WRITTEN OBSERVATIONS
OF THE
GOVERNMENT OF AUSTRALIA

ADMISSIBILITY OF THE AUSTRALIAN DECLARATION OF INTERVENTION

in the case of

Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide

(Ukraine v. Russian Federation)

13 FEBRUARY 2023

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I. INTRODUCTION

1. On 30 September 2022, Australia, invoking its right under Article 63 of the *Statute of the International Court of Justice* (the **Statute**), submitted its Declaration of Intervention (the **Declaration**) in the case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

2. On 15 November 2022, the Written Observations of Ukraine and of the Russian Federation on the admissibility of the Declarations of Interventions filed by Denmark, Ireland, Finland, Estonia, Spain, Australia, Portugal, Austria, Luxembourg and Greece were filed with the Registry. In its Written Observations, the Russian Federation objects to the admission of these Declarations and requests the Court to decide that they are inadmissible.[1]

3. On 31 January 2023, Australia was notified that the Court had fixed 13 February 2023 as the time-limit for Australia to submit observations in writing on the admissibility of its Declaration, in accordance with Article 84(2) of the *Rules of Court* (the **Rules**).

4. At the outset, Australia notes that the right to intervene that is enshrined in Article 63 of the Statute recognises that States parties to a multilateral convention are its "natural guardians",[2] and have an inherent legal interest in its construction.[3]

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1 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 (**Written Observations of the Russian Federation**), paras. 8 and 117. Ukraine contends that the Declaration fulfils the requirements of Article 63 of the Statute and Article 82 of the Rules and is admissible: see Written Observations of Ukraine on the Declaration of Intervention of Australia, 15 November 2022, paras. 2 and 9.

2 Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1742, para. 1.

3 Article 63 confers a right on all States parties to intervene whenever the construction of a convention to which they are party is in question, each having a legal interest in the construction of its provisions: see

5. The Russian Federation has emphasised the exceptional circumstances of this case,[4] in that some 33 States have elected to make Article 63 declarations of intervention. While this is of course unprecedented in the practice of the Court, the fact that the Article 63 right of intervention has not been invoked frequently, including by multiple States, in other cases, or that some 32 other States have elected to exercise that right in this proceeding, logically cannot impact on the admissibility of Australia's Declaration.

6. The Article 63 right of intervention operates to entitle States parties to a convention to provide the Court with their views concerning the construction of the provisions in question in the proceedings. That right cannot be lost or reduced simply because other States also wish to exercise it, or because the intervening States may consider Russia's interpretation of the Genocide Convention to be misconceived.

7. Neither the Statute nor the Rules impose any limit on the number of States that may intervene in a single proceeding and the participation of multiple intervenors is a natural consequence of the operation of the Statute in a case raising questions of wide international concern. Article 63 operates so as to provide the Court with the opportunity to hear the views of other States on the important issues of construction of the Genocide Convention that it will decide in this proceeding. Australia is confident that the Court is well-equipped to manage the proceedings so as to benefit from the input of intervening

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Shabtai Rosenne, *Intervention in the International Court of Justice* (Martinus Nijhoff, 1993), p. 73 ("to protect an interest of a legal nature, not which may be affected by the decision of a case but in a more limited sense that it may be affected by the interpretation given by the Court to the multilateral treaty in question"). See also, Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), pp. 1742-1743, paras. 1-2; Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. 1 (OUP, 2013), pp. 1027-1028; and *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, Separate Opinion of Judge Cançado Trindade, especially pp. 34-35, paras. 56-60.

4 Written Observations of the Russian Federation, paras. 3-4 and 8.

States, whilst maintaining justice between the Parties.

8. Article 63 confers on States a right to intervene in contentious proceedings, where the construction of a convention to which such States are party is in question.[5] An exhaustive list of the conditions for admissibility of a declaration under Article 63 is set out in Article 82 of the Rules. The conditions are:

   (a) the declaration must be filed as soon as possible;

   (b) the State must be a party to the convention in question;

   (c) the declaration must identify the particular provisions of the convention the construction of which the State considers to be in question; and

   (d) the declaration must contain "a statement of the construction of those provisions for which [the intervening State] contends".[6]

9. Australia's Declaration addresses each of these conditions,[7] and it is evident that Australia has met them. Indeed, the Russian Federation does not assert otherwise. It is therefore unnecessary to repeat the reasons those conditions are satisfied.

10. It follows that the Court should admit the Declaration. In that regard, the Court's review function in respect of *determining the admissibility* of Article 63 declarations of intervention is to be contrasted with its competence to *grant* applications for permission to intervene under Article 62.[8] This difference was emphasised by Judge Jiménez de

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5 See, e.g., *Case of the S.S. "Wimbledon", Judgment, 28 June 1923, P.C.I.J., Series A, No. 1,* pp. 12-13.

6 Additional procedural requirements are set out in Articles 82(1) and (2) of the Rules: i.e. to identify the agent; be signed in the prescribed manner; specify the case and the convention; and attach a list of documents in support. These procedural requirements are also satisfied by Australia's Declaration.

7 Declaration, paras. 18-55.

8 Rules, Article 84(1).

Aréchaga in his Separate Opinion on the intervention filed by Italy in the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* as follows:

> Whereas Article 63 confers an unqualified right on the State party to the convention, and the Court merely performs the function of verifying formal admissibility, under Article 62 the Court must reach a judicial decision, by means of a judgment, as to whether permission "should be granted" in accordance with Rule 84.[9]

11. The Court's limited review function under Article 63 was reaffirmed in *Whaling in the Antarctic*, where the Court said:

> Whereas … the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a "declaration" to that end to confer *ipso facto* on the declarant State the status of intervenor; whereas such a right to intervene exists only when the declaration concerned falls within the provisions of Article 63; and whereas, therefore, the Court must ensure that such is the case before accepting a declaration of intervention as admissible.[10]

12. The remainder of Australia's observations respond to the Russian Federation's objections, as follows:

(a) **Section II** addresses the Russian Federation's mischaracterisation of Australia's Declaration as addressing matters unrelated to the construction of the provisions of

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[9] *Continental Shelf (Libyan Arab Jarnahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, Separate Opinion of Judge Jiménez de Aréchaga, p. 58, para. 9 (emphasis added). See also Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), pp. 1750-1751, paras. 19-21.

[10] *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, para. 8 (emphasis added). The same point was made in *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 Judges Ruda, Mosier, Ago, Sir Robert Jennings and De Lacharrière, p. 219, para. 1. See also *Case of the S.S. "Wimbledon", Judgment, 28 June 1923, P.C.I.J., Series A, No. 1,* pp. 12-13; and the *travaux préparatoires* of Article 63: Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16th—July 24th 1920 with Annexes* (1920), p. 746 ("there is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene in the case. If such a State uses this right, the interpretation contained in the [judgment] becomes binding between it and the other parties to the case. Where collective treaties are concerned, general interpretations can thus be obtained very quickly, which harmonise with the character of the Convention").

the *Convention on the Prevention and Punishment of the Crime of Genocide* (the **Genocide Convention,** or the **Convention**).[11]

(b) **Section III** addresses the Russian Federation's objection on the grounds that the Declaration is not "genuine". As is explained below, the considerations motivating a State to exercise its right to intervene under Article 63 of the Statute are irrelevant to the admissibility of an Article 63 intervention. In any event, the Declaration addresses the construction of the provisions of the Genocide Convention that Australia understands to be in question in the proceedings. It therefore complies with the conditions of admissibility set out in the Statute and the Rules.

(c) **Section IV** addresses the Russian Federation's objection on the ground that admission of the Declaration would adversely impact the equality of the Parties and render the Court unable to comply with the requirements of good administration of justice. This objection is unsustainable. As is explained below, the Court has already established that an Article 63 intervenor does not become a party to the proceedings, and an intervenor cannot be regarded as a "party in the same interest" as either the applicant or respondent. Further, admitting the Declaration would not put undue pressure on the Court or the judges, and the Court is well able to safeguard the administration of justice and preserve the equality of the Parties in these proceedings.

(d) Finally, the Russian Federation argues that an intervention on the construction of a compromissory clause and where preliminary objections have been made is inadmissible. That is incorrect. As explained in **Section V** below, Article 63

[11] Genocide Convention, opened for signature 9 December 1948, 78 U.N.T.S. 277 (entered into force 12 January 1951).

interventions can be made whenever construction of a convention is in question, including on compromissory clauses and at a jurisdictional phase of the proceedings. Further, there are no grounds for deferral of a decision on admissibility of the Declaration to a later stage of the proceedings and it would be inappropriate to do so as that would deprive States of their right to intervene on the construction of compromissory clauses.

(e) Australia's submission is set out in **Section VI**.

II. THE DECLARATION IS LIMITED TO THE CONSTRUCTION OF PROVISIONS OF THE GENOCIDE CONVENTION IN QUESTION IN THIS PROCEEDING

13. The Russian Federation asserts that the Declaration addresses matters "unrelated to the construction of the provisions of the Convention".[12] That assertion mischaracterises Australia's Declaration. In particular:

(a) Australia has set out its construction of the term "dispute" and the phrase "interpretation, application or fulfilment" in Article IX, in the context of the case as indicated by the Application and Provisional Measures Order.[13] The question of the meaning to be given to that term is not "an evidentiary question".[14] It is a matter of construction of Article IX. Australia has not addressed any evidence adduced by the Parties in support of their arguments on the application of Article IX to the facts.

(b) The Russian Federation asserts that Australia has impermissibly addressed "the

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12 Written Observations of the Russian Federation, para. 106; see also para. 23.

13 Declaration, paras. 29-33; see also paras. 34-44.

14 Cf. Written Observations of the Russian Federation, para. 107.

relevance of the principle of good faith for the application of the Convention".[15] It cites where the term "good faith" appears in the Declaration, but those paragraphs contain no more than a statement of the construction of the provisions of the Convention for which Australia contends. For example, Australia refers to the primary rule of interpretation of a treaty "in good faith" and in accordance with its ordinary meaning;[16] to the requirement to interpret and perform rights and obligations under the Convention in good faith;[17] and to the question whether Article IX confers jurisdiction on the Court to decide whether a party has taken action in good faith on the basis of a duty contained in the Convention.[18] These are issues of construction of provisions of the Convention, not its application.[19]

(c) The Russian Federation claims that Australia has addressed "the doctrine of abuse of rights", citing paragraph 48 of the Declaration.[20] Paragraph 48 uses the term "abuse" in recording that "States must abstain from actions that frustrate its purpose or abuse its provisions". That naturally follows from the principle that rights and obligations under a convention must be interpreted and performed in good faith, which is a question of the construction of rights and obligations under the

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15 Written Observations of the Russian Federation, para. 106(a).

16 Declaration, para. 24.

17 Declaration, paras. 48 and 51.

18 Declaration, paras. 40 and 44(b).

19 In its Written Observations in the *Whaling in the Antarctic* case, dated 4 April 2013, New Zealand addressed the question of construction of relevant provisions of the *International Convention on the Regulation of Whaling* with reference to principles of international law relevant to that construction, including: the principle of good faith (paras. 10, 12, 45, 96 and 109); the precautionary approach in the interpretation and application of treaties (paras. 73-75); and the duty to cooperate under general international law (paras. 97-105). The Court gave no indication that these statements were somehow inadmissible. The intervention made by New Zealand has been described as having "scrupulously complied with the requirements set out in the Rules, at the admissibility as well as at the merits stage": Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd Ed., (OUP, 2019), p. 1762, para. 42.

20 Written Observations of the Russian Federation, para. 106(a).

Convention.

(d) The Russian Federation also asserts that the Declaration addresses "whether there is evidence that genocide has been committed or may be committed in Ukraine", citing paragraphs 50 and 51 of the Declaration.[21] This is incorrect. Paragraphs 50 and 51 address the question of when a State's obligation to prevent genocide may arise, which is an issue of construction of Article I of the Genocide Convention. Australia has not addressed the question of whether genocide has been or may be committed in Ukraine, or how the construction it urges might apply on the facts.

(e) Finally, the Russian Federation asserts that Australia has addressed "other rules of international law that are distinct from the treaty in question and derive from different sources"[22] including "issues relating to the use of force".[23] This is also incorrect. The Declaration refers to the threat or use of force in the context of construing Articles I and IX of the Genocide Convention.[24] The extent to which Article IX confers jurisdiction on the Court to consider whether conduct involving the threat or use of force is compatible with the Convention, and the question of whether the "duty to prevent" in Article I authorises the threat or use of force, raise questions of construction of those provisions of the Genocide Convention.

14. The Russian Federation is therefore incorrect to assert that Australia has addressed matters unrelated to the construction of the Genocide Convention, and the Declaration clearly is not inadmissible on that basis.

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21 Written Observations of the Russian Federation, para.106(a); see also para. 108.

22 Written Observations of the Russian Federation, para. 110.

23 Written Observations of the Russian Federation, para. 106(a).

24 Declaration, paras. 41, 52-53.

III. THE DECLARATION IS NOT INADMISSIBLE ON THE BASIS OF A PURPORTED CONDITION OF "GENUINE INTERVENTION" OR "REAL INTENTION"

15. The Russian Federation invites the Court to find the Declaration inadmissible on the basis that it is not "genuine", i.e. that the object of the intervention is not to submit Australia's views concerning the construction of the provisions of the Genocide Convention that are in question in the case, but that the "real intention" is "to side with, advocate for, or pursue a joint case with Ukraine".[25]

16. This objection is based on a misreading of the Court's jurisprudence.

17. There is no "genuine intervention" or "real intention" requirement that a declaring State must meet as a precondition to the exercise of its right to intervene. Neither Article 63 of the Statute nor Article 82 of the Rules require a declarant to disclose or explain the considerations underlying its decision to exercise this right. Indeed, even in respect of applications for permission to intervene under Article 62 of the Statute, the Court has confirmed that it has no "general discretion to accept or reject a request for permission to intervene for reasons simply of policy".[26] That must be even more true of declarations of intervention under Article 63, which "clearly gives certain States 'the right to intervene in the proceedings' in respect of the interpretation of a convention to which they are parties".[27]

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25 Written Observations of the Russian Federation, paras. 11-34; see especially paras. 15-17 and 19(a).

26 *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981,* p. 12, para. 17. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* pp. 8-9, para. 12; and *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011,* p. 434, para. 36.

27 *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011,* p. 434, para. 36.

18. In *Whaling in the Antarctic*, upon which the Russian Federation relies,[28] the Court assessed the "object" of the intervention by reference to the Article 63 declaration.[29] Thus the "object" of an intervention is derived from: (a) the declarant's identification of the provisions of the convention it considers to be in question; and (b) its statement of the construction of these provisions for which it contends. The Court took that approach despite Japan having drawn attention to the "context" in which New Zealand's declaration under Article 63 was filed, which included a joint media release in which New Zealand confirmed that it "is a strong partner of Australia in the bid to end 'scientific' whaling".[30] The Court did not consider this "context" a bar to admissibility. Instead, it focussed solely on the fact that New Zealand had complied with the requirements of the Statute and the Rules,[31] and on that basis concluded that its declaration under Article 63 was admissible.[32]

19. In *Haya de la Torre*, Cuba submitted a document that the Court characterized as a declaration of intervention under Article 63 in respect of the *Convention on Asylum signed at Havana on 20 February 1928* (the **Havana Convention**).[33] In response, Peru objected to the admissibility of Cuba's intervention on the ground that, *inter alia*, Cuba's document was not "an intervention in the true meaning of the term, but an attempt by a

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28 Written Observations of the Russian Federation, paras. 11-12.

29 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013,* pp. 5-8, paras. 6-15 and p. 9, para. 19.

30 *Whaling in the Antarctic (Australia v. Japan),* 21 December 2012, Written Observations of Japan on the Declaration of Intervention of New Zealand, paras. 2-4.

31 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013,* pp. 5-8, paras. 6-15 and p. 9, para. 19.

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. 9, para. 19. See also Separate Opinion of Judge Cançado Trinidade, p. 36, para. 63.

33 *Haya de la Torre (Colombia v. Peru), Judgment of June 13th, 1951, I.C.J. Reports 1951,* p. 74.

third State to appeal against the Judgment delivered by the Court on November 20th, 1950".[34] In respect of that issue, the Court stated:

> [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. 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 above-mentioned Judgment.
>
> In these circumstances, the only point which 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 of whether Columbia is under an obligation to surrender the refugee to the Peruvian authorities.
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> 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 Judgment 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, and the Court, having deliberated on the matter, decided on May 16th to admit the intervention in pursuant of paragraph 2 of Article 66 of the Rules of Court.[35]

20. The Russian Federation seizes upon the phrase "the conditions of a genuine intervention" to contend that the Court must "establish the real intention" of the intervening State.[36] However, when that phrase is read in its context, it is apparent that the Court was not

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34 *Haya de la Torre (Colombia v. Peru), Judgment of June 13th, 1951, I.C.J. Reports 1951,* p. 76.

35 *Haya de la Torre (Colombia v. Peru), Judgment of June 13th, 1951, I.C.J. Reports 1951,* pp. 76-77 (emphasis added).

36 Written Observations of the Russian Federation, para. 15.

formulating a requirement of admissibility relating to the intention of the declaring State, but was simply considering whether the subject-matter of the declaration related to "the subject-matter of the pending proceedings". As the Russian Federation acknowledges,[37] Article 82(2) of the Rules implements the Court's approach in *Haya de la Torre*, by requiring that the declaration identify the provisions of the convention the construction of which are in question, and include a statement of the construction for which the intervening State contends.[38] Australia's Declaration meets these requirements.[39] Once that is accepted, the considerations that led to Australia's decision to exercise its right to intervene are entirely irrelevant to whether the Declaration is admissible.

21. It will be obvious to the Court that there will be various considerations (including political factors) which underlie any State's decision to commence or participate in proceedings. Yet the Court has confirmed that "the political nature of the motives" that lead to the commencement of proceedings before it are irrelevant to the question of its jurisdiction in those proceedings.[40] Similarly, the fact that a dispute has both political and legal aspects does not prevent the Court from considering the legal aspects.[41]

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37 The Russian Federation expressly states that *Haye de la Torre* "gave root to Article 82": see Written Observations of the Russian Federation, para. 60. See also Christine Chinkin, "Article 63", in Andreas Zimmerman, Karen Oellers-Frahm, Christian Tomuschat, Christian J. Tams, Maral Kashgar, David Diehl (eds), *The Statute of the International Court of Justice: A Commentary,* 2nd Ed., (OUP, 2012), p. 1589, para. 36.

38 This point is made by Shabtai Rosenne, *Intervention in the International Court of Justice* (Martinus Nijhoff, 1993), p. 75, para. 4. Professor Rosenne observes that, in this way, the Court can ensure that the intervention "remain[s] within the bounds of Article 63 and concern[s] only the interpretation of the convention in question".

39 In its Declaration Australia has identified the provisions of the Genocide Convention it considers to be in question in the case, on the basis of the information available to it (paras. 21-23), and included a statement of the construction of those provisions for which it contents (paras. 24-55).

40 *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996,* p. 234, para. 13 ("The Court moreover considers that the political nature of the motives which may be said to have inspired the request and the political implications that the opinion given might have are of no relevance in the establishment of its jurisdiction to give such an opinion").

41 See, e.g., *United States Diplomatic and Consular Staff in Tehran*, *Judgment, I.C.J. Reports 1980,* p. 20, para. 37 ("legal disputes between sovereign States by their very nature are likely to occur in political

22. The same principles apply to Article 63 interventions. Thus, the Court has never held an application to be inadmissible, refused permission to intervene under Article 62, or held a declaration under Article 63 to be inadmissible, on the basis of an assessment of the motives of the applicant or intervening State. The Russian Federation now invites the Court to do just that. This invitation should be declined and the Russian Federation's objection rejected, on the ground that it is inconsistent with Article 63 of the Statute, Article 82 of the Rules and the Court's case law.

IV. ADMITTING THE DECLARATION WILL NOT IMPAIR THE EQUALITY OF THE PARTIES NOR PREVENT THE COURT FROM SAFEGUARDING THE ADMINISTRATION OF JUSTICE

23. The Russian Federation next asks the Court to find the Declaration inadmissible because admitting it "would seriously impair the principle of equality of the parties" and "be contrary to the requirements of good administration of justice".[42]

24. As noted in paragraph 7 above, there is no restriction in Article 63 on the number of States parties to a convention that may intervene in a single proceeding. The fact that many States parties wish to express a view as to the construction of a convention provides no reason to deprive some or all of them of the right to do so. Furthermore, it is irrelevant whether the construction for which an intervening State contends aligns with one of the parties in some or all respects.

25. The Russian Federation's objection on this ground relies on three arguments, each of

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contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if it were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes").

42 Written Observations of the Russian Federation, para. 35.

which should be rejected. First, it asserts that admission of the Declaration will adversely impact the equality of the Parties because the intervenors have the same interest as the Applicant (**subsection A**). Secondly, it contends that admission of the Declaration would put undue pressure on the Court and the Judges (**subsection B**). Finally, it contends that the admission of the Declaration would be contrary to the requirements of the good administration of justice in these proceedings (**subsection C**).

A. A State intervening under Article 63 is not a party to the proceedings, nor does it have the same interest as a party to the proceedings

26. A State intervening under Article 63 does not become a party to the proceedings, and cannot be regarded as a party "in the same interest" as either party. This was stated explicitly by the Court in *Whaling in the Antarctic*, in circumstances where New Zealand had stated that it was a "strong partner" of the applicant State.[43] The Court held that:

> [I]ntervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and whereas such an intervention cannot affect the equality of the Parties to the dispute.[44]

27. That an intervenor is not a party to the proceedings necessarily follows from the confined nature and scope of an intervention. Intervening States have the limited right and function of furnishing the Court with their views on construction of the provisions of the Genocide

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[43] See paragraph 18 above, and *Whaling in the Antarctic (Australia v. Japan),* 21 December 2012, Written Observations of Japan on the Declaration of Intervention of New Zealand, paras. 2-4.

[44] *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, para. 18 (emphasis added). In his declaration Judge Owada criticises the majority for not providing more reasoning on this point, but he voted with the Court to admit New Zealand's intervention in any event: Declaration of Judge Owada, p. 12, paras. 3-4. See also *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application to Intervene, Judgment, I.C.J. Reports 1984,* Separate Opinion of Judge Mbaye, p. 40 ("[The intervenor] is not a party to the dispute because the Statute limits its intervention to stating its own interpretation of the multilateral treaty in question. It submits neither a claim nor a defence. It contents itself with providing information to the Court").

Convention that are in question in the proceedings. That is all.[45] The Russian Federation is therefore incorrect to claim that the intervening States will become "*de facto* co-applicants" to the proceedings.[46]

28. Not only do they not become parties, but intervenors cannot be treated as being of the "same interest" as either party to the proceedings. That point was underlined in *Whaling in the Antarctic*, where the Court confirmed that an intervention has no impact on the right of an applicant or a respondent (where it applies) to appoint a judge *ad hoc*.[47] It follows that the Russian Federation's references to Article 31(5) of the Statute, and to other provisions of the Rules and extracts from judgments relating to "parties in the same interest",[48] are irrelevant to the admissibility of the Declaration, for the simple reason that these references do not include intervenors under Article 63.

B. The admission of the Declaration will not put pressure on the Judges or the Court

29. So far as concerns the composition of the Court in this case, the Russian Federation states that "multiple interventions and public statements made by [declarant] 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".[49]

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45 Statute, Article 63. This is further confirmed by Article 63(2) of the Statute, which provides that an intervenor is only bound by "the construction given by the judgment" (emphasis added).

46 Written Observations of the Russian Federation, paras. 9(a), 22-24 and 34.

47 *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, para. 21 ("the Court considers that it must make clear in the present Order that, since the intervention of New Zealand does not confer upon it the status of party to the proceedings, Australia and New Zealand cannot be regarded as 'parties in the same interest' within the meaning of Article 31, paragraph 5, of the Statute; whereas, consequently, the presence on the Bench of a judge of the nationality of the intervening State has no effect on the right of the judge *ad hoc* chosen by the Applicant to sit in the case").

48 Written Observations of the Russian Federation, paras. 42-45.

49 Written Observations of the Russian Federation, para. 51. It further asserts that "the Court should not allow

30. Australia wholly rejects the implication that the Court or its members would be subject to any pressure as a result of States exercising their rights under Article 63 to provide the Court with their views on the construction of the Genocide Convention. There is no basis on which to impugn the independence of the Court or its judges.[50] The Court is well accustomed to hearing from multiple States in giving advisory opinions: for example, in *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965*, the Court received written statements from 31 States, and a total of 22 States participated in the oral hearings,[51] alongside the African Union, which represents 55 Member States.[52] As a result, nine of the 14 judges participating in the Opinion had the nationality of States participating in the written or oral proceedings (or both), or the nationality of a Member State of the African Union. Yet there was no suggestion that this placed pressure on the Court or those judges, and nor could there have been.

C. The Court is well able to safeguard the administration of justice in these proceedings

31. The Russian Federation contends that the Declaration should be declared inadmissible because admitting it (alongside the other Article 63 declarations) "would result in an impairment of the principle of the equality of the parties, contrary to the requirements of

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Article 63 of the Statute to be used as a vehicle to circumvent the procedural safeguards … to maintain the equality of the parties, including in terms of the composition of the Court, to the detriment of the Russian Federation": para. 51.

50 In the context of the participation of a large number of States in the proceedings for the Court's advisory opinion in *Legality of the Threat or Use of Nuclear Weapons,* President Bedjaoui noted that "the distribution of the votes, both for and against paragraph 2 E, was in no way consistent with any geographical split; this is a mark of the independence of the Members of the Court which I am happy to emphasize": *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996,* Declaration of President Bedjaoui, p. 272, para. 18.

51 *Legal Consequences of the Separation of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 103, paras. 9 and 11.

52 *Legal Consequences of the Separation of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, I.C.J. Reports 2019,* p. 104, para. 23.

good administration of justice".[53]

32. Australia does not accept that the admission of Article 63 interventions by the Court would have any adverse impact on the administration of justice in this proceeding. But, if and to the extent that there is any substance in the Russian Federation's concerns, the Court has inherent power to ensure the good administration of justice in any proceeding through its case management function.[54] As such, concerns of the kind raised by the Russian Federation can be met by such adaptions to the Court's procedure as the Court thinks necessary and appropriate. Australia has full faith in the Court to manage the proceedings to ensure that the requirements of the administration of justice are met.[55]

V. AUSTRALIA'S RIGHT TO INTERVENE EXTENDS TO THE CONSTRUCTION OF ARTICLE IX OF THE CONVENTION, AND CAN BE EXERCISED IN THE PRELIMINARY OBJECTIONS PHASE

33. The Russian Federation makes three arguments which relate to the jurisdiction of the Court and the fact that it has made preliminary objections to Ukraine's Application (the **Preliminary Objections**): (a) it contends that Australia "cannot intervene on Article IX of the Convention *per se*";[56] (b) it argues that the Court cannot decide on the admissibility of the Declaration before it has made a decision on the Preliminary Objections;[57] and

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53 Written Observations of the Russian Federation, para. 52.

54 Statute, Article 48. See also Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015,* 5th Ed., (Brill, 2016), para. 162 ("the Court possesses inherent jurisdiction to control all aspects of the proceedings"); *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Joinder of Proceedings, Order of 17 April 2013, I.C.J. Reports 2013,* Separate Opinion of Judge Cançado Trindade, p. 178, para. 18; and *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.

55 On the requirements of the proper administration of justice to States seeking to exercise the right to intervene under Article 63, see Santiago Torres Bernárdez, "L'intervention dans la procédure de la Cour Internationale de Justice" 256 (1995) *Receuil des Cours* 193, p. 253.

56 Written Observations of the Russian Federation, para. 9(d); see also paras. 88-104.

57 Written Observations of the Russian Federation, para. 9(c); see also paras. 53-87.

(c) it contends that the Declaration addresses matters which presuppose the Court's jurisdiction, and that, if the Declaration were admitted by the Court, the Court would "prejudge the Preliminary Objections".[58]

34. Each of these objections is without merit. A State may exercise its right to intervene under Article 63 on the construction of a compromissory clause, even where preliminary objections have been made (**subsection A**). Further, there is no basis for the deferral of the Court's decision on the admissibility of an Article 63 declaration to a subsequent phase of the proceedings (**subsection B**). Finally, admitting the Declaration would not prejudge the Preliminary Objections (**subsection C**).

A. A State may exercise its right to intervene under Article 63 on the construction of a compromissory clause, even when preliminary objections have been made

35. The Russian Federation's contention that Australia cannot intervene on the construction of Article IX is not supported by (i) the Statute and the Rules, or (ii) the Court's practice.

i. The right of intervention under Article 63 applies "whenever" the construction of a convention is in question

36. There is nothing in the text of Article 63 of the Statute that restricts a State's right of intervention on the construction of any provision of a convention, or in any phase of the proceedings. To the contrary, Article 63(1) allows a State party to intervene "[w]henever the construction of a convention … is in question".[59] The term "whenever" indicates that

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[58] Written Observations of the Russian Federation, para. 86; see also paras. 73-87.

[59] Statute, Article 63(1) (emphasis added). Further, Article 63(2) confirms that any State party to such a convention will have "the right to intervene in the proceedings" (emphasis added) without limiting such a right to the merits phase of the proceedings, or excluding the right where the provision that is in question is a compromissory clause.

the Article 63 right applies to all phases of a case and to all types of treaty provisions.[60] Further, nothing in the *travaux préparatoires* of the Statute suggests that "whenever" has anything other than its plain meaning.[61]

37. The broad scope of the Article 63 right is consistent with its purpose: i.e. to permit States parties to a convention to provide their construction to the Court. Their interest in doing so applies to compromissory clauses just as it applies to any other provision. As Judge Schwebel has noted:

> There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies … of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court's jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends?[62]

38. The significance of the construction of compromissory clauses, and the interest that all States parties to conventions containing such clauses have in their interpretation, was emphasised by the Court in *Appeal Relating to the Jurisdiction of the ICAO Council.* The

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60 Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd Ed., (OUP, 2019), p. 1763, para. 46.

61 *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,* Dissenting Opinion of Judge Schwebel, p. 234; Alina Miron and Christine Chinkin, "Article 63", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd Ed., (OUP, 2019), pp. 1763-1764, para. 46 (in particular, "when the Court is called to decide on jurisdictional issues that go beyond the case itself, it is desirable for third States to be able to participate in the proceedings"). See also *Case of Certain Norwegian Loans, Judgment of July 6th, 1957, I.C.J. Reports 1957,* Separate Opinion of Judge Sir Hersch Lauterpacht, pp. 63-64, confirming the desirability of Article 63 interventions on the construction of compromissory clauses.

62 *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,* Dissenting Opinion of Judge Schwebel, p. 235.

Court said:

> *(a)* Although a jurisdictional decision does not determine the "ultimate merits" of the case, it is a decision of a substantive character, inasmuch as it may decide the whole affair by bringing it to an end, if the finding is against the assumption of jurisdiction. A decision which can have that effect is of scarcely less importance than a decision on the merits, which it either rules out entirely or, alternatively, permits by endorsing the existence of the jurisdictional basis which must form the indispensable foundation of any decision on the merits. …
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> *(d)* Not only do issues of jurisdiction involve questions of law, but these questions may well be as important and complicated as any that arise on the merits, - sometimes more so. They may, in the context of such an entity as [The International Civil Aviation Organization Council], create precedents affecting the position and interests of a large number of States, in a way which no ordinary procedural, interlocutory or other preliminary issue could do.[63]

39. The right to bring a dispute before the Court, and the corresponding duty to comply with a binding decision given by the Court, has significant potential to affect the rights and obligations of all States parties. In this case, the Court's interpretation of the scope of Article IX will have implications for all States parties to the Genocide Convention. As such, States parties have as much interest in the construction of Article IX as they do in the construction of any other provision of the Convention.

40. The Russian Federation argues that an Article 63 intervention cannot be made on the construction of a compromissory clause because the "subject-matter [of the proceedings] must be substantive".[64] It relies on the Court's indication in *Haya de la Torre* that an intervention must "actually relate[] to the subject-matter of the pending proceedings".[65]

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63 *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972,* pp. 56-57, para. 18 (emphasis added). See also Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015,* Vol. II, 5th Ed., (Brill, 2016), para. 214 ("[t]he question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more").

64 Written Observations of the Russian Federation, para. 95.

65 Written Observations of the Russian Federation, para. 94, referring to *Haya de la Torre (Colombia v. Peru), Judgment of June 13th, 1951, I.C.J. Reports 1951,* p. 76.

That statement must be read in its proper context.[66] It is apparent from that context – in particular, that Cuba had filed a document which did not refer to a convention in question in the proceedings[67] – that the Court was not positing a requirement that an Article 63 intervention relate to a "substantive" rather than a compromissory clause. Instead, it was merely stating that an Article 63 intervention must be addressed to the construction of a provision of a convention that is "in question" in the proceedings. This was subsequently reflected in Article 82(2) of the Rules, as the Russian Federation acknowledges.[68]

41. The Russian Federation also relies on Article 38 of the Rules to contend that a compromissory clause cannot be the "subject-matter of the proceedings", and therefore an Article 63 intervention cannot cover jurisdictional issues.[69] That is incorrect. Article 38(1) of the Rules provides that proceedings may be commenced by application and requires that it include the "subject of the dispute". Article 38(2) elaborates on the content of the application, and refers both to the grounds for the jurisdiction of the Court and the grounds for the claim. However, these requirements in the Rules have no bearing on the proper interpretation of Article 63 of the Statute, which does not limit intervention to the "subject of the dispute" as set out in the application, but instead confers a right of

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66 See paragraph 19 above where the full extract of the Court's judgment is set out.

67 *Haya de la Torre (Colombia v. Peru), Judgment of June 13th, 1951, I.C.J. Reports 1951,* p. 77.

68 See paragraph 20 above and references therein.

The Russian Federation also relies (see Written Observations of the Russian Federation, paras. 93-94) on a report by the French representative to the Council of the League of Nations which referred to "principles of international law which, if they were applied to other countries, would completely modify the principles of the traditional law of this country": 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. Whilst the position being put forward is not entirely clear (a) no such limitation was ultimately incorporated in Article 63, and (b) if it is accepted that the French representative was positing a limitation, it appears to be restricted to "principles of international law" that are self-executing in the intervening State's domestic law. Such a limitation is both non-sensical and contrary to the Court's established approach to Article 63.

69 Written Observations of the Russian Federation, para. 96.

intervention "[w]henever the construction of a convention … is in question".[70]

42. The conclusion that the right to intervene under Article 63 extends to the construction of a compromissory clause, even if raised at a preliminary objections phase, is further supported by the procedure for intervention set out in the Rules. Article 82 of the Rules requires a State party seeking to avail itself of the right to intervene under Article 63 to file a declaration "as soon as possible, and not later than the opening of oral proceedings".[71] The phrase "oral proceedings" is not limited, and must include oral proceedings on a preliminary objection where the intervention concerns the construction of a provision of a convention relating to the Court's jurisdiction. Further, Article 84 of the Rules provides that the Court will ordinarily decide on the admissibility of a declaration "as a matter of priority". That suggests that a decision on admissibility of an intervention should be made at the earliest opportunity, and that a decision resolving any preliminary objections is not a precondition to it.

ii. The Court's practice supports a right to intervene on the construction of a compromissory clause, including where preliminary objections have been made

43. The Russian Federation asserts that "the Court's practice is consistent in not allowing interventions at the jurisdictional phase of the proceedings".[72] That submission is misleading. Article 63 declarations have only been made before the Court in four other cases, so the Court's practice is limited and does not yet address all aspects of the scope

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70 The Russian Federation also refers to statements of the Court and its judges referencing a distinction between jurisdictional clauses and substantive provisions: see Written Observations of the Russian Federation, paras. 96-102. This does not assist the Russian Federation in establishing that the right to intervene under Article 63 "[w]henever … the construction of a convention … is in question" does not apply to the construction of compromissory clauses.

71 Statute, Article 82 (emphasis added).

72 Written Observations of the Russian Federation, para. 55.

of the right of intervention. It would not be correct to conclude that the Court has excluded the possibility of interventions at a preliminary objections phase, or the possibility of interventions concerning the interpretation of compromissory clauses, from the fact that in the small number of cases that have so far arisen the Court has not yet admitted such an intervention.

44. In fact, the Court's practice suggests the contrary. Of most relevance, in *Whaling in the Antarctic*, Japan contested the jurisdiction of the Court before New Zealand had filed its declaration of intervention.[73] Nevertheless, as the Russian Federation acknowledges,[74] New Zealand's Article 63 intervention was unconditionally admitted before the Court addressed Japan's objection to jurisdiction.[75] That case is therefore squarely inconsistent with the Russian Federation's submission that Article 63 interventions are not permitted until jurisdictional objections have been resolved.

45. More generally, Article 63 notifications, being notices issued by the Registrar in accordance with directions given by the Court under Article 43(1) of the Rules, are consistently given to States parties to a convention where the only provision in question is the compromissory clause. For example, in *Maritime Dispute (Peru v. Chile)* the Registrar, on the instructions of the Court, gave Article 63 notifications to all States parties to the Pact of Bogotá, in circumstances where the only provision of the Pact relied upon was the compromissory clause.[76] To the same effect, in the present case the

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73 Japan's objection to jurisdiction was made in its Counter-Memorial (*Whaling in the Antarctic (Australia v. Japan),* 9 March 2012, Counter-Memorial of Japan, paras. 1.1-1.57). New Zealand's Declaration of Intervention was filed on 20 November 2012.

74 Written Observations of the Russian Federation, para. 54(b).

75 *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013,* p. 10, para. 23.

76 *Maritime Dispute (Peru v. Chile), Judgment, I.C.J. Reports 2014,* p. 10, para. 3. There are numerous other examples of Article 63 notifications being given to parties to a multilateral convention where the applicant State relied on that convention only for the purposes of establishing the Court's jurisdiction: see, e.g.,

Registrar's Article 63 notification expressly referred to Article IX of the Genocide Convention.[77] The Court's practice of (a) giving Article 63 notifications to States in cases where the applicant State invokes only a compromissory clause, and (b) expressly referring to compromissory clauses in Article 63 notifications, contradicts any claim that Article 63 interventions cannot be made on the construction of a compromissory clause.

46. The Russian Federation relies on three decisions of the Court addressing interventions which it argues support its claim that the Court's practice is not to admit declarations of intervention before preliminary objections are decided. These concerned attempts to intervene by Fiji in *Nuclear Tests (New Zealand v. France);* five States in *Nuclear Tests (Request for Examination);* and El Salvador in *Military and Paramilitary Activities*.[78] None of those cases stand for the proposition that a State cannot intervene on the construction of a compromissory clause, or during a preliminary objections phase. The approach of the Court in each case is explicable by reference to the particular circumstances identified below.

47. As to *Nuclear Tests*, Fiji's application for permission to intervene was made under Article 62 of the Statute, and did not concern the Court's jurisdiction.[79] In those

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Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016, p. 9, para. 6; and *Nuclear Tests (Australia v. France), Judgment, I.C.J. Reports 1974,* p. 255, para. 8.

77 Letter from the Registrar of the Court to the States parties to the Genocide Convention (except the Russian Federation and Ukraine), Reference 156413, 30 March 2022. This is entirely consistent with the Court's recent practice. See in this regard the Court's Article 63 notification in *The Gambia v. Myanmar,* referring to Article IX of the Genocide Convention (Letter to the States parties to the Genocide Convention (except The Gambia and Myanmar), Reference 153168, 24 January 2020) and the Court's Article 63 notifications in *Armenia v. Azerbaijan* and *Azerbaijan v. Armenia,* referring to the invocation of the International Convention on the Elimination of All Forms of Racial Discrimination as the basis for the Court's jujrisdiciton (Letter to the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (except Armenia and Azerbaijan), Reference 155729, 13 December 2021; and Letter to the States parties to the International Convention on the Elimination of All Forms of Racial Discrimination (except Azerbaijan and Armenia), Reference 155733, 13 December 2021).

78 Written Observations of the Russian Federation, para. 53.

79 *Nuclear Tests (Australia v. France),* 18 May 1973, Application for Permission to Intervene submitted by

circumstances, given that France had made preliminary objections, the Court decided to defer consideration of Fiji's application to intervene on the merits until it had pronounced on the objections.[80] That made sense in the circumstances, as it did not deprive Fiji of the capacity to make submissions on any issue that it wished to address. That situation is clearly distinguishable from the present case, where Australia *does* wish to address the construction of the compromissory clause that the Applicant relies upon to establish the Court's jurisdiction over the dispute. As noted by Professors Miron and Chinkin, *Nuclear Tests* "should not be interpreted as rejecting at large the possibility of intervention on jurisdictional issues at the jurisdictional phase".[81]

48. In *Nuclear Tests (Request for Examination)*, New Zealand made the request relying on paragraph 63 of the Court's 1974 Judgment in *Nuclear Tests*, which referred to the possibility that the Applicant could request "an examination of the situation in accordance with the provisions of the Statute".[82] Soon after the request was made, Article 62 applications and/or Article 63 declarations were made by five States.[83] All of the Article 63 declarations were based on the *Convention for the Protection of Natural*

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the Government of Fiji. The Court therefore noted in its Order that Fiji's application "by its very nature presupposes that the Court has jurisdiction … and that New Zealand's Application against France in respect of that dispute is admissible": *Nuclear Tests (Australia v. France), Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973,* p. 325, para. 1.

80 *Nuclear Tests (Australia v. France), Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973,* p. 325, para. 3.

81 Alina Miron and Christine Chinkin, "Article 62", in Andreas Zimmerman, Christian J. Tams, Karen Oellers-Frahm and Christian Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary,* 3rd Ed., (OUP, 2019), p. 1695, para. 20.

82 *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case,* 21 August 1995, Request for an Examination of the Situation from New Zealand, p. 2, paras. 3-4; and *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,* p. 302, para. 45.

83 *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,* p. 292, para. 11.

Resources and Environment of the South Pacific Region (the **Noumea Convention**), and those declarations did not relate to the Court's jurisdiction.[84] Just a few days later, in late August, France objected to the jurisdiction of the Court.[85] The parties then filed submissions on jurisdiction on 5 and 6 September 1995,[86] and less than a week later the Court held a hearing on jurisdiction.[87] Significantly, none of the States that made Article 63 declarations sought to intervene on any matters of jurisdiction. Shortly thereafter, the Court issued its Order, finding that it did not have jurisdiction.[88] It was in these circumstances that the Court found that applications/declarations seeking to intervene should be dismissed.[89] That was inevitable, because the applications/declarations related to phases of the proceeding that the Court had decided would not occur. The case therefore provides no support for the proposition that

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84 *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,* 24 August 1995, Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of Samoa, p. 1, para. 1(2) and p. 14, para. 41(b); Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Federated States of Micronesia, p. 1, para. 1(2) and p. 14, para. 41(b); Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of the Marshall Islands, p. 1, para. 1(2) and p. 14, para. 41(b); and Application for Permission to Intervene under Article 62 and Declaration of Intervention under Article 63 submitted by the Government of Solomon Islands, p. 1, para. 1(2) and p. 14, para. 41(b). Australia applied for permission to intervene under Article 62 only: see Application for Permission to Intervene under the terms of Article 62 of the Statute submitted by the Government of Australia, 23 August 1995, p. 1, para. 1.

85 *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. 292-293, para. 13.

86 *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. 293-295, paras. 15-24.

87 *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,* p. 296, para. 27.

88 *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,* p. 307, para. 68(1) and (2).

89 *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, para. 67 and p. 307, para. 68(3).

Article 63 does not permit a State to make submissions concerning questions of construction that arise at a preliminary objections phrase if the State wishes to do so.

49. Finally, the Court's decision that El Salvador's Article 63 declaration in *Military and Paramilitary Activities* was inadmissible does not support the conclusion that a State cannot exercise its Article 63 right of intervention on the construction of a compromissory clause. There, the Court held that the Declaration was "inadmissible inasmuch as it relates to the current phase of proceedings".[90] However, the Order does not indicate that a State cannot intervene under Article 63 at a preliminary objections phase, nor that a State cannot intervene on the construction of compromissory clauses. Instead, it records only that:

(a) the Court had decided to have a separate preliminary phase on jurisdiction;

(b) El Salvador's Declaration "addresses itself also in effect to matters … which presuppose that the Court has jurisdiction"; and

(c) El Salvador had reserved "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 phase".[91]

50. The separate opinions appended to the Court's judgment confirm that the Court did not a reject a right to intervene on jurisdictional matters. In particular:

(a) Judge Oda stated that the declaration "appeared mainly directed to the merits of the case, was vague and did not appear to satisfy the requirements of Article 82,

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90 *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, dispositif, para. (ii).

91 *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, paras. 1-3.

paragraph 2 (b) and (c), of the Rules of Court for an intervention at the present stage".[92] He also noted that, had certain defects in El Salvador's declaration been cured and the procedures properly pursued, "El Salvador's Declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case."[93] Thus, Judge Oda expressly recognised that an Article 63 intervention could be considered at a jurisdictional phase.

(b) In a joint separate opinion, five judges (Judges Ruda, Mosler, Ago, Jennings and de Lacharrière) stated that they had voted with the majority "because we have not been able to find, in El Salvador's written communications to the Court, the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase …; nor of the construction of such provision or provisions for which it contends".[94]

(c) In his Separate Opinion, Judge Nagendra Singh similarly noted that the declaration of El Salvador appeared to be directed "in effect" to the merits of the case, and that the Court's decision therefore was "directed towards placing things in the order and sequence in which they rightly belong".[95]

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92 *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, para. 2.

93 *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. 221, para. 5.

94 *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 Judges Ruda, Mosier, Ago, Sir Robert Jennings and De Lacharrière, p. 219, para. 3.

95 *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.

51. It is therefore clear that at least these seven judges (all of whom voted with the majority) did not decide that the Article 63 intervention was inadmissible because it could not be made on the construction of a compromissory clause or in a jurisdictional phase.[96] As noted at paragraph 37, an eighth judge, Judge Schwebel, made clear in his dissent that an Article 63 intervention can be made in a jurisdictional phase.[97] The case should not be treated as a deciding a principle that is (a) not apparent from the Court's Order itself and (b) contradicted by the separate and dissenting opinions of members of the Court.[98]

52. In summary, for the above reasons:

(a) Article 63 confers a right on all States to intervene whenever the construction of a convention to which they are party is in question: that right is unlimited, and encompasses intervention on the construction of a compromissory clause, including during a preliminary objections phase.

(b) The Court unconditionally admitted an Article 63 intervention in *Whaling in the Antarctic*, where a jurisdictional objection was joined to the merits. This confirms that a decision on any objections to jurisdiction is not a condition precedent to the admissibility of an Article 63 intervention.

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96 The Russian Federation relies on the analysis of Sztucki to contend that "up to eight judges might have regarded any intervention at this [jurisdictional] stage as inadmissible": Written Observations of the Russian Federation, para. 56, fn. 73, referring to Jerzy Sztucki, "Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadorian Incident" 79 (1985) *American Journal of International Law* 1005, pp. 1015-1016. Sztucki ignores Judge Singh's order setting out his reasoning to the effect that the declaration was directed to the merits of the case. It cannot be suggested that he voted in favour of the Court's order because any intervention at the jurisdictional phase is inadmissible.

97 *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,* Dissenting Opinion of Judge Schwebel, p. 235.

98 See also Santiago Torres Bernárdez, "L'Intervention dans la procédure de la Cour Internationale de Justice" 256 (1995) *Receuil des Cours* 193, pp. 395 and 399, confirming, in the context of a discussion of the Court's Order on El Salvador's intervention (for which he was Registrar), that an Article 63 intervention is permissible on the construction of a compromissory clause at a jurisdictional phase.

(c) The Court's practice of instructing the Registrar to issue Article 63 notifications where the applicant State invokes only the compromissory clause, and of expressly referring to compromissory clauses in such notifications, is consistent with the Article 63 right extending to intervention on the construction of a compromissory clause, including where there is a preliminary objections phase.

(d) None of the Court's decisions establish a precedent to the effect that an Article 63 intervention on the construction of a compromissory clause is inadmissible, including at a preliminary objections phase.

53. It follows that Russia's objection to the admissibility of the Declaration on the ground that Australia cannot intervene on Article IX of the Convention, or at the current phase of the proceedings, should be rejected.

B. There is no basis for the deferral of the Court's decision on the admissibility of an Article 63 declaration to a subsequent phase of the proceedings

54. The Russian Federation objects to the Declaration on the ground that the Court "cannot decide on the admissibility of the declarations before it considers the Russian Federation's Preliminary Objections".[99]

55. That argument is largely answered by the submissions already made. However, to the extent that the argument is intended to be an alternative to the argument that the Article 63 right of intervention cannot be exercised on the construction of compromissory clauses, it makes no sense. That follows because, if the Court has rejected that argument (and thus held that the Article 63 right of intervention does encompass intervention on the construction of compromissory clauses), it would render that right meaningless if

[99] Written Observations of the Russian Federation, p. 27, Section C heading.

interventions were deferred until after preliminary objections are decided, because by then the question of the proper construction of that compromissory clause will ordinarily have been decided with binding effect.[100]

56. The Russian Federation argues that the Court cannot admit the Declaration at this stage because it has not established the existence of the alleged dispute, its subject-matter, and the provisions of the Genocide Convention that may be in question.[101] This seeks to establish as a precondition for an Article 63 intervention that the Court has already decided on its jurisdiction and the admissibility of the application, but there is no basis upon which to imply such a precondition. Further, it would be entirely inconsistent with the Court's practice, as is illustrated by *Whaling in the Antarctic*, where the Court admitted the Article 63 intervention before it addressed the objection to jurisdiction.[102]

57. Finally, in support of its contention that the Declaration is "premature",[103] the Russian Federation refers to the statement in the Declaration that "Australia reserves its right to respond to additional questions of construction of the Convention, by amending or supplementing its observations in the course of the proceedings, as those questions arise and Australia becomes aware of them".[104] This statement was included in the Declaration because Australia can only identify the provisions of the Genocide Convention that are in question in the proceedings by reference to the limited information available to it.[105]

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100 It is of course possible for the Court to join jurisdictional and/or admissibility objections to the merits where it considers that the objection "does not possess an exclusively preliminary character" (Rules, Article 79*ter*(4)), but its practice is to do so only after considering the issues in a judgment on preliminary objections.

101 Written Observations of the Russian Federation, paras. 57-70.

102 See paragraph 44 above.

103 Written Observations of the Russian Federation, para. 72.

104 Declaration, para. 12.

105 A State exercising the right to intervene under Article 63 is not given access to the case file unless and until its intervention is admitted by the Court: Rules, Article 86(1).

A State intervening under Article 63 must have the right to provide the Court with its construction of any and all provisions of the Convention that are actually in issue, and come to be in issue, as a case develops. An express reservation of this right says nothing about the admissibility of the Declaration.

C. Admitting the Declaration will not prejudge the Preliminary Objections

58. The Russian Federation contends that the Declaration addresses matters which presuppose that the Court has jurisdiction over the dispute, such that, if the Declaration were admitted by the Court, "it would essentially prejudge the Preliminary Objections" raised by the Russian Federation.[106]

59. Like the claim for deferral addressed in **subsection B** above, this argument is non-sensical. If the Article 63 right encompasses intervention on the construction of compromissory clauses, there can be no suggestion that such intervention prejudges a decision on such compromissory clauses.

60. At the time Australia's Declaration was filed on 30 September 2022, no Preliminary Objections had been made.[107] It was in these circumstances that Australia addressed all provisions of the Genocide Convention that it understood to be in question in the proceedings as a whole. In doing so, Australia was aware of the possibility that preliminary objections would be made. That is why it addressed the construction of provisions it understands to be in question in relation to jurisdiction separately from those provisions it understands to be in question relating to the merits. It is also why it stated that, in the event of a preliminary objections phase, it would confine its observations to

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106 Written Observations of the Russian Federation, para. 86; see also paras. 73-87.

107 The Court's Order of 7 October 2022 in these proceedings records that preliminary objections were filed on 3 October 2022.

provisions relevant to that phase.[108] In these circumstances, Australia obviously has not invited the Court to consider questions concerning the merits phrase before the Preliminary Objections are resolved. It is untenable to contend that the inclusion of submissions addressing all provisions of the Genocide Convention in the Declaration renders the Declaration inadmissible, in circumstances where at the time that was done Preliminary Objections had not yet been made.[109]

VI. SUBMISSION

61. Australia requests that the Court decide that the Declaration of Intervention filed by Australia, pursuant to Article 63(2) of the Statute, is admissible.

Jesse Clarke
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Attorney General's Department
Agent of the Government of Australia

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108 Declaration, para. 11.

109 The Russian Federation refers to *Military and Paramilitary Activities* and *Nuclear Tests* in support of this argument: see Written Observations of the Russian Federation, paras. 74-78. These cases do not assist it, for the reasons set out in paragraphs 47 and 49-51 above. Further, as noted in paragraph 44 above, the Court unconditionally admitted New Zealand's Article 63 intervention before it had addressed Japan's objection to jurisdiction, and there was no indication whatsoever that the Court considered its decision to admit the intervention prejudged the objection to jurisdiction.