INTERNATIONAL COURT OF JUSTICE

OBSERVATIONS ON THE RUSSIAN FEDERATION'S OBJECTIONS TO THE ADMISSIBILITY OF THE DECLARATION OF INTERVENTION

OF THE REPUBLIC OF ESTONIA

In the case of

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

(UKRAINE *v.* RUSSIAN FEDERATION)

OBSERVATIONS ON THE RUSSIAN FEDERATION'S OBJECTIONS TO THE ADMISSIBILITY OF THE DECLARATION OF INTERVENTION OF THE REPUBLIC OF ESTONIA

I. INTRODUCTION

1. The present observations are submitted to the International Court of Justice in accordance with the letter No 158451 dated 31 January 2023 of the Registrar in relation to the possibility to make written observations to the Russian Federation's objections as submitted in written observations of 15 November 2022 on admissibility of the declarations of interventions submitted by Australia, Austria, Denmark, Estonia, Finland, Greece, Ireland, Luxembourg, Portugal and Spain in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).*

2. With the present observations, the Republic of Estonia wishes to share with the Court its understanding of Article 63 of the Statute first in order to demonstrate that it fully complied with all the requirements. Thereafter, Estonia gives its written observations to the objections of the Russian Federation.

II. ESTONIAN DECLARATION COMPLIES WITH THE REQUIREMENTS OF THE STATUTE

3. 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 in."

4. Article 82(2) of the Rules of the Court provides that a declaration of a State's desire to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall specify the case and the convention to which it relates and shall contain:

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

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

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

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

5. A plain reading of these provisions indicates that every State party to the Genocide Convention has a "right" to intervene, as confirmed by the Court[1]. In line with Article 82(2) of the Rules, this right may be exercised in the present case if four objective criteria are fulfilled:

(a) The State must show that it has become party to the Genocide Convention;

(b) The intervention must identify the particular provisions of the Genocide Convention the construction of which is in question;

(c) The intervention must contain "a statement of the construction" of these provisions of the Genocide Convention.

(d) The intervention must contain a list of documents in support.

6. Therefore, the Court has to ascertain whether the object of the desired intervention stems from a State Party to the Genocide Convention and whether the object of the intervention is in fact the interpretation of the identified provisions of the Genocide Convention[2].

7. The latter condition leaves room for only two grounds of inadmissibility. First, the Court can reject a statement if it turns out that a State does not advance a "construction" of the Genocide Convention, but ventures into territory of application instead. In such a case, an intervener would act as if it was a co-complainant or co-defendant, circumventing the procedural requirements to become a party in its own right. Second, the Court can declare

---

[1] *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 13, para. 21.
[2] *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.

an intervention inadmissible if the statement does not interpret the Genocide Convention, but elaborates on other self-standing bodies of international law unrelated to the Genocide Convention. In such a case, the Court would not be required to look at the purported intervention, as it would be irrelevant to the case at hand.

8. The Republic of Estonia considers that it has fully complied with the admissibility requirements under Article 63 of the Statute and Article 82 of the Rules of the Court. As indicated in paragraph 24 of the Declaration, it became a party to the Genocide Convention on 19 January 1992. Moreover, it has announced to the Court its intention to contribute to the interpretations of Articles I, II-IV, VIII and IX of the Genocide Convention in paragraphs 17, 27 and 39 of the Declaration. In doing so, the Republic of Estonia has expressed its arguments on construction of certain provisions of the Genocide Convention focusing in particular on construction of the compromissory clause of Article IX in general terms and refrained from making any statements that could be regarded as an attempt to apply the Convention to certain facts that occurred between Ukraine and Russia. Accordingly, it has also not endorsed the Ukrainian pleas or arrogated itself any other right that is reserved to a party to the dispute.

9. The Russian Federation nevertheless objects to this straightforward analysis. However, a closer analysis reveals that none of the Russian argument in its written observations is based on the law. Rather, as will be shown next, Russia invites the Court to read into the Statute additional requirements on admissibility for interventions under Article 63 of the Statute, which are not there.

III. THE ARGUMENTS OF THE RUSSIAN FEDERATION ARE NOT BASED ON THE LAW

A. THERE IS NO SUBJECTIVE TEST ABOUT THE GENUINE INTERVENTIONS OF THE INTERVENER

10. In its first argument, the Russian Federation tries to convince the Court rejecting the intervention as not being "genuine". Quoting several political statements of various intervening States, it takes issue with the fact that the intervention was part of a concerted

political strategy to help Ukraine in the case (paras 16-28). This, in the view of Russia, would reveal an intention of the Republic of Estonia to become a *de facto* co-complaint.

11. The Russian presentation of the law is erroneous. The Court has used the expression of "genuine intervention" in *Haya de la Torres*[3] to describe how it operated the objective test of finding out whether the object of the intervention of Cuba was the interpretation of the Havana Convention (a "genuine" intervention) or an attempt to re-litigate another case (not a "genuine" intervention). However, contrary to the Russian observation in paragraph 13 the Court did not consider the text of the declaration and the context within it had been filed to establish the "genuine *intention*" of Cuba. This semantic shift from an objective test (was the intervention "genuine"?) to a subjective test (was the government's intention "genuine"?) does not have any basis in the case law of the Court. Accordingly, the political motivation of the Republic of Estonia underlying the Declaration of Intervention is irrelevant.

12. Similarly, the question whether an intervener would be "taking sides" or not, cannot trigger the inadmissibility of an intervention. Already in the case of *SS Wimbledon*, the Court accepted that Poland as intervener shared the arguments of the applicant[4]. Moreover, the Republic of Estonia does not "advocate side-by-side with Ukraine as *de facto* co-applicant", as alleged in paragraphs 16, 17, 19, 20, 22, 34 of the Russian observations. As demonstrated above, the Republic of Estonia did not submit a complaint against Russia, did not advance any facts and claims against Russia on which it asked the Court to hand down a judgment, and did not arrogate itself any other rights of a complainant. The Republic of Estonia has clearly stated in its Declaration paragraph 18 that it does not seek to become a party to the proceedings. Russia's first argument is therefore entirely unfounded.

B. THERE IS NO TEST VERIFYING THE EFFECTS OF AN INTERVENTION

13. In its second argument, the Russian Federation pleads admitting the intervention would be incompatible with the equality of the Parties and the requirements of good administration of justice. It thereby shifts the test under Article 63 of the Statute from verifying the

[3] *Haya de la Torre Case*, Judgment of June 13th, 1951, I.C.J. Reports 1951, p. 71, at p. 77
[4] *Case of the SS Wimbledon*, judgment of 17 August 1923, P.C.I.J. Series A Nr. 1, p. 12, at p. 18.

"object" of the intervention to its "effects" on the case. That proposition is equally not supported by the law.

14. The first argument was already advanced by Japan in *Whaling in the Antarctic*. True, Judge Owada gave some credence to the idea of an effects test to restrict the admissibility of an intervention, as quoted extensively in paragraphs 36-38 of the Russian submission. However, he remained isolated with his position in the bench. The Court itself dismissed the very idea that an intervention would affect the equality of parties if it stays within the limits drawn by Article 63 of the Statute. When admitting New Zealand's intervention, it ruled[5]:

"18. Whereas the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention, as set out in Article 63 of the Statute and Article 82 of the Rules of Court ; whereas intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, 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 ;

19. Whereas New Zealand has met the requirements set out in Article 82 of the Rules of Court; whereas its Declaration of Intervention falls within the provisions of Article 63 of the Statute ; whereas, moreover, the Parties raised no objection to the admissibility of the Declaration ; and whereas it follows that New Zealand's Declaration of Intervention is admissible".

15. In other words, the Court confirmed in that order that a proper declaration of intervention under Article 63 of the Statute, which is limited to submitting observations on the construction of the convention in question, cannot affect the equality of the Parties *per se*.

16. While acknowledging the existence of that order (para. 40), Russia takes issue with the fact that the high number of interventions would nevertheless raise an issue of representativeness in the bench under Article 31(5) of the Statute (paras. 42-46) and

---

[5] *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, paras. 18-19.

become "unmanageable" for itself and the Court (para. 48-49). Admitting several interveners would also rune "entirely against the Court's previous practice of admitting only one intervener per case" (para. 52). However, contrary to the Russian assertions expressed in paragraphs 39-51, the Court's order in *Whaling in the Antarctic* also presents good law when the Court faces a situation of several interveners.

17. First, the assertion that the Court admitted only one intervener per case is misleading. To the best knowledge of the Republic of Estonia, the Court has never refused a declaration of intervention with the reasoning that it had already allowed the intervention of another State, and allowing a second one would therefore be inadmissible.

18. Second, such an approach would also be manifestly arbitrary. The Court has no power to declare an intervention inadmissible because another State had already done so before. Such a restriction would directly encroach of the "right of intervention" of every State party to a Convention whose construction is at issue. It may well be the case that States were cautious to exercise this right in the past, leading to very few interventions in the history of the Court so far. However, that is a pure matter of policy. According to the law, all State parties have the right to intervene under Article 63 of the Statute at the same time, if they so wish. Under the Genocide Convention, all State parties can even invoke the responsibility of another party for a breach of its obligations *erga omnes* to institute proceedings against the other party[6]. In such a situation, when the treaty embodies matters of collective interest, the late Judge Cançado Trindade called upon all State parties to contribute to the proper interpretation of the treaty as sort of a "collective guarantee of the observance of the obligations contracted by the State parties"[7]. In the present case, the fact that many other States felt the need to share their interpretation of the Genocide Convention with the Court cannot deprive the Republic of Estonia of its right to intervene under Article 63 of the Statute on this important matter.

19. Third, it is a direct and inevitable consequence of numerous interventions that some judges in the bench may hold the same nationality as an intervening State. However, that does not infringe the equality of the parties. As recalled by the Court in paragraph 18 of its order in

---

[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar),* Judgment of 22 July 2022, p. 36, paras. 107-108.

[7] Separate Opinion of Judge Cançado Trindade, attached to *Whaling in the Antarctic* (*Australia v. Japan*), *Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 33, para 53.

the *Whaling in the Antarctic*, the interveners do not become parties to the proceedings. Therefore, Articles 31(5) of the Statute, and Articles 32 and 36 of the Rules, as quoted by the Russian Federation, do not apply. Moreover, all judges are bound to uphold their neutrality and impartiality in accordance with Article 20 of the Statute.

20. Fourth, the Republic of Estonia reckons that the number of interveners in the present case is unprecedented and may indeed present new organisational challenges to the Court. In line with Article 30(1) of the Statute, the Court enjoys large discretion to organise the proceedings. The Republic of Estonia welcomes the decision of the Court to ask for written submissions of the interveners with an identical deadline in order to streamline the process. In order to help in the good administration of justice, it also reiterates its willingness to coordinate its further action before the Court with other interveners to contribute to an effective management of time of the Court and both parties.

C. THERE IS NO DUTY OF THE COURT TO REFRAIN FROM DECIDING ON THE ADMISSIBILITY OF THE INTERVENTION BEFORE CONSIDERING RUSSIA'S PRELIMINARY OBJECTIONS

21. In its third argument, the Russian Federation maintains that the Court has never allowed interventions at the preliminary stage of the proceedings in which jurisdiction or admissibility of an application was challenged. In paragraphs 53-54, it quotes six cases in support. In the first three instances (*Military and Paramilitary Activities*, *Nuclear Tests* and *Nuclear Tests (Request for Examination)*, the Court is said to have discarded interventions in the respective phases relating to jurisdiction or admissibility. In the second three instances (*Haya de la Torre, Whaling in the Antarctic* and *SS Wimbledon*), the Court accepted interventions within the main phase, because – according to Russia in paragraph 54 – the jurisdiction was not challenged in a separate stage.

22. It appears that Russia draws from this practice a duty of the Court to refrain from deciding on the admissibility of the interventions before considering its preliminary objections. However, such a duty does not exist in the law and the alleged precedents do not support this view either.

23. First, Article 63 of the Statute does not make any distinction between separate phases before the Court. Rather, the opening word "whenever" indicates that a State is allowed to

intervene in all phases of the proceedings[8]. Moreover, the second sentence of Article 82(1) of the Rules sets out only an outer time limit, i.e. a duty to intervene no later than the date fixed for the oral hearing. Again, the mention of an "oral hearing" does not distinguish between separate phases of the Court – the intervention may be filed before the oral hearings set for the jurisdictional/admissibility phase or before the merits phase. In addition, the invitation to file a declaration "as soon as possible" in that provision confirms that the filing of an Article 63 declaration is admissible at this stage of the proceedings.

24. Russia also advances an erroneous interpretation of the convention in question in Article 63 of the Statute. In its view, it would be first for the Court to determine the "dispute" pending before it before allowing the states, which are parties to the convention, to intervene. However, the role of the Court in Article 63 of the Statute is restricted to verify whether the conditions enumerated in Article 82(2) of the Rules are complied with. Contrary to the Russian allegation, the Court did not determine first the subject matter of the dispute in *Haya de la Torres*[9]. Rather, the Court only ascertained whether the object of the intervention of the Government of Cuba was 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.

25. Second, in the first two cases quoted by Russia in support for such a duty (*Military and Paramilitary Activities* and *Nuclear Tests*), the Court had actually decided to split the proceedings in separate phases[10] before examining the admissibility of the subsequent interventions. In the present case, the Court did not order under Article 79(1) of the Rules to separate the proceedings after the filing of Russia's preliminary objection. Rather, it has allowed Ukraine to address jurisdiction, admissibility and merits in one memorial. Accordingly, no authority can be drawn from *Military and Paramilitary Activities* and *Nuclear Tests* for the present case – in those cases, there was a different jurisdictional/admissibility phase, in the present case there is none.

---

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1984, p. 223, at p. 234.
[9] *Haya de la Torres Case*, Judgment of June 13th 1951, I.C.J. Reports 1951, p. 71, at p. 77.
[10] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 169, at p. 187, Point D (separating jurisdiction and admissibility from the merits phase); *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 135, at p. 142

26. Third, even if the Court had separated the proceedings in the two separate phases here, nothing in the case law supports a duty of the Court to refrain from deciding on the admissibility of an intervention during the jurisdictional phase. In *Military and Paramilitary Activities*, the Court's jurisdiction depended on an understanding of Article 36(2) and (5) of the Statute, and the merits touched upon questions of the UN Charter and customary international law. El Salvador's declaration of intervention of 15 August 1984 addressed mainly the latter and did not contain any statement on how it would construe Article 36(2) and (5) of the Statute. Against that background, the Court dismissed the application "in as much as it relates to the current phase of the proceedings"[11]. As Judge Singh[12], Judges Ruda, Mosler, Ago, Jennings and De Lacharrière[13], as well as Judge Oda[14] explained, it had weighed in the Court that El Salvador's declaration was mainly directed to the merits of the case, but insufficient with respect to the jurisdictional question before the Court. This explanation is shared by the doctrine[15].

27. Therefore, it appears that the Court rejected El Salvador's declaration as inadmissible during the jurisdictional phase *because and only insofar it did not contain any construction of Article 36(2) and (5) of the Statute as the jurisdictional base of the case.* The Court did not find that no intervention under Article 63 of the Statute could ever be admissible during a jurisdictional phase, as the Russian Federation seems to read into the Court's order of 4 October 1986.

28. The same is true for *Nuclear Tests*. After having ordered a jurisdictional phase in June 1973, the Court declared in July 1973 Fiji's intervention of May 1973 admissible. However, it deferred the consideration thereof to the merits as the intervention did not contain any construction of the jurisdictional basis of the case[16]. In other words, the Court was able to

---

[11] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Order of 4 October 1984, I.C.J. Reports 1984, p. 215, at p. 216.
[12] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judge Singh, I.C.J. Reports 1984, p. 218.
[13] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings, and De Lacharrière, I.C.J. Reports 1984, p. 219.
[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judge Oda, I.C.J. Reports 1984, p. 220.
[15] Juan José Quintana, *Litigation at the International Court of Justice*, Brill 2015, pp. 943-944.
[16] *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p. 324, at p. 325.

decide about the admissibility of the intervention during the ongoing jurisdictional phase, but deferred it to the merits phase, as it only dealt with issues relating to the merits.

29. Fourth, *Nuclear Tests (Request for Examination)* does not support the Russian argument either. In that rather specific case, the Court had before it New Zealand's application from August 1995 and four subsequent interventions under Article 63 of the Statute to re-examine paragraph 63 of its earlier judgment in *Nuclear Tests*. Instead of separating the proceedings, the Court held a hearing in September 1995 and rejected both the application and the four interventions in an order of October 1995. Hence, the only lesson from this case is that the Court has discretion to dismiss an application together with purported interventions. However, the precedent does not entail a duty of the Court to disregard an intervention prior to the examination of preliminary objections from the Defendant.

30. In conclusion, nothing in Article 63 of the Statute or in the Court's case law supports the Russian view that the Court cannot deal with the admissibility of an intervention before deciding on Russia's preliminary objections.

D. THERE IS NO PROHIBITION FOR THE REPUBLIC OF ESTONIA TO ADDRESS THE COURT'S JURISDICTION

31. In its fourth and fifth argument, the Russian Federation criticises that the Declaration would in effect address matters, which presuppose that the Court has jurisdiction and/or that Ukraine's application is admissible. Russia complains, in particular, that the Declaration contains a construction of Article IX of the Genocide Convention on the jurisdiction of the Court. For Russia, this makes the Declaration inadmissible as it is written in a way that presupposes that the Court has jurisdiction over the alleged dispute. Thereby, Russia effectively maintains that a State may not intervene on questions of jurisdiction, as taking a position on that point would "presuppose" that the Court has jurisdiction. In its fifth argument, it repeats this point with more clarity, contesting the Republic of Estonia´s right to intervene on Article IX of the Genocide Convention *per se*.

32. In the Republic of Estonia's view, this line of reasoning also runs contrary to Article 63 of the Statute and the Court's practice.

33. According to Article 63 of the Statute, a State party may intervene in the proceedings whenever the construction of a convention is in question. The plain wording of Article 63

of the Statute is not selective and refers to the entire convention, including its compromissory clause, as the case may be. Accordingly, nothing in the text suggests that the Republic of Estonia may not offer its construction of Article IX of the Genocide Convention to the Court as it did in its Declaration paragraphs 25-38.

34. That point is further strengthened by the object and purpose of Article 63 of the Statute. States do not only have a legitimate interest to share with the Court their interpretation of substantive obligations contained in a convention at stake before the Court. It is of equal importance to be heard on jurisdictional issues, as this may affect their own position before the Court in future cases relating to themselves. Hence, an intervention under Article 63 of the Statue may cover both jurisdictional and substantive aspects[17].

35. Subsequent practice before the Court indicates the same. So far, the Court has never dismissed an intervention because it was (entirely or primarily) directed to interpreting a compromissory clause. Rather, in *Military and Paramilitary Activities*, El Salvador's attempt to influence the jurisdictional question before the Court was unsuccessful because the declaration had not complied with the formal requirements under Article 82(2)(b) and (c) of the Rules for the great majority in the Court. Had it done so, it would have been of interest to the Court, as expressly confirmed by Judge Oda[18]. Moreover, Judge Schwebel even found that the faults of El Salvador's initial declaration on jurisdiction had been healed by subsequent letters.[19] Based on this reading, he was prepared to admit El Salvador's declaration on jurisdictional matters.

36. In *Pakistani Prisoners of War,* Judge Pétren defended a similar view. He noted that Pakistan and India had different views about the Genocide Convention, including its jurisdictional clause. In his view, *"Article 63 of the Statute of the Court required the questions thus raised to be notified without delay to the States parties to the two international instruments in*

---

[17] MN Shaw (ed*), Rosenne's Law and Practice of the International Court 1920-2015* (5th ed, Vol III, Brill Nijhoff 2016), p. 1533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol I, OUP 2013), p. 1031; A. Miron/C. Chinkin, "Article 63" in: Zimmermann/Tams/Oellers-Frahm/Tomuschat (eds), The Statute of the International Court of Justice: A Commentary (3rd ed. OUP 2019), p. 1741, at p. 1763, note 46.

[18] *Separate Opinion of Judge Oda in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Declaration of Intervention of El Salvador),* Order of 4 October 1984, ICJ Reports 1984, p. 220, at p. 221.

[19] *Separate Opinion of Judge Schwebel in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), (Declaration of Intervention of El Salvador).* Order of 4 October 1984, ICJ. Reports 1984, p 223-244.

question"[20]. Such an invitation would make no sense if States would not be able to make a statement in Article IX of the Genocide Convention under Article 63 of the Statute.

37. It follows that the Republic of Estonia correctly exercised its right to intervene under Article 63 of the Statute. The fact that the intervention also addresses the compromissory clause under Article IX of the Genocide Convention does not render the intervention inadmissible.

E. THE REPUBLIC OF ESTONIA'S ARGUMENTS ARE RELEVANT TO THE CONSTRUCTION OF THE GENOCIDE CONVENTION AND THE DECLARATION DOES NOT CONTAIN ISSUES UNRELATED TO THE GENOCIDE CONVENTION

38. In its last argument, the Russian Federation refers to Republic of Estonia's statement that *"addresses good faith in application of the Convention, whether there is evidence that genocide has been committed or may be committed in Ukraine, issues relating to the use of force, and compliance with the Court's provisional measures order."* It alleges that these issues do not relate to the construction of the Genocide Convention and contain an impermissible incursion into the interpretation or application of other rules of international rules that are distinct from the treaty in question and derive from different sources.

39. The argument is based on a misperception of the Republic of Estonia's statement. Clearly, the statement did not introduce any of these issues as a self-standing matter. Rather, the statement was part of the construction of Articles I, II-IV, VIII and IX of the Genocide Convention.

40. Such technique is permissible under international law. According to Article 31(3)(c) of the Vienna Convention on the Law of Treaties, representing customary international law[21], the

---

[20] *Trial of Pakistani Prisoners of War (Pakistan v. India)*, Interim Protection, Order of 13 July 1973, Separate Opinion of Judge Pétren, I. C.J. Reports 1973, p. 334, at p. 335.

[21] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 87: *"The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969"*; see also *Application of the International Convention On the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, p. 24, para. 75 with further references.

interpretation of a treaty may include *"any relevant rules of international law applicable in the relations between the parties."*

41. According to the Report of the ILC Study Group on Fragmentation of International law, the notion of "relevant rule" includes customary international law, general principles of law and treaty law[22]. It follows that mentioning either good faith, issues relating to the use of force, or compliance with the Court's provisional measures order as an interpretative aid to Articles I, II-IV, VIII and IX of the Convention cannot be disqualified as "impermissible incursion". Rather, it contributes to the required integral interpretation of international law as a legal order.

42. The Republic of Estonia finds further support for its position in the Court's order of 16 March 2022. In paragraph 58, the Court stated:

"The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter."[23]

43. It appears that the Court interpreted Article I of the Genocide Convention in light of Article 1 of the UN Charter. In a similar vein, the Republic of Estonia suggests that it is possible to interpret the Articles of the Genocide Convention on which the Republic of Estonia has focused in its Declaration in the light of relevant international law, as permitted by Article 31(3)(c) of the Vienna Convention. Such operation does not transcend the boundaries of Article 63 of the Statute, but stays within the requirement of constructing the Convention at issue in line with accepted rules of treaty interpretation.

IV. CONCLUSION

44. For the reasons set out above the Republic of Estonia is convinced that its Declaration of Intervention fully complies with the requirements under Article 63 of the Statute and

---

[22] Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the ILC finalised by Mr. Martti Koskenniemi, 13 April 2006, pp. 94-96. https://legal.un.org/ilc/documentation/english/a_cn4_l682.pdf.

[23] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia),* Order of 16 March 2022, p. 13, para. 58.

Article 82 of the Rules. In view of the foregoing, the Republic of Estonia respectfully requests the Court to decide that the intervention is admissible and allow the Republic of Estonia to present its written observations in good time in order to exercise its right to intervene as party to the Genocide Convention.

Respectfully,

Lauri Kuusing

Co-Agent of the Republic of Estonia

Den Haag, 13 February 2023