateway to comment on the Court's jurisdiction *ratione materiae*, providing their views on other Articles of the Convention that have not been identified by the Court as being "in question" between the Parties. Moreover, in the framework of

[131] *Ibid*., ¶27.

[132] Declaration of Australia, ¶¶44(b),(c); Declaration of Austria, ¶¶26, 33; Declaration of Denmark, ¶¶20-30; Declaration of Estonia, ¶¶28-38; Declaration of Finland, ¶¶28-33; Declaration of Greece, ¶¶30-40; Declaration of Ireland, ¶¶22-25; Declaration of Luxembourg, ¶33; Declaration of Portugal, ¶¶23-31 Declaration of Spain, ¶¶20-30.

Article IX they also seek to address issues distinct from the treaty, such as those related to the use of force. Thus, admittance of such Declarations as shown in more detail below in Section F would effectively prejudge the scope of the Court's jurisdiction.

90. Several Declarants claim that their statements pertain to the interpretation of Article IX of the Genocide Convention as such.[133] First of all, it should be noted that, using the words of Judge Kreća in the *Bosnia Genocide case*, "Article IX of the Convention is, by its nature, a standard compromissory clause."[134] [Emphasis added]

91. Under the guise of the construction of Article IX of the Convention some of the Declarants advocate for the existence of a dispute in this case[135] or seek to represent the concept of "non-violation" complaint as part of such a dispute.[136] However, the issue of the existence of a dispute and its scope is a matter of application rather than interpretation of a treaty.[137]

92. In any event, until after the jurisdictional phase of the proceedings, one cannot assert that interpretation or construction of Article IX of the Convention is or is not "in question" between the Parties, as well as any other articles in the Convention. The mere fact that the Preliminary Objections were filed does not attest to the existence of a dispute on interpretation of this Article.

93. Moreover, Article 63 does not envisage interventions in respect of compromissory clauses, such as Article IX of the Genocide Convention, as is shown by the *travaux* of the Statute and the Court's case law. In particular, the report made by the representative of

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[133] Declaration of Australia, ¶¶28-44; Declaration of Austria, ¶¶18-45; Declaration of Denmark, ¶¶18-30; Declaration of Estonia, ¶¶25-38; Declaration of Finland, ¶¶27-33; Declaration of Greece, ¶¶26-41; Declaration of Ireland, ¶¶20-25; Declaration of Luxembourg, ¶¶19-35 Declaration of Portugal, ¶¶21-31; Declaration of Spain, ¶¶17-30.

[134] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, Judgment, Separate opinion of Judge *ad hoc* Kreća, I.C.J. Reports 1996, p. 770, ¶105.

[135] *See, e.g.*, Declaration of Portugal, ¶31 ("It is therefore the view of the Portuguese Republic that a dispute exists between the parties to the case regarding the application, interpretation, and fulfilment of the Genocide Convention, and that the Court has jurisdiction under Article IX of the Convention").

[136] *See* Declaration of Australia, ¶44, Declaration of Austria ¶26, Declaration of Denmark ¶30, Declaration of Estonia ¶38, Declaration of Finland ¶33, Declaration of Greece ¶41, Declaration of Luxembourg ¶35, Declaration of Spain ¶30, containing the following or similar language: "Accordingly, the Court' s jurisdiction is broad enough to include a declaration of the absence of genocide and the violation of a good faith performance of the Convention resulting in an abuse of the law."

[137] *See* below, ¶107. *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, Separate Opinion of Judge Higgins, I.C.J. Reports 1996, p. 855, ¶30.

France to, and adopted by, the Council of the League of Nations on the draft Statute indicates that it is the substantive provisions of a convention that Article 63 was intended to address, as opposed to compromissory clauses. Notably, the report stated that:

> "The observations in the draft project of The Hague by one of our Colleagues draw attention to the following case: it might happen that a case appearing unimportant in itself might be submitted to the jurisdiction of the Court, and that the Court might take a decision on this case, laying down certain principles of international law which, if they were applied to other countries, would completely modify the principles of the traditional law of this country, and which might therefore have serious consequences. The question has been raised whether, in view of such an alternative, the States not involved in the dispute should not be given the right of intervening in the case in the interest of the harmonious development of the law, and otherwise after the closure of the case, to exercise, in the same interest, influence on the future development of the law."[138] [Emphasis added]

94. The words "principles of international law which, if they were applied to other countries, would completely modify the principles of the traditional law of this country" can hardly be used to describe the interpretation of a compromissory clause *per se*. This reading finds support in *Haya de la Torre*, where the Court indicated, with respect to Cuba's declaration of intervention under Article 63 of the Statute, that:

> "[E]very 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." [139] [Emphasis added]

95. Thus, the subject-matter of the proceedings in a case cannot be based solely on a compromissory clause; such subject-matter must be substantive. In *Haya de la Torre*, it concerned the surrender of Haya de la Torre to the Peruvian authorities in accordance with the relevant substantive provisions of the Havana Convention.

96. That the subject-matter of the proceeding in a case is substantive, and not about a compromissory clause, is confirmed by the language of Article 38 of the Rules of Court. Paragraphs (1) and (2) of that Article require the applicant to indicate the "subject of the dispute" and to specify "the legal grounds upon which the jurisdiction of the Court is said to be based". Thus, the "subject of the dispute", which is the same as the "subject-matter

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[138] League of Nations, 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 of International Justice* (1921), p. 50.

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

of a proceeding",[140] is distinct from compromissory clauses. The limited import of jurisdictional clauses was stressed by the Court in *South West Africa*:

> "there is nothing about this particular jurisdictional clause to differentiate it from many others, or to make it an exception to the rule that, in principle, jurisdictional clauses are adjectival not substantive in their nature and effect. It is of course possible to introduce into such a clause extra paragraphs or phrases specifically conveying substantive rights or imposing substantive obligations; but the particular section of any clause which provides for recourse to an indicated forum, on the part of a specified category of litigant, in relation to a certain kind of dispute — or those words in it which provide this — cannot simultaneously and per se invest the parties with the substantive rights the existence of which is exactly what they will have to demonstrate in the forum concerned, and which it is the whole object of the latter to determine."[141] [Emphasis added]

97. In that case, the Court also went on to clarify that litigable disputes arise from substantive provisions, not compromissory clauses themselves:

> "in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it, — and must therefore be established *aliunde vel aliter*. Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal."[142]

98. The Court did not depart from this approach when dealing specifically with Article IX of the Convention. Thus, in *Bosnia Genocide* the Court held:

> "Since Article IX is essentially a jurisdictional provision, the Court considers that it should first ascertain whether the substantive obligation on States not to commit genocide may flow from the other provisions of the Convention".[143]

99. In the subsequent *Croatia Genocide* case, the Court held that:

> "Article IX is not a general provision for the settlement of disputes. The jurisdiction for which it provides is limited to disputes between the Contracting Parties regarding the interpretation, application or fulfilment of the substantive provisions of the Genocide Convention."[144] [Emphasis added]

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[140] *See 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.

[141] *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 39, ¶64.

[142] *South West Africa*, Second Phase, Judgment, I.C.J. Reports 1966, p. 39, ¶65.

[143] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 113, ¶166.

[144] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 49, ¶93.

100. Thus, Article IX of the Convention in itself does not provide any substantive rights and cannot constitute the subject-matter of a dispute. Article IX is a procedural jurisdictional tool in the Convention, which "guarantee[s] its proper application".[145]

101. In his separate opinion in the *Bosnia Genocide* case, Judge Kreća confirmed that:

> "Article IX of the Convention is, by its nature, a standard compromissory clause. As such, its purpose is to determine the jurisdiction of the Court within the co-ordinates of the interpretation, application or fulfilment of the substantive provisions of the Convention.
>
> …
>
> Jurisdictional clauses are not capable of modifying or revising substantive law."[146]

102. This view is also shared by legal doctrine. When examining the *Lockerbie* case, Lim and Elias stated:

> "compromissory clauses [are] instruments for determining (a) jurisdiction as regards (b) consideration of the merits of a dispute in respect of the substantive provisions of a treaty. In short, a compromissory clause is not intended to be a substantive provision in a treaty. This was the view of the Court."[147]

103. Article 82 of the Rules of Court and the relevant case law of the Court require that an intervention concern provisions "in question", *i.e.*, forming the subject-matter of the proceedings. Therefore, such an intervention cannot relate to compromissory clauses *per se*.

104. Consequently, as Article IX does not contain substantive provisions, it cannot be the object of a legal claim stemming from a dispute on its interpretation and form the "subject-matter of the proceedings". As a result, the Declarations seeking to construe Article IX of the Convention must be declared inadmissible.

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[145] R. Kolb, *The Compromissory Clause of the Convention*, in P. Gaeta (ed.), THE UN GENOCIDE CONVENTION: A COMMENTARY (OUP, 2009), p. 413.

[146] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, Separate opinion of Judge *ad hoc* Kreća, I.C.J. Reports 2007, pp. 559-560, ¶134.

[147] C.L. Lim, O.A. Elias, Sanctions without Law: The Lockerbie Case (Preliminary Objections), *Austrian Review of International and European Law*, Vol. 4 (1999), p. 211.

F. 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*

105. As noted above, intervention under Article 63 of the Statute is limited to the 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.[148] Any declaration of intervention purporting to address any matter that is not confined to this limited object must consequently be declared inadmissible.

106. 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) Australia refers to matters relating to the existence of a dispute between the Russian Federation and Ukraine,[149] the relevance of the principle of good faith for the application of the Convention,[150] the doctrine of abuse of rights,[151] whether there is evidence that genocide has been committed or may be committed in Ukraine,[152]and issues relating to the use of force.[153]

(b) Austria addresses the existence of a dispute between the Russian Federation and Ukraine,[154] the relevance of the principle of good faith for the application of the Convention,[155] whether there is evidence that genocide has been committed or may be committed in Ukraine,[156] and the doctrine of abuse of rights.[157]

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[148] *See* above, ¶¶11-15.

[149] Declaration of Australia, ¶¶29 et seqq.

[150] *Ibid.*, ¶¶40, 44(b), 48.

[151] *Ibid.*, ¶48.

[152] *Ibid.*, ¶¶50-51.

[153] *Ibid.*, ¶¶4, 41, 52-55.

[154] Declaration of Austria, ¶¶31-33.

[155] *Ibid.*, ¶¶40-42.

[156] *Ibid.*, ¶41.

[157] *Ibid.*, ¶¶40, 45.

(c) Denmark refers to questions related to whether there is evidence that genocide has been committed or may be committed in Ukraine,[158] the doctrine of abuse of rights[159] and the principle of good faith in application of the Convention,[160] the scope of due diligence to be performed by the State that intends to accuse another State of genocide,[161] issues of use of force,[162] and compliance with the Court's provisional measures order.[163]

(d) Estonia addresses good faith in application of the Convention,[164] whether there is evidence that genocide has been committed or may be committed in Ukraine,[165] issues relating to the use of force,[166] and compliance with the Court's provisional measures order.[167]

(e) Finland refers to the issues of good faith in application of the Genocide Convention,[168] notions of territorial integrity and use of force,[169] and whether there is evidence that genocide has been committed or may be committed in Ukraine.[170]

(f) Greece addresses the existence of dispute between Ukraine and the Russian Federation,[171] issues of use of force,[172] good faith in the application of the Convention and the notion of abuse of law.[173]

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[158] Declaration of Denmark, ¶21.

[159] *Ibid.*, ¶29.

[160] *Ibid.*, ¶¶31, 36.

[161] *Ibid.*, ¶¶32-35.

[162] *Ibid.*, ¶¶39, 42.

[163] *Ibid.*, ¶7.

[164] Declaration of Estonia, ¶¶41, 46.

[165] *Ibid.*, ¶¶42, 44, 46.

[166] *Ibid.*, ¶¶47, 51.

[167] *Ibid.*, ¶10.

[168] Declaration of Finland, ¶20.

[169] *Ibid.*, ¶¶19, 23-24.

[170] *Ibid.*, ¶22.

[171] Declaration of Greece, ¶27.

[172] *Ibid.*, ¶32.

[173] *Ibid.*, ¶41.

(g) Ireland claims the existence of dispute between Ukraine and the Russian Federation[174] and refers to the principle of good faith in the application of the Convention.[175]

(h) Luxembourg refers to good faith application of the Convention,[176] whether there is evidence that genocide has been committed or may be committed in Ukraine,[177] and issues of use of force.[178]

(i) Portugal states that a dispute exists between Ukraine and the Russian Federation.[179] It further addresses issues such as whether there is evidence that genocide has been committed or may be committed in Ukraine,[180] the principles of good faith and abuse of law,[181] and use of force.[182]

(j) Spain's declaration addresses issues such as the existence of dispute between Ukraine and the Russian Federation, abuse of rights and use of force, as well as compliance with the Court's provisional measures order.[183]

107. 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 by 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.

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[174] Declaration of Ireland, ¶22.

[175] *Ibid.*, ¶¶18-19.

[176] Declaration of Luxembourg, ¶¶38-39, 42, 44.

[177] *Ibid.*, ¶¶40, 42, 44.

[178] *Ibid.*, ¶¶45-46.

[179] Declaration of Portugal, ¶31.

[180] *Ibid.*, ¶¶28, 37.

[181] *Ibid.*, ¶35.

[182] *Ibid.*, ¶¶40-41.

[183] Declaration of Spain, ¶¶8, 29-30.

108. The same is true for the question whether genocide has occurred or may occur in Ukraine, 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.

109. 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.

110. The Declarants' several references to rules of international law related to matters such as the use of force, *jus in bello,* territorial integrity and recognition of states, 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.

111. 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.

112. 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.

113. 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 the purpose 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.

114. The test for determining the Court's jurisdiction *ratione materiae* under a treaty, as noted by the Court in previous cases, is whether "acts" or "breaches" complained of do or do not fall within the provisions of a treaty invoked as a basis of jurisdiction.[184]

115. It would therefore not be possible for the Declarants to intervene to bolster Ukraine's arguments on jurisdiction *ratione materiae* without, in one way or another, going beyond the limited scope of Article 63 of the Statute – they would necessarily have to address the facts of the case and the specific "breaches" alleged by Ukraine, or the "acts" of which the latter complains in the present case. This is impermissible for an intervention under Article 63, since according to the Court's case law[185] and legal doctrine,[186] the term

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[184] *See Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 23, ¶36 ("… the Court must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to Article XXI, paragraph 2, thereof").

See also *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 137, ¶38 ("… the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of the [Genocide Convention] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* …").

See also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 584, ¶¶57-58 (noting that determining the Court's jurisdiction *ratione materiae* "may require the interpretation of the provisions that define the scope of the treaty", and that the Court must also "consider the questions of law and fact that are relevant to the objection to its jurisdiction").

[185] *Haya de la Torre Case*, Judgment of June 13th, 1951: I.C.J. Reports 1951, p. 77.

[186] R. Gardiner. TREATY INTERPRETATION (OUP, 2015), p. 30.

"construction" in Article 63 is understood as interpretation of the provisions in question and not their application.

116. In conclusion, 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. 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*.

III. SUBMISSIONS

117. 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, 15 November 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, 15 November 2022

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