INTERNATIONAL COURT OF JUSTICE

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

(UKRAINE v. RUSSIAN FEDERATION)

THE RUSSIAN FEDERATION'S WRITTEN OBSERVATIONS ON THE WRITTEN OBSERVATIONS SUBMITTED BY AUSTRALIA, AUSTRIA, BELGIUM, BULGARIA, CANADA AND THE NETHERLANDS, CROATIA, CYPRUS, THE CZECH REPUBLIC, DENMARK, ESTONIA, FINLAND, FRANCE, GERMANY, GREECE, IRELAND, ITALY, LATVIA, LIECHTENSTEIN, LITHUANIA, LUXEMBOURG, MALTA, NEW ZEALAND, NORWAY, POLAND, PORTUGAL, ROMANIA, SLOVAKIA, SLOVENIA, SPAIN, SWEDEN, THE UNITED KINGDOM, THE UNITED STATES

24 MARCH 2023

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I. INTRODUCTION

1. The present written observations are submitted pursuant to the letter from the Registrar dated 7 March 2023, by which the Russian Federation was informed that the Court had fixed 24 March 2023 as the time-limit for the Parties to submit their observations in writing on the admissibility of the Declarations of Intervention filed in the present case under Article 63 of the Court's Statute.

2. These Written Observations must be read together with the Russian Federation's Written Observations of 17 October 2022, 15 November 2022, 16 December 2022, and 30 January 2023, which are maintained in full.

3. The Russian Federation would reiterate, at the outset, that the Russian Federation had to respond to 32 Written Observations of the Declarants as well as comments of Ukraine within the time-limit of six weeks while at the same time preparing and submitting the Rejoinder in another case before this Court. As has been stated before and will be developed further below, no less than 33 States have collaborated with one another as well as with the Applicant (Ukraine) to seek to intervene *en masse* with the stated intention of supporting it against the Respondent (the Russian Federation).

4. That the Declarants continue to work together on this case is clear from the content of the Written Observations. For example, in its Observations, Germany states:

> "In its fifth argument, it repeats this point with more clarity, contesting Germany's right to intervene on Article IX of the convention *per se*."[1]

In subsequent paragraphs, Germany produces a counter-argument to the Russian Federation's position on Article IX.[2]

5. Germany claims to be responding to the Russian Federation's Written Observations dated 17 October 2022,[3] which is indeed the only written pleading of the Russian Federation in these proceedings that Germany should have access to. In that document, the Russian Federation did *not* raise a separate point with respect to the non-admissibility of

[1] Written Observations of Germany, ¶24.

[2] *Ibid.*, ¶¶25-29. The wording of this argument repeats that of other Declarants. *See* Appendix to these Written Observations.

[3] *Ibid*., ¶2.

interventions with respect to Article IX *per se*. There is simply no "fifth argument" on that matter in the document to which Germany claims to be responding.

6. The presence of this argument in Germany's Written Observations is clear and unequivocal evidence of joint work between the Declarants on this case. Had there been no such joint work, this argument could not have found its way into Germany's Written Observations.

7. A similar remark can be made with respect to the Written Observations of the United Kingdom. The United Kingdom is also responding to the Russian Federation's Written Observations dated 17 October 2022.[4] However, a separate line of argumentation is brought on the alleged admissibility of interventions with respect to "jurisdictional issues only".[5] The logic of the argument and the authorities used are similar to those of Australia, who, unlike the United Kingdom, did have access to Written Observations of the Russian Federation, where this issue is raised as a separate point. This is further proof of joint work between the Declarants on the present case, which shows that their Declarations are not genuine, and nothing more than an abuse of Article 63 of the Statute.

8. As such, the Declarations of Intervention and Written Observations on their admissibility by the Declarants cause great harm to the principle that recourse to international judicial settlement should not be considered as an unfriendly act between States, and they must be appreciated bearing this in mind.

9. The Russian Federation wishes further to emphasise that despite the view of some Declarants that certain arguments of the Russian Federation may be read together, each of the Russian Federation's argument stands on its own and merits consideration as such.

10. In the same vein, while the Russian Federation is of the firm view that all of the Declarations of Intervention submitted in the present case, without exception, are inadmissible, it considers that the admissibility of these Declarations is a matter to be determined for each of them individually.

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[4] Written Observations of the United Kingdom, ¶3.

[5] *Ibid*., ¶49.

11. While some of the Declarants complain that the Russian Federation did not always provide its observations on the admissibility of each of the 32 Declarations of Intervention separately, it ought to be recalled that the Court indicated different deadlines for responding to different groupings of Declarations, without specifying the precise form in which the Russian Federation was to present its arguments. Submitting its views on the Declarations as it did was the most practical way for the Russian Federation to proceed, not least in the light of the overwhelming number of submissions presented by the Declarants, and taking into consideration the time available to do so and also the coordinated nature of the submissions, which has a direct bearing on their content. If the Declarants' concern is that it may not be practical for them to find which arguments of the Russian Federation concern them (although most arguments concern them all equally, with a few exceptions), that is not nearly comparable to the difficulties faced by the Russian Federation in having to respond to 33 different States.

12. A final and related preliminary remark concerns the need for conducting oral hearings on the admissibility of the Declarations. The Russian Federation cannot stress enough the burdens that have been placed upon it by having to respond to 64 different submissions (32 Declarations of Intervention and 32 Written Observations on the admissibility of those Declarations) which, although in many instances copying each other word for word, but also containing arguments, details and nuances that require deep individual assessment. The Russian Federation has made a good faith effort to respond to all the arguments advanced by the 33 Declarants, yet the time available to it to do so has been extremely limited. However, due to the sheer quantity and volume of the documents, the need to simultaneously prepare the Preliminary Objections for the present case and the Rejoinder for another case before this Court, as well as the narrow time frames afforded by the Court, proper individual assessment and reply to every one of the 64 documents have been objectively impossible.[6]

13. The Russian Federation therefore respectfully requests the Court, with a view to ensuring a proper administration of justice and bearing in mind the Statute and the Rules of Court, to hold an oral hearing on the admissibility of each of the Declarations individually, so

[6] Six weeks, effectively reduced to two weeks taking into account that the Russian Federation had to submit its Rejoinder in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* on 10 March 2023.

that they can be properly addressed on their own merits. The Russian Federation proceeds from the understanding that such hearings are mandated by Article 84(2) of the Rules of Court, which prescribes that, if an objection is filed to the admissibility of a declaration of intervention, "the Court shall hear the State seeking to intervene and the Parties before deciding." As the Declarants have themselves expressed a preference for individual consideration of each of their submissions, this would appear to represent the common will of all involved.

14. The Russian Federation sets out its response to the Written Observations filed by the 33 Declarants below, showing that:

(a) the interventions are not genuine as their real object is not the interpretation of the Convention but to act as *de facto* co-applicants alongside with Ukraine (**Section A**);

(b) the interventions would impair the equality of the parties and the requirements of good administration of justice (**Section B**);

(c) the Declarations of Intervention are inadmissible for constituting an abuse of process (**Section C**);

(d) intervention cannot be exercised at a jurisdictional stage (**Section D**);

(e) the Declarations address matters which presuppose that the court has jurisdiction and/or that Ukraine's application is admissible (**Section E**);

(f) no intervention is admissible solely in regard to Article IX of the Genocide Convention (**Section F**);

(g) the Declarants seek to address issues unrelated to the Genocide Convention and their admission would prejudge questions relating to the Court's jurisdiction *ratione materiae* (**Section G**);

(h) the Declaration of the United States is inadmissible due to its reservation to Article IX of the Convention (**Section H**); and

(i) the Joint Declaration of Canada and the Netherlands is inadmissible (**Section I**).

II. LEGAL ARGUMENTS

A. THE INTERVENTIONS ARE NOT GENUINE AS THEIR REAL OBJECT IS NOT THE INTERPRETATION OF THE CONVENTION BUT TO ACT AS *DE FACTO* CO-APPLICANTS ALONGSIDE UKRAINE

15. In its Written Observations, the Russian Federation showed that the Declarations should be declared inadmissible because they do not fall within the provisions of Article 63 of the Statute. This is because the Declarants do not seek to provide their own views concerning the construction or interpretation of the Genocide Convention which is the limited object of an Article 63 intervention. Rather, the Declarants aim to side with Ukraine, apparently as *de facto* co-applicants against the Russian Federation. Therefore, the interventions cannot be considered "genuine" and thus are inconsistent the Statute of the Court and jurisprudence.

16. The Written Observations demonstrated this on the basis of several factors drawn from the context in which the Declarations were submitted and from the Declarations themselves, in particular:

(a) The joint statements of 20 May 2022 and 13 July 2022, where the Declarants expressly stated, *inter alia*, that they "welcome Ukraine's application against Russia"; that they have a "joint intention to explore all options to support Ukraine in its efforts before the ICJ" through intervention; and that they "consider that Russia's violations of international law engage its international responsibility, and that the losses and damage suffered by Ukraine as a result of Russia's violations of international law require full and urgent reparation by Russia, in accordance with the law of State responsibility";

(b) Several individual statements by the Declarants, as well as by Ukraine, reaffirming that the object of the interventions is to support Ukraine against the Russian Federation. Some of those statements expressly reveal that the Declarants have been requested to intervene by Ukraine and that there is a close cooperation and coordination between them in the context of these proceedings;

(c) The Declarations seek to address matters unrelated to the interpretation of the Genocide Convention,[7] thus trespassing the limits of a genuine intervention under Article 63;

(d) The consistent reference in the Declarations to the *erga omnes partes* character of the obligations under the Genocide Convention together with a condemnation of the Russian Federation's actions;

(e) The fact that the Declarations are worded in similar and sometimes identical terms and that they are always in line with Ukraine's arguments, thereby confirming that the Declarants and the Applicant work in a coordinated fashion for purposes of these proceedings;

(f) The unusual predisposition of the Declarants to be "grouped together" even before having access (in principle) to the full case file, thereby confirming that they do not intend to put forward their own interpretation of the Genocide Convention but whatever interpretation may bolster Ukraine's case;

(g) The manifestly contradictory positions adopted by some of the Declarants in this case and in the *Legality of the Use of Force* cases.

17. The Declarants generally argue that they possess a "right" to intervene under Article 63 of the Statute, albeit subject to the requirements of that provision and Article 83 of the Rules of Court.[8] They contend, however, that those requirements are limited and mostly of a formal character, and that the Court is not allowed to examine the broader context in which they seek to intervene. They disagree in this regard with the notion of "genuine

[7] *See* further Section G below.

[8] Written Observations of Australia, ¶17; Written Observations of Austria, ¶¶5-10; Written Observations of Canada and the Netherlands, ¶7; Written Observations of Denmark, ¶7; Written Observations of Estonia, ¶¶6-9; Written Observations of Finland, ¶8; Written Observations of France, ¶¶11-13; Written Observations of Germany, ¶¶7-8; Written Observations of Greece, ¶8; Written Observations of Ireland, ¶5; Written Observations of Italy, ¶9; Written Observations of Liechtenstein, ¶4; Written Observations of Malta, ¶¶4-5; Written Observations of New Zealand, ¶10; Written Observations of Norway, ¶¶3, 7; Written Observations of Poland, ¶6; Written Observations of Portugal, ¶8; Written Observations of Romania, ¶15; Written Observations of Slovakia, ¶12; Written Observations of Slovenia, ¶6; Written Observations of Spain, ¶8; Written Observations of the United Kingdom¶5; Written Observations of the United States, ¶¶12-13.

intervention" set out in the Written Observations based on the Court's own jurisprudence.[9]

18. In this regard, the Russian Federation first notes that the Declarants, for the most part, do not deny the context in which their Declarations were submitted.[10] In other words, it is an established fact, as noted above, that the Declarants seek to support or aid Ukraine in the present proceedings, effectively acting as *de facto* co-applicants, and that the Declarants and Ukraine are closely working together to achieve this aim.[11] The key issue is whether this collective strategy is simply to be overlooked, or whether it should be taken into consideration by the Court when determining the admissibility of the Declarations. The Russian Federation is of the firm view that such a course of action on the part of the Declarants is incompatible with Article 63 of the Statute, and that the Declarations must consequently be declared inadmissible.

19. A threat common to some of the Declarants is the suggestion that the Court is powerless to determine the inadmissibility of a declaration of intervention if the ground invoked is not expressly set out in Article 63 of the Statute of the Court or Article 83 of the Rules of Court.[12] This is clearly wrong and, in any event, based on a mischaracterisation of the Russian Federation's objection to admissibility.

20. It ought to be recalled, first, that the Court has power to determine the admissibility of a declaration of intervention beyond formal requirements. As Judge Owada explained:

> "… when considering the admissibility of a request for intervention, whether it is filed pursuant to Article 62 or Article 63 of the Statute of the Court, the Court, should it find it necessary under the particular circumstances of the case, is in a position to examine and determine *proprio motu* whether such intervention would be in keeping with the principles of ensuring the fair administration of justice, including, *inter alia*, the equality of the Parties in

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[9] Noting that the requirement of "genuine intervention" is relevant to determine the admissibility of a declaration of intervention. *See* Written Observations of Belgium, ¶10; Written Observations of Bulgaria, ¶11; Written Observations of Croatia, ¶¶10-15; Written Observations of Latvia, ¶7; Written Observations of Luxembourg, ¶9.

[10] Some Declarants take issue with the evidence produced by the Russian Federation showing that they seek to act as *de facto* co-applicants alongside with Ukraine, albeit in a very superficial and dismissive manner. This is further addressed below.

[11] Some Declarants briefly state that this is not the object of their intervention, but do not really engage with the evidence adduced by the Russian Federation. *See* Written Observations of the Czech Republic, ¶6; Written Observations of Latvia, ¶4; Written Observations of Lithuania, ¶¶14-19.

[12] Written Observations of Australia, ¶¶17, 20-22; Written Observations of Estonia, ¶9; Written Observations of Italy, ¶11; Written Observations of Norway, ¶13; Written Observations of Slovakia, ¶19; Written Observations of Spain, ¶9; Written Observations of the United Kingdom, ¶13; Written Observations of the United States, ¶15.

> the proceedings before the Court. The Court's authority to examine these matters in considering the admissibility of New Zealand's Declaration of Intervention is inherent in the judicial function of the Court as a court of justice. The Court has the discretion to rule such a declaration inadmissible if its admission should unduly compromise fundamental principles of justice underlying its jurisdiction or the fairness of the proceedings. The Court has the ability to exercise this discretion with respect to intervention, whether it be under Article 63 or under Article 62. In this respect, there should be no difference between intervention under Article 62 and intervention under Article 63 as far as the principle of ensuring the fair administration of justice is at issue …
>
> … Though the intervention in the present case involves a somewhat different factual and legal situation, the Court's Judgment in *Libya/Malta* demonstrates that the Court has the power to deny a request for intervention when such a request would impinge upon fundamental legal principles, including the principle of equality of States, even if the State requesting intervention may have fulfilled the express conditions for intervention set forth in the relevant articles of the Statute."[13]

21. In the present case, the Russian Federation's objections to the admissibility of the Declarations are based both on the terms of Article 63 of the Statute of the Court and fundamental principles of judicial procedure, including the principle of equality of the parties. In addition, Section C below addresses the issue of abuse of process, a generally accepted objection to admissibility that similarly does not need to be laid down expressly in any statutory instrument.

22. The Russian Federation's objection that the interventions sought in the present case are not genuine is based on Article 63 of the Statute of the Court itself, which allows States to intervene for the limited purpose of providing their own views concerning the interpretation of a convention to which they are parties, and more particularly of the provisions thereof that form the subject-matter of a specific case. When the object of an intervention is not to provide the State's own interpretation of the relevant treaty, but to advocate for one of the parties against the other as part of a coordinated collective strategy, then the intervention is not genuine and should not be admitted by the Court.[14]

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[13] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, Declaration of Judge Owada, p. 11, ¶¶1-2.

[14] *See* also Written Observations of Luxembourg, ¶9 ("… la Cour peut rejeter une déclaration s'il s'avère qu'un État n'avance pas une interprétation de la convention en question, mais s'engage uniquement sur un territoire d'application. Dans un tel cas, un intervenant agirait comme s'il était un 'co-requérant' ou un 'co-défendeur', contournant les exigences procédurales pour devenir une partie à part entière").

The Declarants' suggestion that the Russian Federation seeks to read additional admissibility requirements into the Statute of the Court is therefore incorrect.

23. Another general argument advanced by the Declarants is that neither the Statute of the Court nor the Rules of Court require them to disclose or explain the considerations underlying their decision to seek to intervene under Article 63.[15] This is beyond the point. A State may not be required to do so, but in the present case the Declarants have openly and expressly stated what their goal is by intervening in these proceedings. The facts are properly before the Court and they cannot be ignored simply because of the Declarants' discomfort.

24. The reference to the *Tunisia/Libya* case by some of the Declarants in this regard is misplaced.[16] While the Court stated that, under Article 62(2) of the Statute, it does not have "any general discretion to accept or reject a request for permission to intervene for reasons simply of policy", it then immediately indicated that its task is to "determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute".[17] Thus, even assuming that the Court's reasoning in that case applies also to Article 63, the question still remains whether the Declarations are admissible by reference to the relevant provisions of that Article, *i.e.* whether they genuinely concern the construction of the Genocide Convention.

25. The Declarants also refer to *Whaling in the Antarctic* and argue that the "context" in which New Zealand's declaration of intervention was submitted, which included a joint media release where New Zealand supported Australia in its case against Japan, was not considered by the Court as a bar to admissibility.[18] As explained in the Russian Federation's Written Observations, however, that case is markedly different from the

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[15] Written Observations of Australia, ¶17.

[16] *Ibid.*; Written Observations of Austria, ¶13.

[17] *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya),* Application to Intervene, Judgment of 14 April 1981, I.C.J. Reports 1981, p. 12, ¶17. The same applies to the other cases referred to by the Declarants. *See Continental Shelf (Libyan Arab Jamahiriya v. Malta),* Application to Intervene, Judgment of 21 March 1984, I.C.J. Reports 1984, p. 9, ¶12 ("The Court will therefore now examine the contentions now advanced by Italy in support of its application for permission to intervene, and the objections taken by the Parties to the admissibility of the Italian Application, in the light of the relevant provisions of the Statute"); *Territorial and Maritime Dispute (Nicaragua v. Colombia),* Application for Permission to Intervene, Judgment of 4 May 2011, I.C.J. Reports 2011, p. 434, ¶36 ("It is for the Court, responsible for safeguarding the proper administration of justice, to decide whether the condition laid down by Article 62, paragraph 1, has been fulfilled").

[18] Written Observations of Australia, ¶18; Written Observations of Bulgaria, ¶13.

present one because Japan did not object to the admissibility of New Zealand's intervention.[19]

26. The Declarants also disagree with the Russian Federation's interpretation of the Court's judgment in *Haya de la Torre*, where the Court considered that Cuba's declaration was not a "genuine intervention" and was therefore inadmissible:[20]

(a) Australia, for example, suggests that "when that phrase [genuine intervention] is read in its context, it is apparent that the Court was not formulating requirements 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'."[21]

(b) Other Declarants maintain that the Russian Federation entertains a confusion between "genuine intervention" and "genuine intention".[22]

(c) Finland argues that *Haya de la Torre* is irrelevant because it concerned the question whether an intervention could disregard a judgment with force of *res judicata*, and not whether a large number of States could collectively intervene to support one of the parties to a case.[23]

(d) Ireland argues that a genuine intervention is "one that falls within the provisions of Article 63 of the Statute" and that this is "an objective test and no subjective requirement of 'real intentions' exists."[24]

27. These arguments are misleading. It is clear from the judgment that the Court was indeed concerned with whether there was a "genuine intervention" or an "intervention in the true

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[19] *Whaling in the Antarctic, (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 8, ¶17.

[20] *Haya de la Torre (Colombia v. Peru)*, Judgment of 13 June 1951, I.C.J. Reports 1951, pp. 76-77.

[21] Written Observations of Australia, ¶20. *See* also Written Observations of Estonia, ¶11; Written Observations of the United Kingdom, ¶15.

[22] Written Observations of Croatia, ¶12; Written Observations of Denmar, ¶10; Written Observations of Germany, ¶9; Written Observations of Greece, ¶10; Written Observations of Lithuania, ¶9; Written Observations of Luxembourg, ¶14; Written Observations of Poland, ¶7; Written Observations of Portugal, ¶11; Written Observations of Slovakia, ¶¶20-21; Written Observations of Spain, ¶11.

[23] Written Observations of Finland, ¶12.

[24] Written Observations of Ireland, ¶15. *See* also Written Observations of Liechtenstein, ¶7.

meaning of the term", and that to make a decision on this matter it had to examine Cuba's declaration to determine whether Cuba indeed sought to provide its views on the subject-matters of the *Haya de la Torre* proceedings, or whether Cuba's real aim was to provide views on the matter that had already been decided by the Court in the *Asylum* case. Hence the Court's finding that

> "it is necessary to ascertain whether the object of the intervention … is in fact the interpretation of the [relevant] Convention."[25]

28. The Court's judgment must be read together with the *Whaling in the Antarctic* case, where the Court further noted that

> "the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention."[26]

29. Following the Court's jurisprudence, any attempt to intervene that has an object different from the interpretation of the relevant convention must be declared inadmissible.

30. The Declarants misunderstand the use of the terms "genuine intervention" or "genuine intention" in the Russian Federation's Written Observations. These terms are interrelated because to determine whether the object of an intervention is to construe a convention, one must determine what the intention of the State seeking to intervene is when invoking Article 63 – the two questions are interconnected.

31. In the *Haya de la Torre* case, as many Declarants note, the Court found that Cuba's intervention was not genuine to the extent that it intended to address matters that had already been decided with *res judicata* effect. But this was a particular circumstance of that case and is by no means the only reason for which an intervention may be considered as not genuine and thus inadmissible. An intervention may also be declared inadmissible, if, for example, the State seeking to intervene intends to address the facts of the case and the application of the relevant convention. The Declarants do not disagree with this.[27] Similarly, an intervention cannot be considered genuine if a declarant State does not seek

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

[26] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 5, ¶7. *See* also Written Observations of the United Kingdom, ¶16.

[27] *See* further Section G below.

to provide its own views concerning the interpretation of the convention, but rather seeks to intervene as part of a coordinated collective strategy to support one of the parties to the case against the other.

32. In the present case, the question is whether the object of the Declarations is to genuinely provide the interpretation of the Genocide Convention of the State concerned, or whether they intend to do something else.[28] To make this determination, the Court is by no means limited to the Declarations themselves, as some of the Declarants seem to suggest, but must take into account the broader context surrounding those Declarations, which is equally relevant. Nor is this a "subjective" test, as some of the Declarants suggest: the objective facts upon which the Court can rule are already before it. As noted above, the Declarants do not deny that their aim is in fact to argue side-by-side with Ukraine, in close coordination with the latter, even though they urge the Court to disregard this reality.

33. The Declarants also seek to draw a parallel between the Court's case law regarding the distinction between the political and legal aspects of a dispute, suggesting that the Court should overlook the motivations underlying their decision to intervene.[29] The flaw in this is self-evident. The problem that the Declarants face in the present case is not that their decision to intervene may be motivated by political reasons. The real problem is that the Declarants do not intend to engage in the interpretation exercise, but to co-advocate with the Applicant against the Respondent in close consultation and coordination. The Russian Federation continues to be of the view that this is not the "construction of the convention" envisaged by the Statute. A serious distortion of Article 63 would therefore occur, should the Declarants be allowed to intervene.

34. The Declarants' position that the exercise of their right to intervention should be subject to formal criteria only, without considering the purpose of exercising the right under Article 63, directly contradicts the legal nature of the right to intervention. This is confirmed by A. Madakou:

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[28] *See* also Written Observations of Belgium, ¶10 ("Il s'agit dès lors d'un examen objectif qui doit être fait par la Cour pour déterminer si une intervention a effectivement pour objet l'interprétation d'une convention").

[29] Written Observations of Australia, ¶¶21-22; Written Observations of Croatia, ¶15; Written Observations of Latvia, ¶7; Written Observations of Lithuania, ¶10; Written Observations of Malta, ¶13; Written Observations of New Zealand, ¶14; Written Observations of Sweden, ¶9; Written Observations of the United Kingdom, ¶19; Written Observations of the United States, ¶53. *See* also Written Observations of Germany, ¶9.

> "Article's 63 intend was neither to insert a kind of *actio popularis* with the bounds of Article 63 nor to provide pure political considerations with a disguise as respectable interpretive interventions."[30] [Emphasis added]

35. The same idea is supported by S. Bernárdez:

> "[i]t remains the third general feature of the statutory intervention regarding the ICJ and ITLOS, namely that intervention is a means of self-protection of a legal interest of the third state seeking to intervene or declaring its intervention. The interest must be "legal" in nature because the authors of the Statutes wish to exclude "political" interventions from international judicial proceedings."[31] [Emphasis added]

36. Any possible presumption of a genuine legal interest on behalf of the Declarants is rebutted by their brazen admission of the actual political nature of their interventions, for which the "legal" disguise is a mere window-dressing.

37. Relying on the *Wimbledon* and *Whaling in the Antarctic* cases, some of the Declarants alternatively suggest that, even if a State seeks to intervene under Article 63 of the Statute of the Court in order to support one of the parties to the case, this does not necessarily render the intervention inadmissible.[32] As regards the *Wimbledon* case, the reading of the Permanent Court's decision by the Declarants is incorrect. The Court simply noted that Poland "desired permission to intervene on the side of the four applicant States [Great Britain, France, Italy and Japan] under Article 62 of the Statute …", and that later in the proceedings Poland decided to change the basis of its intervention to Article 63. In doing so, Poland clarified that it "[did] not insist that the grounds submitted by it as justification for intervention under Article 62 should be taken into consideration", and that it did not "intend to ask the German Government for any special damages for the prejudice caused to it".[33] Thus, it was in the context of Poland's initial intention to intervene as a party

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[30] A. Madakou, Intervention Before the International Court of Justice, *Institut universitaire de hautes études internationals*, 1988, p. 26.

[31] S. T. Bernárdez, *Provisional Measures and Interventions* in R. Lagoni, D. Vignes (eds.) MARITIME DELIMITATION (Brill-Nijhoff, 2006), p. 53.

[32] Written Observations of Austria, ¶16; Written Observations of Belgium, ¶12; Written Observations of Cyprus, ¶8; Written Observations of Denmark, ¶11; Written Observations of Estonia, ¶12; Written Observations of Finland, ¶¶14-15; Written Observations of Liechtenstein, ¶8; Written Observations of Luxembourg, ¶15; Written Observations of New, ¶17; Written Observations of Norway, ¶14; Written Observations of Poland, ¶7; Written Observations of Portugal, ¶12; Written Observations of Romania, ¶24; Written Observations of Slovakia, ¶27; Written Observations of Spain, ¶12; Written Observations of Sweden, ¶8; Written Observations of the United Kingdom, ¶18.

[33] *Case of the S.S. "Wimbledon",* Question of Intervention by Poland, Judgment of 28 June 1923, PCIJ Series A No. 1, p. 13.

under Article 62 of the Statute of the Court and bring a claim against Germany that Poland was considered as aiming to take sides with the applicants. This does not mean that States can act as *de facto* co-applicants under Article 63.

38. With respect to *Whaling in the Antarctic*, as indicated above, while Japan expressed a concern that New Zealand apparently sought to intervene to side with Australia, it did not object to the admissibility of New Zealand's intervention. The Court was not called upon to decide this matter in that case.

39. Even if the Declarants' position was correct (*quod non*), a simple coincidence of similar legal positions must be distinguished from a collective strategy by a large number of States to support one of the parties to the case against the other, in close consultation and coordination with the former and with the stated intention to have the Court rule against the respondent. This is not only far from being a genuine intervention under Article 63; it also raises serious questions regarding the good administration of justice and the equality of the parties, as further explained in Section B below.

40. Some of the Declarants also argue, again alternatively, that they do not seek to act as *de facto* co-applicants with Ukraine because they do not advance facts or claims against the Russian Federation or do not arrogate themselves any other rights belonging to an applicant.[34] This argument is equally misplaced. As shown in the Russian Federation's Written Observations, the Declarants have a clear preconceived position regarding Russian Federation's alleged responsibility in the present case and essentially repeat Ukraine's arguments. In these circumstances, they can hardly be perceived as objective non-party interveners who genuinely wish to put forward their own interpretation of the Genocide Convention. Furthermore, due to the existing context, there is reason to doubt the Declarants' "vow" in their Declarations that they will limit themselves to the interpretation of the Genocide Convention without making incursions into other aspects of the case; indeed they already started doing so even before being allowed in the proceedings.[35]

[34] *See*, for example, Written Observations of Estonia, ¶12; Written Observations of Lithuania, ¶7; Written Observations of Portugal, ¶12; Written Observations of Slovakia, ¶28; Written Observations of Spain, ¶¶8, 12.

[35] *See* further Section G below.

41. Some of the Declarants refer to the *Legality of the Use of Force* cases and contend, superficially and in a curiously dismissive tone, that the striking difference between their interpretation of the Genocide Convention in those cases and the interpretation that they purport to put forward in the present proceedings does not concern the admissibility of their Declarations.[36] It ought to be recalled that the Declarants in the *Legality of the Use of Force* cases argued in essence that questions relating to the use of force do not fall within the scope of the Genocide Convention, and that the Court therefore did not have jurisdiction to hear the claims relating to the NATO bombings in Yugoslavia in 1999. In this case, the Declarants concerned seek to argue the *exact opposite* at the behest of Ukraine, in order to align themselves with the latter's position.

42. To recall, 11 of the Declarants (namely Belgium, Canada, Denmark, France, Germany, Italy, Poland, Portugal, Spain, the United Kingdom, the United States) have previously expressed before the Court positions that are opposite to what they currently hold in their Declarations. In particular:

(a) USA:

> "[t]hese NATO operations are the only current constraint on the actions of forces under the control of the Federal Republic of Yugoslavia in Kosovo. Provisional measures directed against NATO States could be misinterpreted as restricting or casting doubt on the propriety of those operations. The result of this could be to increase, and not to constrain, the risk of acts of genocide, and to make more difficult a diplomatic solution to the crisis."[37] [Emphasis added]

(b) Germany:

> "[i]t is a matter of common knowledge, as demonstrated in the Preliminary Objections… that the military operations against the FRY were undertaken in an attempt to rescue the Kosovo Albanians from being subjected to atrocities, including genocidal acts, and from being driven out of their ancestral lands."[38]

(c) Italy:

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[36] Written Observations of Belgium, ¶¶14-17; Written Observations of Italy, ¶20; Written Observations of Portugal, ¶13; Written Observations of Spain, ¶13; Written Observations of the United Kingdom, ¶21; Written Observations of the United States, ¶54.

[37] *Legality of Use of Force (Yugoslavia v. the United States of America)*, Provisional Measures, Verbatim Record of Public sitting of 11 May 1999, p. 25, ¶4.4.

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

"[i]t is accordingly clear that the Atlantic Alliance was compelled to intervene to prevent an ongoing genocide and has never had the least intention of embarking upon a genocide of its own. There can be no doubt that any interruption of the action by the ten NATO member States would cause immediate and irreparable harm to the Kosovar Albanian population. The Yugoslav special forces would pursue their actions with still greater intensity, with the result that, very shortly, the genocide of that population would be complete… A group of States, who - much against their will - have felt compelled to intervene against a State to halt genocide being carried out against a minority living on the territory of that State, are being called upon to defend themselves before this Court against the accusation, as defamatory as it is absurd, that they are themselves committing genocide. The Court will not be deceived by a diversionary tactic of this kind."[39] [Emphasis added]

(d) France:

"[t]he Court is…without jurisdiction to rule on the issues concerning alleged violations of the United Nations Charter and of certain principles and rules of international humanitarian law applicable in armed conflict, as those issues do not fall within the provisions of Article IX of the 1948 Genocide Convention."[40]

(e) Germany:

"[b]y enunciating in a long list all the breaches of rules of international law which all ten NATO member States impleaded before the Court have allegedly committed, [Yugoslavia] openly admits that even according to its own judgment the bulk of the dispute lies outside the confines of the Genocide Convention."[41]

(f) United Kingdom:

"[j]urisdiction under Article IX would not extend to disputes regarding alleged violation of other rules of international law, such as the provisions of the United Nations Charter relating to the use of force and the Geneva Conventions and Additional Protocols of 1997 relating to the conduct of armed conflict."[42]

(g) USA:

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

[40] *Legality of Use of Force (Serbia and Montenegro v. France)*, Preliminary Objections of France, p. 11, ¶14. *See* also *Legality of Use of Force (Serbia and Montenegro v. France)*, Provisional Measures, Verbatim Record of Public sitting of 10 May 1999, p. 13, ¶7.

[41] *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Preliminary Objections of Germany, p. 39, ¶3.28.

[42] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Preliminary Objections of the United Kingdom, p. 68, ¶5.02.

"[f]urther, the provisional measure requested by the Applicant would be inappropriate, even if a credible allegation of violation of the Convention had been made, since the measure requested calls for the cessation of all acts of force and is therefore clearly outside the scope of the Convention."[43]

(h) Poland's Prime Minister also supported the NATO bombing campaign as aimed to prevent genocide in Kosovo stating that "[t]here is no question that what is going in Kosovo is genocide."[44]

(i) Portugal:

"[t]he rights claimed by the Federal Republic of Yugoslavia are not rights arising out of the Genocide Convention, but are said to arise from other international agreements, such as the United Nations Charter, the Geneva Conventions, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc. – this claim fails because the alleged breach by the Portuguese Republic could not be the subject of a judgment in the exercise of the jurisdiction provided by Article IX of the Genocide Convention and, accordingly, could not be the subject of any provisional measures within a jurisdiction based on the said Convention."[45] "A dispute may indeed exist, but it relates to whether or not the international norms on the use of force, International Humanitarian Law and Security Council Resolution 1244 (1999) were respected. It does not relate to acts of genocide, and it is manifest that no such acts occurred."[46] [Emphasis added]

(j) Spain:

"I completely agree with the views expressed on this issue by several of my colleagues representing other States, who have argued that the Court should not accept the applicant State's reliance on this Convention as a basis for jurisdiction. Such reliance is clearly fraudulent and artificial and has no relevance to the present case or to the conduct of the Kingdom of Spain and its allies. The dispute here is not one about the application of the Convention, and it is evident that the request for provisional measures has not been conceived with the aim of safeguarding the rights protected by the Convention."[47] [Emphasis added]

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

[44] Buffalo News, *Polish Leader Voices Support for Bombing* (24 April 1999), available at: https://buffalonews.com/news/polish-leader-voicessupport-for-bombing/article_9316d186-aed3-5f6a-a1fe-8c6d10b8a18f.htm. *See* Written Observations of the Russian Federation, 17 October 2022, Annex 20.

45 *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Provisional Measures, Verbatim Record of Public sitting of 11 May 1999, p. 9, ¶2.1.2.2.4.

[46] *Legality of Use of Force (Serbia and Montenegro v. Portugal)*, Provisional Measures, Verbatim Record of Public sitting of 11 May 1999, p. 37, ¶125.

[47] *Legality of Use of Force (Yugoslavia v. Spain)*, Provisional Measures, Verbatim Record of Public sitting of 11 May 1999, CR 99/22 (translation), p. 9.

43. As explained in the Written Observations, the Declarants' inconsistent behaviour is further evidence that their interventions cannot be considered genuine because they do not intend to put forward their own views concerning the interpretation of the Genocide Convention. Instead, they reiterate Ukraine's arguments as part of a collective strategy to prejudice the Russian Federation's position. However, this radical change of position also constitutes abuse of process and is examined in more detail in Section C below.

44. Finally, the Declarants express a willingness to be grouped together as interveners for purposes of expedience and good administration of justice.[48] However, as noted in the Written Observations, it is hard to understand how the Declarants could know *ex ante* that they are willing to be grouped together with other Declarants, entirely at the discretion of the Court, without even knowing whether their individual interpretations of the Genocide Convention may actually coincide. The Russian Federation continues to be of the view that this willingness to be grouped together does nothing but confirm the collective strategy that pervades the Declarants' attempt to intervene, showing that they do not intend to put forward their own interpretation of the Genocide Convention, but simply to endorse whatever Ukraine may have to say in order to "tilt the balance" in its favour.

45. The Declarations must accordingly be declared inadmissible.

B. THE INTERVENTIONS WOULD IMPAIR THE EQUALITY OF THE PARTIES AND THE REQUIREMENTS OF GOOD ADMINISTRATION OF JUSTICE

46. In its Written Observations, the Russian Federation showed that intervention by the Declarants would be manifestly incompatible with the principle of equality of the parties and the requirements of good administration of justice. It is beyond any doubt that the 33 Declarants seek to intervene in order to advocate for Ukraine and advance arguments against the Russian Federation. Therefore, conferring upon them the status of intervener would result in an unwieldy procedure that would unduly burden the Russian Federation, undermine its capacity to properly discharge its duties before the Court, and severely impair equality of arms between the Parties. Furthermore, given their stated purpose, Ukraine and the Declarants should be considered as "parties in the same interest" in accordance with Article 31(5) of the Statute of the Court and the Court's jurisprudence.

[48] *See*, for example, Written Observations of Slovakia, ¶31.

Allowing the Declarants to intervene under Article 63 in these extraordinary circumstances would therefore also impair the equality of the Parties in terms of the composition of the Court and irretrievably upset the balance between them.[49]

47. The Declarants agree that the equality of the parties, the equality of arms and the requirements of good administration of justice are fundamental principles that must be protected by the Court. They suggest, however, that these principles are irrelevant in the context of Article 63, curiously adding that the Court is prohibited from "verifying the effects" of an intervention. Four main arguments are put forward in this regard:

(a) In *Whaling in the Antarctic*, the Court noted, with respect to New Zealand's intervention, that "an intervention cannot affect the equality between the Parties to the dispute";[50]

(b) All States have an individual right of intervention and the exercise of that right by one State cannot "arbitrarily" deprive other States from doing so;[51]

(c) An intervener under Article 63 does not in principle become a "party" to the proceedings and, consequently, they cannot be regarded as "parties in the same interest" with Ukraine under Article 31(5) of the Statute;[52]

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[49] Written Observations of the Russian Federation, 30 January 2023, ¶¶36-53; Written Observations of the Russian Federation, 16 December 2022, ¶¶31-48; Written Observations of the Russian Federation, 15 November 2022, ¶¶35-52; Written Observations of the Russian Federation, 17 October 2022, ¶¶32-49.

[50] Written Observations of Australia, ¶26; Written Observations of Austria, ¶20; Written Observations of Belgium, ¶18; Written Observations of Bulgaria, ¶19; Written Observations of Croatia, ¶17; Written Observations of Cyprus, ¶¶8-9; Written Observations of the Czech Republic, ¶8; Written Observations of Denmark, ¶13; Written Observations of Estonia, ¶14; Written Observations of Finland, ¶16; Written Observations of France, ¶39; Written Observations of Germany, ¶11; Written Observations of Greece, ¶13; Written Observations of Ireland, ¶16; Written Observations of Italy, ¶28; Written Observations of Latvia, ¶12; Written Observations of Liechtenstein, ¶9; Written Observations of Luxembourg, ¶17; Written Observations of Malta, ¶15; Written Observations of New Zealand, ¶¶23-24; Written Observations of Poland, ¶16; Written Observations of Portugal, ¶15; Written Observations of Slovakia, ¶36; Written Observations of Slovenia, ¶30; Written Observations of Spain, ¶15; Written Observations of Sweden, ¶11; Written Observations of the United Kingdom, ¶23; Written Observations of the United States, ¶57.

[51] Written Observations of Bulgaria, ¶20; Written Observations of Canada and the Netherlands, ¶24; Written Observations of Denmark, ¶17; Written Observations of Estonia, ¶18; Written Observations of Finland, ¶17; Written Observations of Liechtenstein, ¶11; Written Observations of Lithuania, ¶30; Written Observations of Luxembourg, ¶¶21-22; Written Observations of New Zealand, ¶26; Written Observations of Norway, ¶19; Written Observations of Portugal, ¶19; Written Observations of Slovakia, ¶45; Written Observations of Spain, ¶19; Written Observations of Sweden, ¶10; Written Observations of the United States, ¶58.

[52] Written Observations of Australia, ¶28; Written Observations of Denmark, ¶18; Written Observations of Estonia, ¶19; Written Observations of France, ¶41; Written Observations of Germany, ¶16; Written Observations of Greece, ¶13; Written Observations of Liechtenstein, ¶12; Written Observations of Luxembourg, ¶23; Written

(d) The Court is capable of ensuring the proper administration of justice through its power to conduct the proceedings.[53]

48. These arguments are incorrect as a matter of law and inapposite to the exceptional circumstances of the present case, which the Declarants again exhort the Court to simply ignore.

49. At the outset, it must be recalled that the equality of the parties and the good administration of justice are indeed fundamental principles of judicial procedure that all courts of law must uphold. As the late Judge Cançado Trindade explained, they may apply in different contexts within a proceeding.[54] The Declarants rightly do not seem to contest this. The Russian Federation also notes that, contrary to their views on the question of genuine intervention addressed in Section A above, the Declarants do not suggest that this objection to admissibility must be rejected because the matter is not expressly laid down in the Statute of the Court or Rules of Court.

50. As regards the finding in the *Whaling in the Antarctic* case that "an intervention cannot affect the equality between the Parties to the dispute",[55] the Court's order makes it clear that this is the case only insofar as an intervention properly falls within the provisions of Article 63 of the Statute.[56] As explained in Section A above, the interventions sought by the Declarants in the present case do not meet this requirement, because their object is not to provide the Court with an independent interpretation of the Genocide Convention, but rather to side with Ukraine acting as a *de facto* co-applicants against the Russian Federation in close coordination and cooperation. Such interventions cannot be

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Observations of New Zealand, ¶25; Written Observations of Norway, ¶22; Written Observations of Portugal, ¶20; Written Observations of Slovakia, ¶38; Written Observations of Spain, ¶20; Written Observations of the United Kingdom, ¶27.

[53] Written Observations of Australia, ¶32; Written Observations of Austria, ¶19; Written Observations of Croatia, ¶19; Written Observations of Cyprus, ¶10; Written Observations of Denmark, ¶19; Written Observations of Estonia, ¶20; Written Observations of Germany, ¶17; Written Observations of Greece, ¶14; Written Observations of Latvia, ¶13; Written Observations of Liechtenstein, ¶13; Written Observations of Luxembourg, ¶24; Written Observations of New Zealand, ¶27; Written Observations of Portugal, ¶21; Written Observations of Slovakia, ¶41; Written Observations of Slovenia, ¶31; Written Observations of Spain, ¶21; Written Observations of the United States, ¶60.

[54] *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. 179, ¶20.

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

[56] *Ibid.*

considered genuine and would most definitely impair the principles of equality of the parties, equality of arms, and good administration of justice.

51. However, even if the Court were to find that such a coordinated mass intervention is somehow compatible with Article 63 (*quod non*), the decision in *Whaling in the Antarctic* would still not be dispositive of the problem.[57] The Russian Federation recalls the Court's position that:

> "To the extent that the decisions contain findings of law, the Court will treat them as it treats all previous decisions: that is to say that, while those decisions are in no way binding on the Court, it will not depart from its settled jurisprudence unless it finds very particular reasons to do so".[58]

52. This *dictum* of the Court applies squarely in the present case. ***First***, the Court's decision in *Whaling in the Antarctic* may not be considered "settled jurisprudence": Japan did not oppose the admissibility of New Zealand's intervention and the Court was therefore not called upon to address this question in depth.

53. ***Second***, even if that decision could be somehow considered "settled jurisprudence", it is beyond doubt that there are "very particular reasons" for the Court to depart from it in the present context. As the Russian Federation explained in its Written Observations, the differences between the two cases are abysmal because in these proceedings 33 States and the Applicant are working in concert against the Respondent.[59] These extraordinary circumstances, which the Declarants recognise, are as clear as daylight to the world and it would be entirely inappropriate to ignore them. The Court must therefore analyse the present case on its own merits taking into account all the facts before it to determine whether the equality of the parties, the equality of arms, and the good administration of justice may be affected by allowing the 33 Declarants to intervene.

54. With respect to the question whether the Declarants and Ukraine may be considered "parties in the same interest", the Declarants adopt a narrow and incorrect approach towards Article 31(5) of the Statute. Contrary to what they appear to suggest, the States

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[57] *See* also Written Observations of Lithuania, ¶¶29-30.

[58] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008, p. 428, ¶53.

[59] Written Observations of the Russian Federation, 30 January 2023, ¶¶15-21, 49-50; Written Observations of the Russian Federation, 16 December 2022, ¶¶16-22, 44-45; Written Observations of the Russian Federation, 15 November 2022, ¶¶16-22, 48-49; Written Observations of the Russian Federation, 17 October 2022, ¶¶15-19, 44-45.

that are "in the same interest" do not necessarily need to be parties to the same proceedings. This is clear from the Court's practice, where Article 31(5) of the Statute of the Court has been applied in cases where the States concerned were considered to be "parties in the same interest" even if, from a formal standpoint, they were parties to two different sets of proceedings, as shown in the Written Observations of the Russian Federation.[60] The relevant test, following the Court's jurisprudence, is that "all Governments which, in proceedings before the Court, come to the same conclusion, must be held to be in the same interest".[61] This certainly applies to the Declarants and Ukraine in the present case, as their public statements and the Declarations make clear.

55. Various Declarants note in this regard that the Court's judges are in any event bound by their obligation to remain independent and impartial under Article 20 of the Statute. The Russian Federation has never contested this. The real issue revolves around whether Ukraine should be entitled to a judge *ad hoc* while there are already various judges that are nationals of the Declarants siding with Ukraine on the bench, and whether there exist conflicts of interest of which the Russian Federation may not at present be aware. Again, the Russian Federation has faith in the independence and impartiality of the judges, but these are legitimate questions that may be asked in light of the circumstances. The Russian Federation is entitled to request that a procedural balance between the Parties be maintained.

56. Some Declarants rely on cases where the Court addressed issues relating to the equality of access to the Court.[62] But these are irrelevant. One of the most serious problems that the attempt of a coordinated mass intervention raised in the present case is not about accessing the Court, but rather one of equality of arms. The Russian Federation cannot conceive how the latter could be credibly maintained in a *de facto* "34 v. 1" situation.

57. Some Declarants also suggest that "there is nothing unusual" in multiple third-party interventions, referring notably to the dispute settlement mechanism of the World Trade

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[60] Written Observations of the Russian Federation, 30 January 2023, ¶¶43-46; Written Observations of the Russian Federation, 16 December 2022, ¶¶38-41; Written Observations of the Russian Federation, 15 November 2022, ¶¶42-44; Written Observations of the Russian Federation, 17 October 2022, ¶¶39-41.

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

[62] *See*, for example, Written Observations of the United Kingdom, ¶¶29-30.

Organisation and the European Court of Human Rights.[63] This reference, however, does nothing but confirm the Russian Federation's position. As regards the former, the relevant provisions of the WTO Dispute Settlement Understanding allow for a type of intervention that goes well beyond what is allowed by Article 63 of the Statute, since they allow States that have a "substantial interest" to address *all* aspects of the particular dispute (law and facts), and States are not limited to providing their views on the interpretation of the relevant agreement – indeed, they are allowed to make "submissions".[64]

58. As regards ECtHR, 31 States have sought to intervene in four inter-State cases lodged by Ukraine against the Russian Federation.[65] Those 31 States are largely the same as those seeking to intervene in the present proceedings, which confirms to coordinated strategy between Ukraine and the Declarants to side against the Russian Federation not only before this Court, but in other judicial fora as well. Moreover, the proceedings before ECtHR in inter-state cases raise many concerns with respect to procedure and therefore cannot be regarded as a model for other jurisdictions. Even from a purely formal standpoint, intervention proceedings in ECtHR are fundamentally different from those in this Court: under Article 36(2) of the European Convention on Human Rights and Rule 44(3) of the ECtHR Rules of Court the authority to admit third party interventions is vested in the President of the Court, while the aim of the third-party intervention is not limited to construction of the Convention but extends to any issues related to the case.[66]

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[63] *See*, for example, the Written Observations of Latvia, ¶13.

[64] WTO Dispute Settlement Understanding, Article 17(4) ("Third parties which have notified the DSB of a substantial interest in the matter pursuant to paragraph 2 of Article 10 may make written submissions to, and be given an opportunity to be heard by, the Appellate Body"); Understanding on Rules and Procedures Governing the Settlement of Disputes, Articles 10(1) and 10(2) ("1. The interests of the parties to a dispute and those of other Members under a covered agreement at issue in the dispute shall be fully taken into account during the panel process"; "2. Any Member having a substantial interest in a matter before a panel and having notified its interest to the DSB (referred to in this Understanding as a 'third party') shall have an opportunity to be heard by the panel and to make written submissions to the panel. These submissions shall also be given to the parties to the dispute and shall be reflected in the panel report"). *See* also *United States – Import Prohibition of Certain Shrimp and Shrimp Products (India, Malaysia, Pakistan, Thailand v. the United States of America)*, Appellate Body Report No. WT/DS58/AB/R, 12 October 1998, ¶101.

[65] ECtHR, Press release No. 292 (2022) on Multiple third-party intervention requests in inter-State proceedings Ukraine v. Russia (X), 23 September 2022, available at: https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7442168-10192988&filename=Ukraine%20v.%20Russia%20.

[66] It should also be noted that according to Article 58(3) of the European Convention on Human Rights, "Any High Contracting Party which shall cease to be a member of the Council of Europe shall cease to be a Party to this Convention under the same conditions"; as the Russian Federation's membership in the Council of Europe has

59. As noted above, the Declarants also argue that they have an individual right to intervene under Article 63 and that the Court would act in an arbitrary manner if it denied them the status of intervener because other States decided to intervene as well. This is disingenuous, not least because the Declarants' decision to intervene was a collective one at the behest of Ukraine, as is clear from the facts. In the Russian Federation's view, what would be arbitrary is subjecting it to an exceedingly overwhelming procedure that prejudices its rights as Respondent.

60. Finally, the Declarants suggest that the Court can guarantee the proper administration of justice using its power to conduct the proceedings.[67] By advancing this argument, the Declarants appear to admit that the Russian Federation's concerns in light of the present extraordinary circumstances are not misplaced, and that the Court may well need to take special measures to try to address them, should the interventions be allowed. This alternative position is difficult to reconcile with the Declarants' previous argument that a coordinated mass intervention siding with the Applicant can never upset the balance between the parties to the case.

61. The Russian Federation has already provided extensive references to prominent publicists regarding the dangers of mass interventions for the integrity of Court proceedings.[68] In addition, the imminent negative effect of a mass influx of participants in Court proceedings has been discussed in various other contexts – such as *amicus curiae* participation, which has been likened to interventions under Article 63,[69] or "multiparty litigation". The conclusion has invariably been that such an influx, whatever its form or pretext, would endanger equality of the parties and other basic principles of justice. As

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been unlawfully terminated by the Committee of Ministers, in violation of that Organisation's Statute, on 16 March 2022, the Convention has ceased to operate with regard to the Russian Federation from the same date.

[67] *See* ¶47(d) above.

[68] Written Observations of the Russian Federation, 30 January 2023, ¶36.

[69] A. Wiik, AMICUS CURIAE BEFORE INTERNATIONAL COURTS AND TRIBUNALS. (Nomos, 2018), p. 159 ("Article 63 allows intervention by states '[w]henever the construction of the convention to which States other than those concerned in the case are parties is in question'. The latter form of intervention has been considered to be functionally akin to amicus curiae participation because of its purpose to promote and facilitate the uniform interpretation of multilateral conventions"); P. Palchetti, Opening the International Court of Justice to Third States: Intervention and Beyond, *Max Planck Yearbook of United Nations Law*, 2002, Vol. 6, p. 142 ("the form of intervention provided by Article 63 comes close to a participation as amicus curiae"). The analogy with *amicus curiae* is also drawn by J. J. Quintana, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE (Brill-Nijhoff, 2015), pp. 900, 905.

put by Professor P.W. Almeida with regard to the possibility of introducing the institution of *amicus curiae* into the Court's practice:

> "[T]here is indeed a fear that any expansion of procedural rules would open the flood-gates and expose the ICJ to an uncontrolled number of subjects, which could compromise its function of settling bilateral disputes by undermining party equality and the efficient management of proceedings. This could demotivate States from choosing the Court as a legitimate dispute settlement forum, thereby generating political friction or backlashes. The tension between the bilateral nature of ICJ proceedings and the necessary protection of community interests would also justify the overall internal reluctance to adapt ICJ Rules for 'multiparty litigation'."[70]

62. The Russian Federation is convinced that no matter what special measures may be taken by the Court to try and conduct the proceedings in a way that seeks to guarantee that at least some of the procedural rights of the Russian Federation are protected, such special measures may only mitigate, but not resolve, the problem. In particular, there would appear no solution to the inequality of the parties in terms of the composition of the Court that allowing the coordinated mass intervention in favour of Ukraine would create, as well as the self-evident inequality of arms created by such situation.

63. For these reasons, the Declarations must be declared inadmissible.

C. THE DECLARATIONS ARE INADMISSIBLE FOR CONSTITUTING AN ABUSE OF PROCESS

64. Several of the States seeking to intervene recognised in their Written Observations that the present case, in which no less than 33 States have unprecedentedly sought to intervene *en masse* in support of the Applicant, presents exceptional circumstances.[71] The Russian Federation has been arguing just that, and it continues to consider that the exceptional circumstances of the case warrant the dismissal by the Court of all the Declarations of Intervention on account of an abuse of process.

65. The Court explained that a claim concerning "[a]n abuse of process goes to the procedure before a court or tribunal and can be considered at the preliminary phase of [the]

[70] P. Wojcikiewicz Almeida, International Procedural Regulation in the Common Interest: The Role of Third-Party Intervention and *Amicus Curiae* before the ICJ, *The Law & Practice of International Courts and Tribunals*, 2019, Vol. 18, Issue 2, p. 187.

[71] *See*, for example, Written Observations of the United Kingdom, ¶9; Written Observations of Australia, ¶5; Written Observations of Denmark, ¶19; Written Observations of Slovenia, ¶31; Written Observations of Portugal, ¶21; Written Observations of Spain, ¶21; Written Observations of New Zealand, ¶27.

proceedings".[72] The present stage of the Court calls now for such consideration in order to safeguard the integrity of proceedings and ensure the fair administration of justice.

66. An abuse of process may be described as:

> "the use of procedural instruments and entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings (or some other related proceedings) of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted."[73]

67. The Declarations filed in the present proceedings may be described in these very terms, for they certainly have for their aim causing harm to another (the Russian Federation); depriving the proceedings of their proper purpose or outcome; and using the procedure of intervention in a manner wholly alien to that for which it has been introduced. The Written Observations submitted by those States seeking to intervene have only made all of that clearer.

68. The Russian Federation has previously pointed out[74] that the States that have filed a Declaration of Intervention have done so pursuant to a stated intention of "support[ing] Ukraine in its efforts before the ICJ".[75] Some of these States have revealed in this vein that they are intervening "at the express request of the Ukrainian side", and added that they intended to work "hand in hand" with Ukraine's legal team.[76] Ukraine itself "express[ed] sincere gratitude to those countries who decided to stand beside [it] in the World Court", noting that they and Ukraine will "continue working closely on the case".[77]

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[72] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018, p. 336, ¶150.

[73] R. Kolb, *General Principles of Procedural Law* in A. Zimmermann, K. Oellers-Frahm et al. *(eds.)*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), pp. 998-999.

[74] *See* Written Observations of the Russian Federation, 17 October 2022, ¶15.

[75] *See* Joint statement on Ukraine's application against Russia at the International Court of Justice, 20 May 2022, available at: https://www.auswaertiges-amt.de/en/newsroom/news/-/2532254. *See* Written Observations of the Russian Federation, 15 November 2022, Annex 1. *See* also Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, 13 July 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4509. *See* Written Observations of the Russian Federation, 15 November 2022, Annex 2.

[76] *See* Written Observations of the Russian Federation, 17 October 2022, ¶18.

[77] UN Web TV, General Assembly: 21st plenary meeting, 77th session, 27 October 2022 (Transcript). *See* Written Observations of the Russian Federation, 15 November 2022, Annex 17.

69. Thus, those States wishing to intervene clearly do not seek in good faith to put before the Court their considered and/or independent positions as to the proper construction of the Genocide Convention in question. Instead, the present case is one where the filing of declarations of intervention has been weaponised in accordance with a collective strategy of supporting the Applicant against the Respondent, in close coordination and cooperation with the Applicant itself, and as part of a broader hostile campaign against the Respondent. The declarant States would have the Court turn a blind eye to this reality.

70. The insistence of those States seeking to intervene that their right to do so is "unqualified",[78] that the Court has no discretion in the matter,[79] or that "the exercise of a right cannot be undertaken in bad faith",[80] speaks volumes — and surely cannot be right. ***First***, the notion of abuse of process concerns precisely the existence of a right, but one that is being misused: it serves to bar States from pursuing a procedural course of action that is otherwise open to them under the rules of the court or tribunal in question.[81] ***Second***, the Court undoubtedly has the inherent power — and indeed the obligation — to protect the integrity of the proceedings by preventing such misuse. A narrow and formalist approach to Article 63 of the Statute, as advocated in the Written Observation of the States seeking to intervene, is directly opposed to both these basic points.

71. The argument by those States seeking to intervene that the issue before the Court "is not one of seeking to determine a State's subjective intention",[82] is likewise very telling, and is equally bound to fail. Treaties — including the Statute of the Court— must be

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[78] Written Observations of Croatia, ¶21.

[79] Written Observations of Austria, ¶3. *See* also, to the same effect, Written Observations of Croatia, ¶9; Written Observations of Canada and the Netherlands, ¶10; Written Observations of Germany, ¶¶7-8; Written Observations of Finland, ¶8; Written Observations of Estonia, ¶7; Written Observations of Denmark, ¶¶6, 9; Written Observations of Italy, ¶11; Written Observations of Norway, ¶7; Written Observations of Slovenia, ¶20; Written Observations of Portugal, ¶6; Written Observations of Slovakia, ¶26; Written Observations of Poland, ¶6; Written Observations of Spain, ¶¶6-7; Written Observations of the United States, ¶15.

[80] Written Observations of Malta, ¶11. *See*, to the same effect, Written Observations of Slovenia, ¶35.

[81] *See* also A. D. Mitchell, T. Malone, Abuse of Process in Inter-State Dispute Resolution, *Max Planck Encyclopedia of International Procedural Law* (2018).

[82] Written Observations of the United Kingdom, ¶17. *See* also Written Observations of Australia, ¶17; Written Observations of Bulgaria, ¶14; Written Observations of the Czech Republic, ¶6; Written Observations of Croatia, ¶15; Written Observations of Canada and the Netherlands, ¶¶20-23; Written Observations of Finland, ¶¶14-15; Written Observations of Estonia, ¶¶11-12; Written Observations of Greece, ¶10; Written Observations of Latvia, ¶7; Written Observations of Lithuania, ¶11; Written Observations of Italy, ¶22; Written Observations of Sweden, ¶9; Written Observations of Slovenia, ¶37; Written Observations of New Zealand, ¶8; Written Observations of the United States, ¶¶52-52.

performed in good faith,[83] and article 63 of the Statute, and any procedural right it may confer, are no exception. It follows that recourse to Article 63 is clearly impermissible where good faith is found to be absent, as it is in the present case.

72. The Written Observations of States seeking to intervene confirm, moreover, that even if some of these States continue to deny that coordinated mass intervention would impair the good administration of justice,[84] others do concede that "procedural fairness and the efficient resolution of the case" may well be compromised if the Declarations were admitted.[85] For these latter States, the solution to this grave wrong would lie in the ability of the Court to organise the proceedings as it deems appropriate; yet this approach cannot be accepted. Safeguarding the fundamental principle of equality of arms would not be achieved in the present circumstances by mere procedural adjustments; these would only highlight the prejudice caused to the Respondent.

73. The present circumstances are indeed such that the concerted effort on the part of those States wishing to intervene has the malevolent intent — and inevitable effect — of jeopardizing the integrity as well as smooth conduct of the proceedings before the Court. The interventions seek to subvert the purposes of Article 63 of the Statute of the Court to obtain an illegitimate advantage for the Applicant, and to compromise the equal treatment of the Parties. This clearly constitutes an abuse of process, and ought to be rejected by the Court as such.

74. While the Court has made it clear (at least in relation to a claim based on a valid title of jurisdiction) that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process",[86] the

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[83] *See* also Vienna Convention on the Law of Treaties,1969, Article 26.

[84] *See,* for example, Written Observations of Ireland, ¶16; Written Observations of Latvia, ¶11 (which is somewhat inconsistent with ¶13); Written Observations of Lithuania, ¶¶29, 32.

[85] Written Observations of Croatia, ¶19; Written Observations of the Czech Republic, ¶9; Written Observations of Germany, ¶17; Written Observations of Estonia, ¶20; Written Observations of Greece, ¶14; Written Observations of Denmark, ¶19; Written Observations of Lichtenstein, ¶13; Written Observations of Slovenia, ¶31; Written Observations of Portugal (13 February 2023), ¶21; Written Observations of Slovakia, ¶41; Written Observations of Spain, ¶21; Written Observations of New Zealand, ¶27.

[86] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment of 6 June 2018, I.C.J. Reports 2018, p. 336, ¶150. *See* also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary objections, Judgment of 22 July 2022, p. 21, ¶49; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment of 3 February 2021,

Russian Federation reiterates that the present case clearly presents such exceptional circumstances, as demonstrated above. It follows that the Court should find the Declarations to be inadmissible.

D. INTERVENTION CANNOT BE EXERCISED AT THE PRELIMINARY OBJECTIONS STAGE

75. The Court cannot decide on the admissibility of the Declarations at the preliminary stage of the proceedings until its jurisdiction is established (**i**) and the subject-matter of the case is determined (**ii**). For this reason, too, the Declarations are inadmissible.

i. The Court cannot decide on the admissibility of the Declarations at the preliminary stage of the proceedings

a. Intervention is an incidental proceeding that presupposes the existence of jurisdiction and the admissibility of an application

76. In *Haya de la Torre,* the Court declared that:

> "[e]very intervention is incidental to the proceedings in a case."[87]

77. In *Land, Island and Maritime Frontier Dispute*, the Court reiterated this position, adding that the finding of the Court in *Haya de la Torre* "… applies equally whether the intervention is based upon Article 62 or Article 63 of the Statute".[88]

78. The incidental character of an intervention is defined in relation to the main procedure. Therefore, except for the case of provisional measures, there are no incidental proceedings if there is no main case, and the latter does not exist until the Court determines its jurisdiction and the admissibility of the application:

> "[i]t is noteworthy that intervention is dealt with in Chapter III of the Court's Statute, which is headed "Procedure". This approach was adopted by the Court also when it drew up and revised its Rules of Court, where intervention appears in Section D of the Rules, headed "Incidental Proceedings". Incidental proceedings by definition must be those which are incidental to a case which is already before the Court or Chamber. An incidental proceeding

I.C.J. Reports 2021, p. 36, ¶93; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment of 13 February 2019, I.C.J. Reports 2019, pp. 42-43, ¶113; *Jadhav (India v. Pakistan)*, Judgment of 17 July 2019, I.C.J. Reports 2019, p. 433, ¶49.

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

[88] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening),* Application to Intervene, Order of 28 February 1990, I.C.J. Reports 1990, p. 4.

cannot be one which transforms that case into a different case with different parties."[89] [Emphasis added]

79. These statements of the Court indicate very clearly that "a case" must be understood as the main case, *i.e*. the case on the merits. As Judge Ago explained:

> "[w]ith regard in particular to intervention, counsel for Italy have also asserted that Articles 62 and 63 themselves confer upon the Court "a sufficient title of jurisdiction" to deal with this procedural incident. For my own part, I would go further; I think it should be stated more clearly - and I stress this point - that, in order to deal with an intervention, the Court does not need to be provided with a special title of jurisdiction, even by the articles in question. It is merely bound to observe the rules which govern its conduct in the supposed circumstances; *all it does is to act on the basis of the jurisdiction conferred upon it in connection with the main case*, exercising in this context its functions as laid down in the Statute. Moreover, as has been observed, this is also true for other examples of incidental proceedings, such as those concerning the indication of provisional measures (Article 41 of the Statute) or the revision of the judgment following the discovery of some new fact (ibid., Art. 61)."[90]

80. This is plainly confirmed by the Court practice in the *Nuclear Tests (Request for Examination)* Case, where the Court held a hearing on both New Zealand's Application and declarations of intervention filed by Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia, and dismissed both the Application and the declarations together. The Court noted that since the main proceedings had been removed from the Court's list, there was no point in addressing interventions.[91] That means that the Court should first satisfy itself in regard to the existence of the main case before authorising an intervention. In the present case, the Russian Federation objected to the jurisdiction of the Court and the admissibility of Ukraine's application, and it has strong reason to believe that the Court will uphold its objections.

81. In the same vein, in the *Haya de la Torre* case, where Cuba, as a party to the Havana Convention of 1928, filed a declaration of intervention, the Court stressed that "the right

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[89] *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras: Nicaragua intervening)*, Application to Intervene, Judgment of 13 September 1990, I.C.J. Reports 1990, p. 134, ¶98.

[90] *Continental Shelf (Libyan Arab Jamahiriya v. Malta),* Application to Intervene, Judgment of 21 March 1984, I.C.J. Reports 1984, Dissenting Opinion of Judge Ago, p. 120.

[91] *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*, Order of 22 September 1995, I.C.J. Reports 1995, pp. 306-307, ¶¶67-68. *See* also CR 95/21, Public Sitting of 12 September 1995 (Sir Arthur Watts), p. 50 ("… there being no "case" or "proceedings", there is no occasion for the application of Articles 62 and 63 of the Statute relating to intervention by other States").

to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case".[92] "[T]he point of interpretation which is in issue in the proceedings" is not yet identified in this case; it will only be identified by the judgment of the Court on the preliminary objections.

b. The Court's decision on preliminary matters does not justify the intervention under Article 63 of the Statute of the Court

82. The *raison d'être* of Article 63, as laid down in the *travaux* of that article, is to provide a consistent and harmonised interpretation of the multilateral treaties:

> "[w]here collective treaties are concerned, general interpretations can thus be obtained very quickly, which harmonise with the character of the Convention."[93]

83. As an authoritative commentary on the Statute highlights, "Article 63 predicates that the Court will interpret treaties consistently and, in this context, a State that exercises its right of intervention is probably in no different a position from other party to the treaty."[94] This consistency and harmony could only have meaning with the interpretation of the substantive provisions of a convention. The jurisdictional clause can only be interpreted with respect to the facts (like the existence of the dispute and the exhaustion of the preconditions for the seisin of the Court) that are exclusively related to the existence or not of a dispute between the parties to the case. The Court's decision on these points cannot contribute to the harmonisation of the convention.

84. The "construction of a convention" that would contribute to the harmonisation of the convention, justifying the intervention under Article 63, is done at the merits stage of the case. For the purpose of the establishment of its jurisdiction, the Court must verify if the facts alleged by the applicant "are capable of falling within the scope"[95] of the invoked provision(s) of the treaty. This determination cannot affect the rights and obligations of other States that are not parties to the case.

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[92] *Haya de la Torre (Colombia v. Peru),* Judgment of 13 June 1951, I.C.J. Reports 1951, pp. 76-77.

[93] Permanent Court of International Justice, League of Nations, Advisory Committee of Jurists, Procès-Verbaux of the Proceedings of the Committee, 16 June – 24 July 1920, p. 746.

[94] A. Miron, C. Chinkin, *Article 63* in A. Zimmermann, C. Tams et al. (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, (3rd ed., OUP, 2019), p. 1770, ¶64.

[95] *Oil Platforms (Islamic Republic of Iran v. United States of America),* Judgment of 6 November 2003, I.C.J. Reports 2003, p. 174, ¶22.

85. The distinction between the compromissory clause and the substantive provisions of the Genocide Convention is well rooted in the practice of the Court. In its Advisory Opinion on *Reservation to the Genocide Convention*, the Court declared that the "object and purpose of the Convention … limit both the freedom of making reservations and that of objecting to them",[96] while in the *Armed Activities* case, it considered that:

> "Rwanda's reservation to Article IX of the Genocide Convention bears on the jurisdiction of the Court, and does not affect substantive obligations relating to acts of genocide themselves under that Convention. In the circumstances of the present case, the Court cannot conclude that the reservation of Rwanda in question, which is meant to exclude a particular method of settling a dispute relating to the interpretation, application or fulfilment of the Convention, is to be regarded as being incompatible with the object and purpose of the Convention."[97]

86. In the *Free Zones* case, "States Parties to the Treaty of Versailles were not specially notified under Article 63 of the Statute, which was considered as inapplicable in this case; but their attention was drawn to the right which they no doubt possessed to inform the Court, should they wish to intervene in accordance with the said Article, in which case it would rest with the Court to decide."[98] [Emphasis added] For Rosenne, "this suggests that even where the 'construction of a convention to which States other than those concerned in the case are parties is in question', the Court might have regard not merely to the convention as a whole, but to the particular provision or provisions in question; and if those provisions do not concern States which are not parties to the litigation, it will prima facie assume that they are not entitled to file a declaration of intervention."[99] Needless to emphasise, the compromissory clause for its procedural nature[100] does not concern States which are not parties to the litigation and they are not entitled to file a declaration of intervention.

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[96] *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide,* Advisory Opinion of 28 May 1951, I.C.J. Reports 1951, p. 24.

[97] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Judgment of 3 February 2006, I.C.J. Reports 2006, p. 32, ¶67.

[98] *Free Zones of Upper Savoy and District of Gex (France v. Switzerland),* Judgment of 7 June 1932, 1932 PCIJ Series A/B No. 46, p. 100, ¶5.

[99] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1448.

[100] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v. Rwanda),* Judgment of 3 February 2006, I.C.J. Reports 2006, p. 32, ¶67.

c. Established practice of the Court militates against the admissibility of the Declarations at the preliminary stage of the proceedings

87. In its Written Observations, the Russian Federation demonstrated that the Court has never allowed intervention at the preliminary stage of the proceedings in which its jurisdiction or the admissibility of an application was challenged. In particular:

(a) In *Military and Paramilitary Activities*, the Court found El Salvador's intervention inadmissible inasmuch as it related to the phase of the proceedings in which the Court was to consider the United States' preliminary objections against Nicaragua's application.[101]

(b) In *Nuclear Tests*, the Court deferred the consideration of Fiji's application for intervention until the Court had considered France's preliminary objections to jurisdiction and admissibility of New Zealand's application.[102] While Fiji invoked Article 62 of the Statute, as confirmed by some scholars, this difference is immaterial; this case is a relevant authority for interventions under Article 63 of the Statute as well.[103]

(c) In *Nuclear Tests (Request for Examination)*, the Court did not consider the declarations of intervention filed by Samoa, the Solomon Islands, the Marshall Islands, and the Federated States of Micronesia under Articles 62 and 63 of the Statute before the Court had ruled on the admissibility of New Zealand's original request for an examination of the situation.[104]

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[101] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C.J. Reports 1984, p. 216, ¶¶2-3, (ii).

[102] *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p. 325, ¶¶1, 3.

[103] *See* J. Sztucki, Intervention under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The Salvadoran Incident, *American Journal of International Law*, 1985, Vol. 79, Issue 4, pp. 1012-1013.

[104] *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)*, Order of 22 September 1995, I.C.J. Reports 1995, pp. 306-307, ¶¶67-68.

88. In the three cases where the Court and its predecessor allowed intervention under Article 63 of the Statute, *i.e. Haya de la Torre,*[105] *Whaling in the Antarctic,*[106] and *Wimbledon,*[107] they did so within the main phase of the proceedings because the jurisdiction was not challenged in a separate stage.

89. Thus, the Russian Federation established that Court's practice is consistent in not allowing interventions at the jurisdictional phase of the proceedings and believes that in this case the Court has no reason to depart from its jurisprudence.[108]

90. In their Written Observations, the Declarants disagree and mostly maintain that the Russian Federation misrepresents the Court's practice on the matter. For those States, in the *Military and Paramilitary Activity* case, El Salvador's declaration was declared inadmissible not because declarations of intervention cannot, as a matter of principle, address issues of a preliminary nature, but because it was directed either solely or mainly to the merits of the case.[109] This is to ignore the very clear and plain text of the Court's Order on the admissibility of El Salvador's Declaration of intervention. The relevant part of the Court's Order reads as follows:

> "[w]hereas the Declaration of Intervention of the Republic of El Salvador, which relates to the present phase of the proceedings, addresses itself also in effect to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute between

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

[106] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening),* Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 10, ¶23.

[107] *Case of the S.S. "Wimbledon",* Question of Intervention by Poland, Judgment of 28 June 1923, PCIJ Series A No. 1, pp. 12-13. *Case of the S.S. "Wimbledon"* (*United Kingdom et al. v. Germany*), Judgment of 17 August 1923, PCIJ Series A No. 1, p. 17-18.

[108] *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea intervening)*, Preliminary Objections, Judgment of 11 June 1998, I.C.J. Reports 1998, p. 292, ¶28 ("[t]he real question is whether, in this case, there is cause not to follow the reasoning and conclusions of earlier cases"). *See* also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Preliminary Objections, Judgment of 18 November 2008, I.C.J. Reports 2008, pp. 428-429, 437, ¶¶53, 54, 76 ("it will not depart from its settled jurisprudence unless it finds very particular reasons to do so"), (or "compelling reasons" to do so); Y. Shany, ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS (OUP, 2014), p. 82 ("The interpretation and application of jurisdictional authorizations and conditions delineate the general powers of the court, reflecting a category-based designation by the mandate providers of future cases for adjudication. Such a construction leaves no room for treating differently similar cases that raise essentially identical jurisdictional problems").

[109] Written Observations of Italy, ¶40; Written Observations of Croatia, ¶22; Written Observations of Cyprus, ¶15; Written Observations of Malta, ¶25; Written Observations of New Zealand, ¶36(a); Written Observations of Luxembourg, ¶¶30, 32; Written Observations of Portugal, ¶27; Written Observations of Poland, ¶24; Written Observations of Greece, ¶24.

> Nicaragua and the United States of America and that Nicaragua's Application against the United States of America in respect of that dispute is admissible;
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> …
>
> By fourteen votes to one,
>
> *Decides* that the declaration of intervention of the Republic of El Salvador *is inadmissible inasmuch as it relates to the current phase of the proceedings* brought by Nicaragua against the United States of America."[110] [Emphasis added]

91. The Court thus clearly accepted that El Salvador's declaration of intervention did, at least in part, relate to the jurisdictional stage of the proceedings; and yet the Court in no uncertain terms denied the admission of this declaration at the jurisdictional stage – regardless of the "degree" to which the declaration was related to either stage ("solely", "mainly" or in some other measure). This proves that for the Court, presence of material ostensibly related to matters of jurisdiction or admissibility does not provide ground for admission of a declaration at the jurisdictional stage.

92. This is confirmed by several opinions of the Judges, which the Declarants neglect to mention, even though the Russian Federation has already referred to them:

(a) Judge Sette-Camara indicated that the intervention was "untimely, because of the fact that the Court was entertaining the jurisdictional phase of the proceedings."[111]

(b) Judge Lachs noted that "there was no adequate reason to grant El Salvador the right of intervention at the jurisdictional stage."[112]

(c) Judge Ni called the intervention "premature".[113]

93. It is also confirmed by analysing the Declaration of El Salvador itself, which does contain several passages which, at least on their face, relate to issues of jurisdiction or admissibility, such as the following:

> "…El Salvador considers, and this is a reason for intervening in the case of Nicaragua v. the United States, that all these multilateral treaties and

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[110] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of the Republic of El Salvador, Order of 4 October 1984, I.C.J. Reports 1984, p. 216.

[111] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment of 27 June 1986, I.C.J. Reports 1986, Separate Opinion of Judge Sette-Camara, p. 195.

[112] *Ibid.*, Separate Opinion of Judge Lachs, p. 171.

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

> conventions constitute the lawful mechanisms for the resolution of conflicts, having priority over the assumption of jurisdiction by the International Court of Justice. …
>
> In the opinion of El Salvador, therefore, it is not possible for the Court to adjudicate Nicaragua's claims against the United States without determining the legitimacy or the legality of any armed action in which Nicaragua claims the United States has engaged and, hence, without determining the rights of El Salvador and the United States to engage in collective actions of legitimate defence. Nicaragua's claims against the United States are directly interrelated with El Salvador's claims against Nicaragua.
>
> Moreover, the Application of Nicaragua is inadmissible inasmuch as it is based on a fallacy, which is to say that El Salvador is not being affected by Nicaragua's actions in exporting subversion.
>
> Any case against the United States based on the aid provided by that nation at El Salvador's express request, in order to exercise the legitimate act of self-defence, cannot be carried out without involving some adjudication, acknowledgment, or attribution of the rights which any nation has under Article 51 of the United Nations Charter to act collectively in legitimate defence. This makes inadmissible jurisdictional action by the Court in the absence of the participation of Central America and specifically El Salvador, in whose absence the Court lacks jurisdiction.
>
> …In this intervention, presented by El Salvador on the basis of Article 63 of the Statute of the Court and Article 82 of the Rules of Court, El Salvador places on record its valid points of view regarding the interventionist attitude of Nicaragua and regarding the Court's lack of jurisdiction over this case and its inadmissibility. El Salvador reserves its other rights under the Statute of the Court and the Rules of Court to make its views known and to assert its interests, including the right to file written pleadings in support of El Salvador's intervention in this case."[114]

94. In light of this, it cannot be said to have been addressed solely to matters of the merits, as some of the Declarants claim.

95. It is plain that the "hybrid Declarations" (that is, those which cover Article IX as well as other – substantive – provisions of the Convention) while ostensibly related to the jurisdictional phase of the proceedings still presuppose the jurisdiction of the Court and admissibility of the Application.[115] Therefore, there is no reason for the Court to decide other than it previously did and admit them.

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[114] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention, Declaration of Intervention of the Republic of El Salvador, p. 14, 18.

[115] While, as noted previously, it does not have particular bearing on the matter of general inadmissibility of interventions at the jurisdictional stage, it may be noted that Declarations in the present case are, for the most part, mainly addressed to issues of the merits.

96. The Declarants' reliance on the joint separate opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharrière does not assist them.[116] These Judges explained that El Salvador's Declaration was inadmissible "because [they] 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 between Nicaragua and the United States; nor of the construction of such provision or provisions for which is contends", as required by Article *82 of the Rules of Court.*[117] *However, the mere fact that the Judges appended a separate* opinion to the decision of the Court shows that, ***first***, the majority thought differently and rejected El Salvador's Declaration on grounds other than the absence of Article 82 requirements (as otherwise there would have been no need for a separate opinion); ***second***, that even these five Judges did not in principle disagree with the majority's decision (as otherwise their opinion would have been dissenting).

97. ***Third***, as pointed out in the dissenting opinion of Judge Schwebel, on which the Declarants also heavily rely:

> "[h]owever, on 10 September 1984, El Salvador submitted to the Registrar a letter which amplified its Declaration in clearer terms, which conformed to the essential requirements of Article 82, paragraph 2, of the Rules. … It is accordingly clear that El Salvador sought to intervene in the jurisdictional phase of the proceedings between Nicaragua and the United States to argue that a proper construction of Article 36 of the Statute of the Court, and of Articles 39, 51 and 52 of the Charter, debar the Court from addressing the merits of Nicaragua's claims. Its argument appears to be more addressed to the admissibility of the claims of Nicaragua than to the Court's jurisdiction over them."[118]

98. Nevertheless, the Court's decision was clear – El Salvador's intervention was not allowed, El Salvador's elucidations notwithstanding. Therefore, even when matters of jurisdiction and admissibility have been laid out distinctly in a declaration of intervention, it is still inappropriate to admit it at the jurisdictional stage.

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[116] Written Observations of Italy, ¶41; Written Observations of Croatia, ¶23; Written Observations of Canada and the Netherlands, ¶32; Written Observations of Cyprus, ¶16; Written Observations of New Zealand, ¶36(b); Written Observations of Luxembourg, ¶30; Written Observations of Portugal, ¶27; Written Observations of Greece, ¶24.

[117] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of the Republic of El Salvador, Order of 4 October 1984, I.C.J. Reports 1986, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, p. 219, ¶3.

[118] *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, pp. 225-226.

99. The suggestion that the Russian Federation is not assisted by the fact that in *Nuclear Tests* case the Court decided to defer consideration of the application of Fiji to intervene because "Fiji's application to intervene concerned issues exclusively related to the merits",[119] even taken at its face value, approves Russian argument that the Court cannot admit hybrid declarations at the preliminary stage of the proceedings.

100. Some States' contention that Article 82 does not distinguish between jurisdiction and merits and requires States to file their declarations "as soon as possible" before opening of the oral proceedings,[120] is not convincing. As the Court's established practice described above indicates very clearly, the "oral proceedings" in the context of this article is one related to the merits of the case, and the expression "as soon as possible" should be understood with reference to that stage of the proceedings. Furthermore, "filing" of declarations is clearly distinct from their "admission".

101. Some Declarants argue that Article 63 does not limit the right of intervention to a specific phase of the proceedings. Rather, it establishes that right "[w]henever the construction of a convention … is in question".[121] This contention is of no assistance for the purpose of justifying a premature intervention. "Whenever construction is in question" is not equal to "whenever" within the proceedings. This term should be understood in the light of the Court's consistent practice that authorises the intervention after deciding on preliminary objections. It is only at the merits phase that the construction of a convention is in question, and the intervention can be authorised "whenever" within the proceedings on the merits.

102. Some Declarants insist on the *erga omnes* character of the obligations under the Convention to justify their request for intervention. France, for exemple, explained that "l'intérêt d'ordre juridique des Etats intervenants existe tant pour les interventions

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[119] Written Observations of Ireland, ¶19; Written Observations of Croatia, ¶25; Written Observations of New Zealand, ¶38; Written Observations of Luxembourg, ¶33; Written Observations of Portugal, ¶29

[120] Written Observations of Poland, ¶20; Written Observations of Denmark, ¶22; Written Observations of Greece, ¶21; Written Observations of Spain, ¶24; Written Observations of Liechtenstein, ¶15; Written Observations of Norway, ¶26; Written Observations of Portugal, ¶24; Written Observations of Romania, ¶¶31-33; Written Observations of Latvia, ¶21; Written Observations of the United Kingdom, ¶34(d)-34(e); Written Observations of Malta, ¶24; Written Observations of Luxembourg, ¶27; Written Observations of Poland, ¶20.

[121] Written Observations of Cyprus, ¶14; Written Observations of Liechtenstein, ¶18; Written Observations of Malta, ¶23; Written Observations of New Zealand, ¶41; Written Observations of Norway, ¶25; Written Observations of Poland, ¶20; Written Observations of Greece, ¶21.

effectuées dans le cadre de l'article 62 que dans celles de l'article 63 du Statut. Seulement, si, pour les premières, cet intérêt doit être démontré, pour les secondes il se trouve être 'présumé de manière irréfragable' en raison de la qualité de Partie à la Convention de l'Etat intervenant."[122] It is unclear what is the "presumed" interest of the Declarants at this stage of the proceedings is. It must be stressed once more, as explained above, that the right of intervention under Article 63 is granted to States for the purpose of ensuring the harmonious interpretation of the substantive provisions of the convention, not to support the existence or non-existence of the Court's jurisdiction in a case

103. It follows that all the Declarations filed in the present case may not be allowed at the preliminary objections phase of the proceedings.

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

104. According to Article 82 of the Rules of the Court:

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

105. As explained above, until the Court decides on the preliminary objections raised by the Russian Federation, no State can identify the particular provisions of the Genocide Convention the construction of which would be in question.

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

> "[e]very intervention is incidental to the proceedings in a case; it follows that a declaration filed as an intervention only acquired that character, in law, if it actually relates to the subject-matter of the pending proceedings."[123]

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

> "it [the subject-matter of the present case] concerns <u>a question</u> - the surrender of Haya de la Torre to the Peruvian authorities - <u>which in the previous case</u>

[122] Written Observations of France, ¶28.

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

> was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the abovementioned Judgment."[124] [Emphasis added]

When applying this principle, the Court stated:

> "in these circumstances, the only point which it is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention in regard to the question whether Colombia is under an obligation to surrender the refugee to the Peruvian authorities."[125] [Emphasis added]

108. Thus, Cuba's right to intervene did not concern just a general interpretation of a convention invoked in *Haya de la Torre*, but was limited by the Court to the interpretation of the specific provisions that were in dispute between the parties. In turn, the Court determined the subject-matter of the proceedings by examining the submissions of the Parties[126] (in that case the existence of a dispute, the jurisdiction of the Court, and the admissibility of the Application were not challenged in a separate phase of the proceedings).

109. It follows that the requirement of a "construction … in question" means that a State can intervene in a case only if it seeks to interpret a provision of the convention over which there is a dispute between the Parties as to their interpretation in that case as established by the Court. The Declarants presuppose the existence of the dispute between Ukraine and Russian Federation in this case. For example, Poland pointed out "It is evident from the Russian officials' statements that there *prima facie* exists a dispute".[127] France argued that "[i]t is apparent from the Parties' exchange that there exists a dispute between the

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

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

[126] *Haya de la Torre (Colombia v. Peru)*, Oral Proceedings, Verbatim Record of Public sitting of 15 May 1951, pp. 141-142 ("Mais les conclusions prises par la Colombie le 13 décembre 1950 cessent d'être valables le jour où ce gouvernement, le 7 février 1951, prend dans son Mémoire de nouvelles conclusions qui ne font plus état de la Convention de La Havane … Et alors, Messieurs, quelle peut être dans ces conditions la valeur d'une déclaration d'intervention qui est faite le 15 février 1951, et qui est fondée sur la participation à une convention que la Colombie, c'est-à-dire la Partie même qui a provoqué cette déclaration, a d'ores et déjà, huit jours avant l'émission de la déclaration d'intervention, éliminée du corps des conclusions sur lesquelles elle demande à la Cour qu'il lui plaise de statuer?" ("But the submissions made by Colombia on December 11, 1950, ceased to be valid on the day when that government, on February 7, 1951, included in its Memorial new submissions which no longer referred to the Havana Convention. … And then, Gentlemen, what can be in these conditions the value of a declaration of intervention which is made on February 15, 1951, and which is based on the participation in a convention that Colombia, that is to say the very party which provoked this declaration, has already, eight days before the issuance of the declaration of intervention, been eliminated from the body of the conclusions on which it asks the Court to rule?").

[127] Written Observations of France, ¶26-27.

Parties".[128] It is plain that the Court cannot allow the intervention on the basis of mere speculation of the intervener regarding the basic requirements of the intervention.

110. Some Declarants recall the text of Article 63 to highlight that the role of the Court is restricted to verifying whether the conditions enumerated in Article 82(2) of the Rules of Court are complied with.[129] However, the case-law shows clearly that the approach of the Court on the matter of intervention under Article 63 is not as formalistic as these Declarants propose, and its role is not as limited as they suggest. The Court has the power to dismiss a declaration of intervention filed on the basis of Article 63 if it is premature (*Military and Paramilitary Activity*) or when the main case is to be removed from the List (*Nuclear Tests (Request for Examination)*), or to defer the consideration of intervention until it has pronounced upon the question of jurisdiction (*Nuclear Tests*).

111. Certain Declarants point out that if they are admitted as interveners, then they will be furnished with copies of the pleadings and will be able to submit their fully informed written Observations on the subject-matter of intervention at the relevant procedural stage.[130] This is further proof that intervention at the preliminary stage of the proceedings is premature, and should be rejected or at least deferred.

112. The intervention at the preliminary stage of the proceedings is premature because only the judgment of the Court on the preliminary objections determines the existence of the dispute with regard to which the admissibility of the intervention can be assessed.

113. The existence of the dispute is determined by the Court on the basis of the facts and arguments advanced by the parties to the litigation. According to Article 40(1) of the Statute of the Court, "the subject of the dispute …shall be indicated" in the application. Article 38(2) of the Rules of Court further requires that "the application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based." As the Court observed in the *Fisheries Jurisdiction* case:

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[128] Written Observations of Poland, ¶25.

[129] Written Observations of Portugal, ¶25.

[130] Written Observations of Latvia, ¶17.

> "there is no burden of proof to be discharged in the matter of jurisdiction. Rather, it is for the Court to determine from all the facts and taking into account all the arguments advanced by the Parties."[131] [Emphasis added]

114. In short, the judgment on preliminary objections would determine the existence of the dispute between the parties, and the provisions the construction of which is in question. Otherwise, the conditions of the application for intervention set out in Article 82 cannot be met. In *Military and Paramilitary Activities*, El Salvador's declaration of intervention was dismissed because, *inter alia*, the requirements of Article 82 of the Rules of Court were not met.

115. Thus, if the respondent State files preliminary objections to challenge the Court's jurisdiction or the admissibility of the applicant's claims, the Court's decision on these preliminary issues will have important ramifications on the admissibility of any intervention under Article 63 of the Statute of the Court. Specifically, the Court will first have to examine the submissions of the parties and establish (*i*) whether there is a dispute between them; (*ii*) what the real nature of such dispute, if any, is; and (*iii*) what provisions of the relevant convention, if any, are in question.

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

117. Unable to identify the provisions of the convention construction of which in question in this case, several Declarants pointed to Article IX of the Genocide Convention. This argument cannot stand either. Article IX is a jurisdictional clause that does not support a request for intervention; it rather provides for the jurisdiction of the Court with regard to a dispute between the parties on the substantial provisions of the Convention. This "dispute" is not yet determined, and until it is determined by the judgement of the Court

[131] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment of 4 December 1998, I.C.J. Reports 1998, p. 450, ¶38.

on the preliminary objections, the States seeking to intervene cannot identify the provision whose construction is in question.

118. An important point that went unanswered in the Written Observation of the States seeking to intervene is that they have purportedly reserved a "right" to amend or supplement the Declarations or to file new declarations at later stages of these proceedings.[132] The Russian Federation reiterates its position that this reservation further attests to the fact that the Declarations are premature, and recalls that in *Military and Paramilitary Activities* the Court specifically referred to a similar reservation made by El Salvador as another reason why El Salvador's declaration of intervention was inadmissible at the jurisdictional phase of the proceedings.[133]

119. It follows that all declarations of intervention filed in the present case may not be allowed at the preliminary objections phase of the proceedings.

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

120. In its Written Observations, the Russian Federation showed that "the Declarations are written in a way that presupposes that the Court has jurisdiction over the alleged dispute and that the Application is admissible. If the Court allows the Declarants to intervene now, it would essentially prejudge the Preliminary Objections that the Russian Federation raised within a separate phase of the proceedings, and the outcome of such phase overall."[134]

121. This is based on the consistent and well-established practice of dismissing declarations of intervention which presupposes that the Court has jurisdiction or that the application is admissible. In *Military and Paramilitary Activities*, El Salvador sought to "place[] on record its valid points of view regarding the interventionist attitude of Nicaragua and

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[132] Declaration of Belgium, ¶16; Declaration Bulgari, ¶16; Declaration of Canada and the Netherlands, ¶43; Declaration of Cyprus, ¶17; Declaration of Liechtenstein, ¶30; Declaration of Malta, ¶13; Declaration of Norway, ¶10; Declaration of Slovakia, ¶29; Declaration of Slovenia, ¶49.

[133] *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, ¶3.

[134] Written Observations of the Russian Federation, 30 January 2023, ¶84.

regarding the Court's lack of jurisdiction over this case and its inadmissibility".[135] Rejecting El Salvador's declaration, the Court found that:

> "[d]eclaration of Intervention of the Republic of El Salvador, which relates to the present phase of the proceedings, addresses itself also in effect to matters … which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States of America and that Nicaragua's Application against the United States of America in respect of that dispute is admissible."[136]

122. El Salvador's assertion that its declaration was related to the preliminary matters of the proceedings did not convince the Court, which held that El Salvador's declaration was "inadmissible inasmuch as it relate[d] to the current [jurisdictional] phase of the proceedings."[137]

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

> "… by its very nature presupposes that the Court has jurisdiction to entertain the dispute between New Zealand and France and that New Zealand's Application against France in respect of that dispute is admissible."[138]

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

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[135] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention of Republic of El Salvador of 15 August 1984, p. 18, ¶XVI.

[136] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention, Order of 4 October 1984, I.C.J. Reports 1984, p. 216, ¶2.

[137] *Ibid.*, p. 216, ¶3(ii).

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

inadmissible at the jurisdictional stage of the proceedings.[139] As previously mentioned by the Russian Federation,[140] Judge Singh noted in this relation that:

> "El Salvador's Declaration in effect appears directed to the merits of the case – an observation with which I do agree and which has also weighed with the Court… if a hearing were ever to be granted to El Salvador at the present first phase there would inevitably be arguments presented touching the merits, which aspect belongs to the second phase of the case after the Court's jurisdiction to deal with the dispute has been established. If, therefore, El Salvador's request for a hearing had been granted at this stage, it would have amounted to two hearings on merits, which could not be acceptable to any tribunal because of the confusion it would cause all round. In fact this would be both undesirable and untenable."[141] [Emphasis added]

125. In their Written Observations, the Declarants fail to provide a convincing answer to this argument of the Russian Federation. Some of them acknowledge that their Declarations cover, apart from Article IX, also other – substantive provisions of the Genocide Convention. Such is the case of, *inter alia*, the Declaration of Croatia, Cyprus, Estonia, Lithuania and Denmark.[142]

126. All these Declarations of Intervention presuppose that the Court has jurisdiction or/and that Ukraine's Application is admissible. Therefore, the Court must treat them in the same way that it treated the Declarations of El Salvador and Fiji in the *Nicaragua* and *Nuclear Tests* Cases respectively. Attempts to stretch the jurisdiction of the Court to cover self-standing rules of international law, such as use of force are also without legal merit, as explained in more detail in the Section G below.

127. Some States attempt to confine their Declarations to the construction of Article IX,[143] to no avail. As further explained in Section F below, no intervention can be admissible with

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[139] In its Written Observations, Russian Federation, identified the Declarations that present this character. *See* Written Observation of the Russian Federation, 30 January 2023, ¶83.

[140] Written Observation of the Russian Federation, 1 October 2022, ¶74; Written Observation of the Russian Federation, 15 November 2022, ¶78; Written Observation of the Russian Federation, 16 December 2022, ¶74; Written Observation of the Russian Federation, 30 January 2022, ¶79.

[141] *Ibid*. *See* also *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.

[142] Written Observations of Denmark, ¶37; Written Observations of Estonia, ¶¶8, 39; Written Observations of Lithuania, ¶41; Written Observations of Liechtenstein, ¶22; Written Observations of New Zealand, ¶55; Written Observations of Norway, ¶24; Written Observations of Portugal, ¶32; Written Observations of Poland, ¶¶30-31.

[143] Written Observations of Italy, ¶¶45-46; Written Observations of Greece, ¶22; Written Observations of Slovakia, ¶60; Written Observations of the United States, ¶42; Written Observations of Croatia, ¶¶6-9; Written

respect to Article IX *per se*. Moreover, the contention that "the construction of Article IX is in question" is based on premature speculations; this would not be clear unless the Parties' arguments have been fully litigated.[144]

128. In short, the Declarations filed in this case are either limited to Article IX, or are more general in nature, covering Article IX and other substantial provisions of the Genocide Convention. This shows that the Declarants find themselves in an *impasse*: when they invoke the substantive articles, they face the obstacle described by the Court in the *Nicaragua* and *Nuclear Tests* cases; when they confine themselves to Article IX, they come up against the obstacle that, as a compromissory clause, this article is not subject to an interpretation that could justify an intervention based on Article 63.[145]

129. The Declarants' counter-arguments do not stand up to scrutiny:

(a) Some of them argue that Russian Federation's position runs contrary to Article 63 of the Statute of the Court, which refers generally to a "convention", including its compromissory clause[146]. As explained in depth in Section F, compromissory clauses do not contain substantive rights and obligations, are adjectival rather than substantive, and thus cannot be subject-matter of a dispute *per se*.[147]

(b) The contention that the opening word "whenever" in Article 63 indicates that a State is allowed to intervene in all phases of the proceedings,[148] is of no assistance for the purpose of justifying a premature intervention. "Whenever construction is in question" is not equal to "whenever" within the proceedings. This term should be understood in the light of the Court's consistent practice that does not allow to intervene at the preliminary stage of the proceedings.

Observations of Norway, ¶37; Written Observations of the Czech Republic, ¶16; Written Observations of Latvia, ¶25; Written Observations of Belgium, ¶25; Written Observations of France, ¶59; Written Observations of Cyprus, ¶23; Written Observations of Canada and the Netherlands, ¶29; Written Observations of Ireland, ¶23; Written Observations of Romania, ¶43.

[144] *See* Section F below.

[145] *See* Section F below.

[146] Written Observations of Germany, ¶¶26-27.

[147] *See* Section F below.

[148] Written Observations of Greece, ¶21.

(c) Some of the Declarants refer to the Dissenting Opinion of Judge Schwebel in *Military and Paramilitary Activities*,[149] who was the only Judge (of fifteen) to support El Salvador's Declaration at the jurisdictional stage of the proceedings. This, however, was not the position followed by the Court.

(d) Others relied on Article 82 of the Rules of Court, according to which a declaration for intervention "shall be filed as soon as possible".[150] However, this provision is of no aid to the Declarants' case either. That article has no bearing on the phase in which the intervention may be admitted; rather, it is aimed at ensuring that declarations, like all other written submissions, are available to the Court with sufficient time so that they can be properly considered without disrupting the regular course of the proceedings (*e.g.*, by filing a declaration days before the beginning of the oral phase of a case). Article 82(2) explicitly gives the Court discretion to decide on the admissibility of interventions under Articles 62 and 63 of the Statute of the Court whenever the Court deems it appropriate in view of the circumstances of the case, including doing so at a later stage.

(e) The reference made to the notification or the invitation sent by the Registrar in this case[151] does not help the interveners. If this notification meant that for the Court the Declarations filed at this phase of proceedings are admissible, there would no longer be any need for it to hear the Parties and the Declarants before deciding. Moreover, the Registrar is directed by the Court to send out notifications. At the very preliminary stage of the proceedings the Court cannot yet be certain which articles will actually be in question and makes an assumption on the basis of the documents already submitted. A more detailed analysis would prejudge the Court's decision and would therefore be unwarranted. Procedural formalities are in any event not decisive. For example, even a party that has received no notification may submit a Declaration of intervention.

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[149] *See*, for example, Written Observations of Italy, ¶ 41, Written Observations of New Zealand, ¶36(c),

[150] Declaration of Belgium, ¶14; Declaration of Bulgaria, ¶¶10, 14; Declaration of Malta, ¶13; Declaration of Norway, ¶¶11, 24; Declaration of Slovakia, ¶14.

[151] Written Observations of Canada and the Netherlands, ¶33.

130. For these reasons, the Declarations are inadmissible inasmuch as they presuppose that the Court has jurisdiction over the alleged dispute between the Parties and that the Ukraine's Application is admissible.

F. NO INTERVENTION IS ADMISSIBLE SOLELY IN REGARD TO ARTICLE IX OF THE GENOCIDE CONVENTION

131. Some Declarants only address the interpretation of Article IX of the Genocide Convention.[152] In its Written Observations, the Russian Federation has explained why no intervention can be admissible with respect to Article IX *per se*. Specifically, the Russian Federation has demonstrated that:

(a) Article IX of the Genocide Convention is a standard compromissory clause[153] and Article 63 of the Statute of the Court does not envisage interventions in respect of compromissory clauses, as stems from the *travaux* of the Statute of the Court and the Court's case law.[154]

(b) Intervention must be related to the subject-matter of the main proceedings, but the subject-matter of the proceedings in a particular case cannot be based on a compromissory clause. That subject-matter is always of a substantive character.[155] As the Court noted in the *South West Africa* cases:

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[152] *See*, generally, Declaration of Bulgaria, Declaration of Croatia, Declaration of Czech Republic, Declaration of Greece, Declaration of Liechtentein, Declaration of Malta, Declaration of Slovakia, Declaration of Slovenia and Declaration of Spain.

[153] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Preliminary Objections, Judgment of 11 July 1996, I.C.J. Reports 1996, Separate Opinion of Judge *ad hoc* Kreća, p. 770, ¶105.

[154] Note the Court's findings at *Haya de la Torre (Colombia v. Peru)*, Judgment of 13 June 1951, I.C.J. Reports 1951, p. 76 ("[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.") [Emphasis added].

Australia attempts to present an alternative interpretation of this finding in ¶40 of its Written Observations, based on "the context" of the judgment, but this attempt is not supported by authority, nor does it disprove the Russian Federation's interpretation of the case.

[155] *South West Africa (Liberia v. South Africa)*, Second Phase, Judgment of 18 July 1966, I.C.J. Reports 1966, p. 39, ¶64; *see* also at ¶65, where it is noted that litigable disputes arise from provisions containing substantive rights and obligations, and not from compromissory clauses *per se*.

Even authorities referred to by the Declarants agree with this. For instance, R. Kolb, when commenting specifically on Article IX, refers to it as a "*renvoi* … to the provisions of the convention in which it is inserted" (R. Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ* in P. Gaeta (ed.), THE UN GENOCIDE CONVENTION: A COMMENTARY, p. 454).

> "there is nothing about this particular jurisdictional clause to differentiate it from many others, or to make it an exception to the rule that, in principle, jurisdictional clauses are adjectival not substantive in their nature and effect. It is of course possible to introduce into such a clause extra paragraphs or phrases specifically conveying substantive rights or imposing substantive obligations; but the particular section of any clause which provides for recourse to an indicated forum, on the part of a specified category of litigant, in relation to a certain kind of dispute — or those words in it which provide this — cannot simultaneously and *per se* invest the parties with the substantive rights the existence of which is exactly what they will have to demonstrate in the forum concerned, and which it is the whole object of the latter to determine ."[156] [Emphasis added]

(c) Whether there exists a dispute between the parties or not, and what its scope might be, is a matter of application rather than interpretation of a treaty. The filing of preliminary objections does not *ipso facto* demonstrate that there is a dispute on the compromissory clause.

(d) Article 82 of the Rules of Court, supported by the Court's case law, requires that an intervention concern provisions "in question", that is, forming the subject-matter of the proceedings. Therefore, such an intervention cannot be based on a compromissory clause, such as Article IX *per se*.

132. In their Written Observations, the Declarants failed to present a coherent response to this. For the most part, the Declarants merely restate their original position, for example by vaguely referring to the "plain text" and "object and purpose" of Article 63 as indicating that intervention may relate to the entire convention at issue or that the language of that article is "unqualified", without engaging with the Russian Federation's arguments on their substance.

133. The Declarants also do not engage with, for instance, the *South West Africa* judgment, which is of direct relevance for this issue. The Declarants attempt to diminish the value of the case law referred to by the Russian Federation, specifically by referring to the number of cases that have dealt with intervention.[157] In doing so, however, the Declarants fail to point to any case law supporting their position. Declarants also attempt to sway

[156] *South West Africa (Liberia v. South Africa)*, Second Phase, Judgment, I.C.J. Reports 1966, p. 39, ¶64.

[157] Written Observations of Australia, ¶43 ("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").

the discussion to matters completely irrelevant to the issue at hand – such as "significance of interpretation of compromissory clauses"[158] or "common interest of international community".[159] These considerations bear no relevance whatsoever as to whether or not there exists a right to intervention under Article 63 with respect to compromissory clauses *per se*.

134. Other Declarants simply insist that Article IX is "in question" in this case without any explanation. To exemplify, Slovakia contends that it intervened with respect to Article IX because, in its view, Ukraine and the Russian Federation seem to disagree on whether the Court has jurisdiction under Article IX.[160] This, however, still remains a premature assessment. Until the jurisdictional phase is over, the Court does not reach a finding on the subject-matter of the dispute (if there exists any) and is thus unable to admit the declaration of intervention.

135. On this matter too, the Declarants continue to rely heavily on Judge Schwebel's Dissenting Opinion in *Military and Paramilitary Activities*. For example, Greece claims that:

> "[s]ubsequent practice before the Court points into the same direction. 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 Rule 82, paragraph 2, (b) and (c), 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. Moreover, Judge Schwebel even found that the faults of El Salvador's initial declaration on jurisdiction had been healed by subsequent letters. Based on this reading, he was prepared to admit El Salvador's declaration on jurisdictional matters."[161]

136. Even if this were true (*quod non*), this is still no proof that jurisdictional clauses *per se* may form the subject-matter of the dispute and that of an intervention. In any event, the

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[158] Written Observations of Australia, ¶38.

[159] Written Observations of the Czech Republic, ¶19.

[160] Written Observations of Slovakia, ¶¶74-75. *See* also Written Observations of Norway, ¶32 ("From the documents available, it is clear that Ukraine contends that the Court has jurisdiction to hear its case under Article IX. The Russian Federation has disputed this. Accordingly, Norway has identified that the construction of Article IX of the Genocide Convention is in question in the case, and Norway has a right to provide its view on its construction").

[161] Written Observations of Greece, ¶17.

Russian Federation has already explained both in its Written Observations[162] and in ¶129(c) above, Judge Schwebel's Dissenting Opinion is of no avail to the Declarants' argument. Importantly, when dealing with this example, the Declarants wrongly assert that the Court never "dismissed an intervention because it was … directed to interpreting a compromissory clause" [Emphasis added]. This is a misrepresentation of the Court's findings and its reasoning.[163] Even Rosenne, whom the Declarants cite, admits that "the question whether an intervention under Article 63 can be admitted in any incidental proceedings cannot therefore be regarded as settled with any finality", showing that the Court's practice did not give any support to the Declarants' position.[164]

137. Australia and the United Kingdom[165] refer to the Court's practice of sending Article 63 notifications mentioning compromissory clauses, stating that:

> "[t]he 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."[166]

138. This is misleading. This "practice does not prove that intervention under Article 63 may relate to compromissory clauses *per se*. ***First***, to the extent that by "[t]he Court's practice" the practice of the Registrar is meant, it must be noted that the sending out of such notifications is not decisive for the purposes of the actual legal analysis under Article 63.[167] Such notification cannot "prejudge any decision which the Court might be called upon to take pursuant to Article 63 of the Statute of the Court".[168] [Emphasis added] Moreover, under Article 43 of the Rules of Court, the Registrar sends out notifications upon consulting with the Court, and such may happen very early in the case.[169] If the Declarants' position were accepted, this would in essence be a very early

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[162] Written Observations of the Russian Federation, 30 January 2023, ¶82.

[163] Written Observations of the Russian Federation, 17 October 2022, ¶52.

[164] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1480.

[165] Written Observations of Australia, ¶45; Written Observation of the United Kingdom, ¶¶52-53.

[166] Written Observations of Australia, ¶45.

[167] Written Observations the Russian Federation, 15 November 2022, ¶¶57-58.

[168] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ICJ Reports 1988, p. 71, ¶5.

[169] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1480, footnote 65.

prejudgment (done based solely on an Application instituting proceedings) of what issues are in question, form the subject-matter of the dispute (and that there is a dispute at all), and give rise to the right of intervention. Such notifications cannot predetermine or prejudge the subject-matter of the dispute, if it exists or what the Court's decision on the admissibility of an intervention should be.

139. Canada and the Netherlands' argument to this end, which consists of a reference to the Court's instructions to set a cut-off date for submitting declarations of interventions in this case at a date before the conclusion of the preliminary objections phase should also fail.[170] The Court's instruction was simply aimed at case management.

140. ***Second***, the few cases that some Declarants cited for support are not relevant because in those cases the compromissory clause *per se* was not the subject-matter of the dispute. For instance, in *Maritime Dispute (Peru v. Chile)*, one of those cases cited,[171] the subject-matter of the dispute was clearly identified by the Court at the outset, which did not include the jurisdictional provisions:

> "1. On 16 January 2008, the Republic of Peru (hereinafter "Peru") filed in the Registry of the Court an Application instituting proceedings against the Republic of Chile (hereinafter "Chile") in respect of a dispute concerning, on the one hand, "the delimitation of the boundary between the maritime zones of the two States in the Pacific Ocean, beginning at a point on the coast called Concordia . . . the terminal point of the land boundary established pursuant to the Treaty . . . of 3 June 1929" and, on the other, the recognition in favour of Peru of a "maritime zone lying within 200 nautical miles of Peru's coast" and which should thus appertain to it, "but which Chile considers to be part of the high seas". In its Application, Peru seeks to found the jurisdiction of the Court on Article XXXI of the American Treaty on Pacific Settlement signed on 30 April 1948, officially designated ..." [Emphasis added]

141. As explained, even if a notification was sent by the Registrar, this in no way should serve as indication that a dispute exists involving the interpretation of the Genocide Convention, or that a compromissory clause *per se* can be the subject-matter of the

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[170] Written Observations of Canada and the Netherlands, ¶33.

[171] It is worth noting that even the cases referred to by the United Kingdom regarding the Pact of Bogota lack consistency in the Court's approach to them. For instance, in *Border and Transborder Armed Actions*, cited by the United Kingdom, the Court's judgment states: "On 3 November 1986 the Registrar informed the States parties to the Pact of Bogota that he had been directed, in accordance with Article 43 of the Rules of Court, to draw to their notice the fact that in the Application the Republic of Nicaragua had invoked, inter alia, the Pact of Bogota, adding however that the notification did not prejudge any decision which the Court might be called upon to take pursuant to Article 63 of the Statute of the Court." *See Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Judgment of 20 December 1988, ICJ Reports 1988, p. 71, ¶5.

proceedings. Notably no State party to the Pact of Bogota attempted an Article 63 intervention, thus the Court never actually examined the potential of its admissibility on the merits. Thus, the practice with respect to the Pact of Bogota does not show that compromissory clauses *per se* could form the subject-matter of the proceedings, with respect to which a right to intervention arises.

142. In any event, Australia and the United Kingdom's reliance on the practice of sending notifications with respect to the Pact of Bogota is irrelevant, as Article IX of the Genocide Convention and Article XXXI of the Pact of Bogota are manifestly different jurisdictional clauses.

143. Article XXXI of the Pact of Bogota in its wording is very similar to Article 36(2) of the Statute of the Court. It constitutes a collective acceptance of the Court's compulsory jurisdiction over a broad scope of issues, with respect to the Parties of the Pact of Bogota.

144. Under Article 40(3) of the Statute of the Court and Article 42 of the Rules of Court, all States are notified when proceedings are instituted in the Court. In this respect, Rosenne notes that:

> "[h]owever, it is recalled that all parties to the Statute are automatically notified of the institution of all proceedings in the Court, and a copy of the instrument by which the proceedings are commenced is communicated to them by virtue of Article 40, paragraph 3, of the Statute and Article 42 of the Rules of Court. This is sufficient for the purposes of Article 63."[172]

145. Such notifications, however, do not mean that in every case there exists a dispute with respect to Article 36 of the Statute of the Court (or the Statute of the Court in general), or that it is "in question" in the proceedings, which can give rise to a right of intervention under Article 63. Otherwise, any case before the Court would be subject to intervention, as the Court's jurisdiction in each case is, *inter alia*, based on Article 36 of the Statute.

146. Likewise, a similar practice of merely notifying the Parties to the Pact of Bogota of its Article XXXI (very similar in wording to Article 36(2) of the Statute) being invoked in the proceedings before the Court does not show that it is "in question" and that there exists a right to intervene under Article 63.

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[172] *See* also S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1453.

147. With respect to the *Nuclear Tests* case, cited by the United Kingdom, claiming that "the Registry sent a notification to States parties to the General Act for the Pacific Settlement of International Disputes, which was relevant to Australia's claim only as the alleged basis for the Court's jurisdiction",[173] in addition to the abovementioned considerations, it is worth adding that, Rule 43, instructing the Registrar to consult the Court on the issue of notifications, was only introduced in 1978, several years after the completion of that case. Thus, it is unclear if the Court was even consulted in that case on the issue of sending notifications.

148. The Separate Opinion of Judge Petren in the *Pakistani Prisoners of War* case, on which some Declarants rely,[174] is also inapposite. While Judge Petren indeed opined that notifications under Article 63 should have been sent, the Declarants fail to mention his observation that "these notifications, however, were not made",[175] and that the Court opposed their premature sending.[176] Moreover, Judge Petren himself acknowledged that the compromissory clause (Article IX) in that case was not the subject-matter of the proceedings, as he notes as follows:

> "[t]he arguments of the two Governments on the subject of the Court's jurisdiction concerned inter alia the construction of the Convention of 9 December 1948 on the Prevention and Punishment of the Crime of Genocide, and in particular its jurisdictional clauses, as also the question whether Pakistan is a party to the General Act of 26 September 1928 for the Pacific Settlement of International Disputes and, if so, whether the jurisdiction of the Court could be founded upon that instrument."[177] [Emphasis added]

149. Judge Petren's careful choice of words "inter alia" and "in particular" demonstrates that in his view there were *a few more* questions before the Court, and further reinforces the Russian Federation's position that compromissory clauses *per se* cannot form the subject-matter of the dispute or intervention under Article 63.

150. Accordingly, the practice relied on by the Declarants does not disprove the Russian Federation's argumentation that compromissory clauses alone cannot be the subject-

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[173] Written Observations of the United Kingdom, ¶51.

[174] Written Observations of Spain, ¶36.

[175] *Trial of Pakistani Prisoners of War (Pakistan v. India),* Interim Measures, Order of 13 July 1973, I.C.J. Reports 1973, Dissenting Opinion of Judge Petrén, p. 335.

[176] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1449.

[177] *Ibid.*

matter of the proceedings by themselves. Consequently, because Article IX of the Genocide Convention cannot constitute the subject-matter of the proceeding before the Court, no intervention is possible with respect to Article IX *per se*.

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

151. As explained in the Russian Federation's Written Observations, the Declarants seek to address issues that are unrelated to the construction of the Genocide Convention, which renders their Declarations inadmissible in light of the limited scope of Article 63 of the Statute of the Court. In addition, admitting the interventions would prejudge questions relating to the Court's jurisdiction *ratione materiae*, which are to be addressed at a separate phase of the proceedings. This, too, renders the Declarations inadmissible.[178]

152. Several Declarants have not addressed either of these matters.[179] Others rightly do not disagree that an intervention that seeks to address provisions of a convention which are not in question in a particular case, other rules of international law, or the application of the convention to the facts of the case, should be declared inadmissible.[180] They argue, however, that such circumstances are not present in this case.

153. The Russian Federation takes note of the statement of some of the Declarants that they do not intend to address matters unrelated to the construction of the Genocide

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[178] Written Observations of the Russian Federation, 30 January 2023, ¶¶103-113; Written Observations of the Russian Federation, 16 December 2022, ¶¶98-108; Written Observations of the Russian Federation, 15 November 2022, ¶¶105-116; Written Observations of the Russian Federation, 17 October 2022, ¶¶84-94.

[179] *See*, for example, Written Observations of Australia; Written Observations of Austria; Written Observations of Canada and the Netherlands; Written Observations of Liechtenstein; Written Observations of Malta. Various Declarants ignore, in particular, the question of prejudging the Court's jurisdiction *ration materiae. See*, for example, Written Observations of Denmark; Written Observations of France; Written Observations of Greece; Written Observations of Ireland; Written Observations of Italy; Written Observations of New Zealand; Written Observations of Poland; Written Observations of Portugal; Written Observations of Romania. The Czech Republic appears to admit that it intends to address questions unrelated to the Genocide Convention and factual matters, suggesting that this would somehow be relevant for purposes of interpreting Article IX of the Convention. *See* Written Observations of the Czech Republic, ¶¶21-23.

[180] *See* Written Observations of France, ¶23; Written Observations of Estonia, ¶7; Written Observations of Latvia, ¶24; Written Observations of Slovenia, ¶10; Written Observations of Spain, ¶7; Written Observations of the United Kingdom, ¶77. A notable exception is Norway, which wrongly suggests that whether a State seeks to address issues unrelated to the construction of the Genocide Convention is "irrelevant" when determining the admissibility of a declaration of intervention. *See* Written Observations of Norway, ¶42.

Convention.[181] However, this promise is hardly a credible one, as the Declarants already do directly the opposite, and some even admit that it would not be possible for them to interpret the Genocide Convention without, for example, addressing how the latter would apply to particular facts.[182] Against this background, some additional observations are warranted.

154. Several of the Declarants state that, when they refer to rules of international law other than the Genocide Convention, they do so for interpretation purposes only and rely on Article 31(3)(c) of the Vienna Convention on the Law of Treaties.[183] For example:

(a) Estonia, Lithuania and Denmark argue that "mentioning either good faith, issues relating to the use of force, or compliance with the Court's provisional measures order as interpretative aid to Article 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 legal order."[184]

(b) Croatia reiterates its position that "occasional reference to matters such as the Russian Federation's use of force" explains "Croatia's views concerning the proper construction of Article IX of the Genocide Convention."[185]

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[181] Written Observations of Belgium, ¶45; Written Observations of Bulgaria, ¶47; Written Observations of Croatia, ¶29; Written Observations of Estonia, ¶39; Written Observations of France, ¶31; Written Observations of Germany, ¶31; Written Observations of Latvia, ¶25; Written Observations of Lithuania, ¶50; Written Observations of Luxembourg, ¶41; Written Observations of Slovakia, ¶81; Written Observations of Slovenia, ¶10; Written Observations of the United Kingdom, ¶¶79-82.

[182] Written Observations of Belgium, ¶47; Written Observations of Malta, ¶39 ("Frankly, even if it did refer to evidentiary matters, this certainly does not render its request to intervene as inadmissible."). Estonia furthermore suggests that the Russian Federation's compliance with the Court's order on provisional measures would be relevant to the "interpretation" of the Genocide Convention, which is clearly incorrect. *See* Written Observations of Estonia, ¶41. *See* also Written Observations of Norway, ¶42.

[183] Written Observations of Belgium, ¶46; Written Observations of Croatia, ¶29; Written Observations of Denmark, ¶38; Written Observations of Estonia, ¶40; Written Observations of Finland, ¶27; Written Observations of Greece, ¶28; Written Observations of Ireland, ¶25; Written Observations of Italy, ¶59; Written Observations of Latvia, ¶25; Written Observations of Luxembourg, ¶43; Written Observations of New Zealand, ¶57; Written Observations of Norway, ¶41; Written Observations of Poland, ¶32; Written Observations of Portugal, ¶41; Written Observations of Romania, ¶53; Written Observations of Spain, ¶40; Written Observations of Sweden, ¶9. Germany suggests that Article 31(1) of the VCLT would somehow allow it to address matters related to use of force or abuse of rights when interpreting Article IX of the Genocide Convention. *See* Written Observations of Germany, ¶¶31-33.

[184] Written Observations of Estonia, ¶41; Written Observations of Denmark, ¶39.

[185] Written Observations of Croatia, ¶29.

(c) Cyprus claims that the "existence of a dispute" is part of the compromissory clause; Article IX must be seen to encompass "non-violation complaints"; and the "reference (…) to 'the use of force and countermeasures with extensive references to other sources of international law, including the UN Charter', are nothing but arguments in the Republic's construction of Article I of the Convention that "is in question in the present phase of the proceedings."[186]

155. However this argument misses the point since a State ought not to be allowed to intervene when it seeks to refer to the convention in question only in passing or as vehicle for introducing other rules of international law. In the present case, it is apparent from the Declarations that the States concerned intend to focus mainly on matters such as the prohibition of the use of force and abuse of rights (what some Declarants oddly and vaguely refer to as "abuse of law"), as opposed to addressing the Genocide Convention itself.

156. Furthermore, the Declarants' attempt to draw matters falling outside the scope of the Genocide Convention into their interventions for purposes of "interpretation" clearly raises problems regarding the Court's jurisdiction *ratione materiae*, which is a subject-matter of the Russian Federation's Preliminary Objections. The Russian Federation showed that Ukraine seeks to incorporate into the Genocide Convention an indefinite number of rules of international law, including those relating to the use of force and territorial integrity.

157. Some of the Declarants, such as Cyprus,[187] directly refer to the Russian Federation's Preliminary Objections, which Ukraine has cavalierly quoted in its own Written Observations on the admissibility of interventions.[188] However, as long as the matter concerns Preliminary Objections, it cannot be decided by the Court in intervention proceedings until the formal hearings on these Objections have concluded and the Court has reached a decision decision. By allowing the Declarants to intervene based on their argument that other rules of international law are relevant for purposes of interpreting the Genocide Convention using Article 31(3)(c) of the VCLT, the Court would risk

[186] Written Observations of Cyprus, ¶23.

[187] *Ibid*., ¶¶24-25.

[188] Written Observations of Ukraine to the Declaration of Intervention by Cyprus, ¶7.

prejudging these crucial issues. The Court should therefore declare the interventions inadmissible, lest there be an unwarranted prejudice to the Parties' position at the preliminary objections phase.[189]

158. Moreover, the Declarants themselves admit that "the Court can declare an intervention inadmissible if the statement does not refer to the Convention in question, but to other self-standing areas of international law without the connection to the Convention."[190] However, self-defence and/or use of force are commonly considered a self-standing area of international law. Rosenne stated that "[s]elf-defence is an independent, self-standing, principle of law".[191]

159. Moreover, a number of the Declarants have already argued that use of force has nothing to do with the Genocide Convention in *Legality of the Use of Force.* France, for example, concluded that

> "the Court is…without jurisdiction to rule on the issues concerning alleged violations of the United Nations Charter and of certain principles and rules of international humanitarian law applicable in armed conflict. As those issues do not fall within the provisions of Article IX of the 1948 Genocide Convention."[192]

160. The same position was taken by the United Kingdom:

> "jurisdiction under Article IX would not extend to disputes regarding alleged violation of the other rules of international law, such as the provisions of the United Nations Charter relating to the use of force and the Geneva Conventions relating to the conduct of conduct of armed conflict."[193]

161. Thus, both legal doctrine and the practice of Declarants themselves demonstrate that matters of use of force and/or self-defence are self-regulated (self-standing) and out of the scope of the Genocide Convention. Moreover, the countries also mention that

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[189] The Russian Federation notes that some of the Declarants, by clarifying that they only seek to address rules of international law other than the Genocide Convention at the merits stage if the Court finds it has jurisdiction to hear Ukraine's claims, confirm the Russian Federation's position. *See, e.g.* Written Observations of the United Kingdom, ¶83.

[190] Written Observations of Portugal, ¶7; Written Observations of Spain, ¶7; Written Observations of Estonia, ¶7. *See* also to the same effect Written Observations of Germany, ¶31; Written Observations of Liechtenstein, ¶22; Written Observations of Denmark, ¶37.

[191] S. Rosenne *Self-defence and the non-use of force: some random thoughts* in S. Rossen, ESSAYS ON INTERNATIONAL LAW AND PRACTICE (Martinus Nijhoff Publishers, 2007), p.647

[192] Written Observations of France, ¶14.

[193] Written Observations of the United Kingdom, ¶502.

intervention may be held inadmissible if it contains interpretation of issues unrelated to the Genocide Convention. It can be concluded that the Declarants themselves admit that their interventions may not be regarded as admissible in this regard.

162. The Court should therefore declare the interventions inadmissible, lest there be an unwarranted prejudice to the Parties' position at the preliminary objections phase.

H. THE DECLARATION OF THE UNITED STATES IS INADMISSIBLE DUE TO ITS RESERVATION TO ARTICLE IX OF THE CONVENTION

163. It is important to keep in mind the unprecedented nature of the Declaration of the United States: it is for the first time in the Court's history when a State that does not recognise the jurisdiction of the Court under a treaty attempts to intervene and by that receive a decision of the Court in a case before regarding that treaty. It is further the first time that the United States, which had always been sceptical of the Court's jurisdiction, attempts to intervene in a case before the Court. Due to the sheer novelty of the legal issues involved, one should exercise utmost caution when considering whether such an intervention can be admitted.

164. The Russian Federation showed that the Declaration of the United States is inadmissible by virtue of the reservation that it made to Article IX of the Genocide Convention. Specifically, the Russian Federation explained that:

(a) Intervention under Article 63 of the Statute is aimed at protecting an interest of a legal nature in a sense that the State's interest may be affected by the interpretation given by the Court to the multilateral treaty.[194] Because the United States made a reservation to the compromissory clause of the Genocide Convention, it has insulated itself from any repercussions caused by the Court's interpretation under that article. Thus, the United States does not have a legal interest to intervene in these proceedings to interpret the Genocide Convention, including its Article IX.[195]

(b) The text of Article 63, in light of its object and purpose, as confirmed by the structure of the Statute, implies the prerequisite of a jurisdictional link between the

[194] Written Observations of the Russian Federation, 17 October 2022, ¶102.

[195] *Ibid.*, ¶¶98-109.

Parties to the case and the putative intervener. In order to successfully intervene under Article 63, a State simply may not have entered a reservation concerning the compromissory clause in a convention to be interpreted.[196] Because the United States continues to maintain its reservation to Article IX of the Genocide Convention, there is presently no jurisdictional link between the United States and the Parties to these proceedings. Thus, the Declaration of the United States is inadmissible.

(c) A right to intervene under Article 63 can be exercised only subject to the principle of reciprocity, as both the drafters of the Statute and certain judges and commentators have confirmed.[197] The reservation made by the United States to Article IX of the Genocide Convention makes it impossible to respect this principle insofar as such intervention and the related matters are concerned and thus bars the Declarant's right of intervention in the present proceedings.

165. The United States fails to rebut or even meaningfully engage with the Russian Federation's arguments in its Written Observations of 13 February 2023.

166. ***First***, in relation to the lack of interest argument, the United States makes a flat and unsubstantiated assertion that its intervention is valid as "the construction of the provisions of the Convention to be given by the Court in this case will be binding on the United States."[198] This position is at odds with its own admission in the same paragraph that the reservation to Article IX of the Genocide Convention "would preclude it from being a respondent in a contentious case without its specific consent."[199] The United States cannot seriously argue that it could be in any meaningful sense, or in the same way as others, bound by the interpretation of the Genocide Convention given by the Court if no State can enforce such interpretation against the United States before the Court.

167. Further, the United States' argument that if the Court accepts the Russian Federation's position, "[t]here would exist a question… whether the Court should look to whether all parties to a proceeding have accepted the reservation of the State intervening under

[196] *Ibid*., ¶116.

[197] *Ibid.*, ¶¶119-125.

[198] Written Observations of the United States, ¶24.

[199] *Ibid.*

Article 63…"[200] is also inapposite. The Russian Federation never argued that; its argument is that the intervening State's reservation to the compromissory clause *by itself* signifies lack of special interest in intervention, and indeed in any and all matters related to judicial settlement before the Court regarding the Genocide Convention.

168. The United States' statements that its interest in the interpretation of the Genocide Convention can be explained by the Genocide Convention's "humanitarian and civilizing purposes" and "high ideals" as well as its bolstering of Article IX[201] miss the point. The United States' reservation to Article IX lays bare its reluctance to be accountable for the actual application of the Genocide Convention and fulfilment of its purposes, however high the "ideals" may be, as well as its apprehensive attitude towards Article IX. It is also highly illustrative that the United States has never before been eager to uphold and defend the "high ideals" of the Genocide Convention on any of the previous occasions when the Genocide Convention was invoked before the Court. In fact, when the Genocide Convention was invoked against the United States itself, rather than availing of the hypothetical possibility permitted by its reservation and accepting the Court's jurisdiction in the interests of justice, the United States elected instead to appeal to its reservation as a ground for rejecting the jurisdiction of the Court, declaring that it "has not given the specific consent [that reservation] required [and] … will not do so."[202] The United States has thus demonstrated, unequivocally, that it holds no genuine interest in the construction of the Genocide Convention, whether applied to its own activities or to activities of other States, and its current attempt to intervene in the present case is motivated exclusively by the goal of supporting one of the Parties to the detriment of the other Party, for reasons that are purely political in nature.

169. ***Second***, as regards the jurisdictional link requirement, the United States failed to refute the Russian Federation's arguments that the object and purpose of Article 63 speak for the necessity of the jurisdictional link between the intervener and the disputing parties.

170. In an attempt to mislead the Court, the United States resorts to selective quoting of Rosenne, who noted *in passim* that "Article 82 [of the Rules of Court] makes no mention

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[200] *Ibid*., ¶25.

[201] *Ibid*., ¶¶26-28.

[202] *See Legality of Use of Force (Yugoslavia v. United States of America)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 924, ¶22.

of any possible jurisdiction link between the intervener and the parties in the case."[203] However, the United States omits the very next sentence of the passage, where Rosenne states that:

> "[t]his question is open, for instance where the convention in question contains a compromissory clause conferring jurisdiction on the Court, to which the intervener has made a duly established reservation."[204]

171. In fact, Rosenne considered intervention under Article 63 as one of the "clear and safe situations" where a jurisdictional link is required, after analysing the drafting history of the Statute. In his opinion, "what is involved is not merely an obligation to recognise the jurisdiction of the Court and the final and binding quality of its judgment, but also an obligation to comply with the decision of the Court". Importantly:

> "the only clear and safe situations [with regard to interventions] that I can see are: (a) where the case is brought on the basis of declarations accepting the jurisdiction under Article 36, paragraphs 2 or 5 of the Statute, and the State wishing to intervene has made a similar declaration; then it would seem to be essential that no question of reciprocity should arise, as that would only introduce innumerable complications into the case; and (b) where the intervention is made under Article 63 of the Statute, and if the convention in question contains a compromissory clause conferring jurisdiction on the Court in circumstances there defined, and the case is instituted on the basis of that compromissory clause, then it is submitted that the intervening State, which *ex hypothesi* is a party to that convention, must not have made an established reservation affecting the compromissory clause."[205] [Emphasis added]

172. Judge Jiménez de Aréchaga agrees that "*The assumption that Article 63 does not require a demonstration of jurisdiction has never been put to the test*".[206] A. Daví takes it even further, stressing that:

> "an intervention under Article 63 should always be conditional on the existence of a jurisdictional link."[207]

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[203] Written Observations of the United States, ¶32, footnote 38.

[204] S. Rosenne, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT, 1920-2005 (Brill-Nijhoff, 2006), p. 1524.

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

[206] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Intervention, Judgment of 21 March 1984, I.C.J. Reports 1984, Separate Opinion of Judge Jiménez de Aréchaga, p. 58, ¶9.

[207] A. Daví, L'Intervento davanti alla Corte Internazionale di Giustizia. Naples: Casa Editrice Jovene, *American Journal of International Law*, 1984, Vol. 81(2), p. 255-256; cited by G. Giorgio, *A New Way for Submitting Observations on the Construction of Multilateral Treaties to the International Court of Justice* im U. Fastenrath and others et al. (eds.), FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA (OUP, 2011), p. 668.

173. That the "jurisdictional link" requirement is not expressly set out in Article 63 of the Statute of the Court or Article 82 of the Rules of Court is of no importance: its existence is presumed by the other requirements of Article 63, read in light of the structure and the drafting of the Statute of the Court, as the Russian Federation has previously explained.[208]

174. By analogy, although the "legal interest" that is expressly required under Article 62 is similarly not expressly set by Article 63, it does not mean that a legal interest is not required in a case of intervention under the latter. Article 63 does not mention the legal interest because it is *presumed* that any State party to a convention would by default have a legal interest in its interpretation:

> "for Article 63 refers to a case where the State concerned is not a party to the dispute…. Its interest of a legal nature is presumed, and it is not a party to the dispute because the Statute limits its intervention to stating its own interpretation of the multilateral treaty in question" [Emphasis added].[209]

175. Likewise, in Article 63 the presence of a jurisdictional link might ordinarily be presumed without having been explicitly set out as a prerequisite. Other scholars have also espoused the view that although Article 63 does not explicitly stipulate that intervening States must possess a jurisdictional link and legal interest, these elements are nevertheless implicit, noting in this context that such a jurisdictional link is clearly missing in the case of the United States in the present proceedings because of its reservation to Article IX. For example, specifically with regard to the United States' intervention in the present case, Professor B. Bonafe, even despite a generally hostile attitude towards the Russian Federation, still argues that

> "…Article 63 intervention is meant to allow participation in the proceedings of third States that share with the parties the collective interest in the uniform interpretation of a multilateral convention… the proper construction of Article 63 as being based on the existence of a general interest could be crucial to deciding whether certain requests to intervene are admissible… The footnote [in the United States' Declaration of Intervention] justifying the admissibility of that request precisely argues that the USA intervention must be admitted because Article 63 does not require the existence of a legal interest. However, this is not entirely correct: the provision is premised on the existence of an 'implicit' collective interest. And that interest cannot be said to exist with respect to obligations having made the object of a reservation. Accordingly, the request of the USA seems only partially admissible – to the

[208] Written Observations of the Russian Federation, 17 October 2022, ¶¶110-118.

[209] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Intervention, Judgment of 21 March 1984, I.C.J. Reports 1984, , Separate Opinion of Judge Mbaye, pp. 40.

> extent that it relates to provisions of the Genocide Convention that are binding for the USA – and it should not be admissible for the part relating to Article IX."[210]

176. Of course, this would imply *ut minimum* that the United States' intervention is altogether inadmissible at the jurisdictional phase of the proceedings, since it relies on Article IX to attempt entry into that phase. But there is no reason not to take the same logic further – the absence of the implicit legal interest and the presumed jurisdictional link can thus vitiate the entire intervention of the United States.

177. ***Third***, the United States has also failed to find any authorities to rebut the Russian Federation's argument that the principle of reciprocity prevents intervention under Article 63 if an intervener made a reservation to the compromissory clause. The United States' argument thus boils down to an unsubstantiated allegation that the Russian Federation "seek to burden Article 63 interventions with all the conditions that are applicable to applicants before the Court, or third parties intervening under Article 62".[211] This ignores the drafting history of Article 63 and multiple authorities previously cited by the Russian Federation, which explained that any successful intervention (including intervention under Article 63) requires absence of the reservations to the compromissory clause in the convention at issue, such as those expressed by Judge Anzilotti, Judge Huber, Judge Jiménez de Aréchaga and helpfully summarised by Rosenne.[212]

178. The United States' claim that "[i]t is difficult to see under the Russian Federation's reading what purpose Article 63 would serve, or why it would ever be invoked"[213] flies in the face of reality: Article 63 has already on several occasions been invoked and "served its purpose"; yet, up until this moment, it has never been invoked by a State which does not recognise the jurisdiction of the Court in regard to the convention in question.

179. The United States then concedes that reciprocity is enshrined in Article 63, but tries to explain it away by stating that a potential intervener, if admitted, will be bound by the Court's interpretation of the treaty. Again, the United States ignores in a self-serving

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[210] B. Bonafe, The collective dimension of bilateral litigation: The Ukraine v Russia case before the ICJ, *Questions of International Law*, 2014, Vol 1, pp. 32-34.

[211] Written Observations of the United States, ¶29.

[212] Written Observations of the Russian Federation, 17 October 2022, ¶¶119-125.

[213] Written Observations of the United States, ¶29.

manner the fact that a reservation to the compromissory clause in the treaty makes it impossible for any State to enforce a treaty's interpretation given by the Court, which, on the United States' reading, renders Article 63(2) of the Statute *jus nudum* in reality. Moreover, the obligatory nature of a possible Court's decision on interpretation will rest only on the US unilateral statement, which is not reliable since the US has already changed its position on the interpretation of the Genocide Convention and it is very likely that it will deny the obligatory nature of any possible decision of the Court with reference to its reservation to the Genocide Convention.

180. Consequently, the Declaration of the United States is inadmissible.

I. THE JOINT DECLARATION OF CANADA AND THE NETHERLANDS IS INADMISSIBLE

181. The Russian Federation has explained that the intervention sought by Canada and the Netherlands is inadmissible because, by using the singular form to describe a potential intervening State and a declaration of intervention, the language of the Statute of the Court and the Rules of Court leaves no doubt that it does not envisage the filing of joint declarations of intervention under Article 63 of the Statute.[214]

182. The arguments that Canada and the Netherlands made in their Written Observations in order to justify their unconventional and unsubstantiated approach to the Court's Statute and procedure are unavailing.

183. ***First***, Canada and the Netherlands are quick to suggest that "[t]here is nothing in the Statute or the Rules that prevents intervening States from filing a joint declaration of intervention."[215] This reading of the Statute and the Rules is incorrect. In fact, the use of the singular form to describe the potential intervening State and the declaration of intervention in the language of the Statute and the Rules of Court *does* preclude the joint action by more than one State in attempting to intervene in a proceeding under Article 63. If Canada and the Netherlands meant to say that there is no *express* language to this effect, there is no need for such express language. In any event, it is equally the case that there is nothing express in the Statute or the Rules that would authorise the filing of a joint declaration, either.

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[214] Written Observations of the Russian Federation, 30 January 2023, ¶¶114-119.

[215] Written Observations of Canada and the Netherlands, ¶36.

184. ***Second***, Canada and the Netherlands wrongly cite Article 47 of the Rules of Court. This rule has nothing to do with interventions: it applies only to the joining of cases before the Court.[216] In any event, this article provides that the Court may "direct that the proceedings in two or more cases be joined" [Emphasis added] – that is, a joinder does not occur on a party or declarant's sole initiative.

185. ***Third***, the analogy drawn by Canada and the Netherlands between joined applicants and joined interveners is inapposite.[217] Canada and the Netherlands described as "precedence on joint submissions"[218] the case concerning the *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation*, which was brought jointly by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates. But this was a case of joint application instituted under Article 40 of the Statute,[219] and is no precedent for a matter of joint declaration of intervention under Article 63. In cases instituted by application, Article 40 states in part that "the subject of the dispute and the parties shall be indicated." Article 43 of the Statute likewise uses the plural form in providing that "memorials", "counter-memorials" and "replies" may be filed by the parties to the case. These provisions thus do not preclude joint applications and envisage the possibility of multiple applicants and respondents in the proceedings. This in fact was confirmed by the practice of the Permanent Court in *The S.S. "Wimbledon"*. That case was instituted by one application jointly filed by the Great Britain, France, Italy and Japan.[220] In cases of intervention, the relevant provisions of both the Statute of the Court and the Rules of Court operate in the singular form. For example:

(a) Article 63(2) of the Statute reads:

> "[e]very state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it." [Emphasis added]

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[216] Canada's and the Netherlands' resort to this rule on the joinder of cases betrays their true appreciation of their presence not as interveners but as co-applicants with Ukraine in this case, thus proving that their intended intervention is not genuine.

[217] Canada's and the Netherlands' attempt to draw an analogy between joint applicants and joint interveners also betrays their true appreciation of their presence not as interveners but as co-applicants with Ukraine in this case, thus proving that their intended intervention is not genuine.

[218] Written Observations of Canada and the Netherlands, ¶38.

[219] *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar),* Judgment of 14 July 2020, I.C.J. Reports 2020, p. 88, ¶1.

[220] *The SS. "Wimbledon"*, Application Instituting Proceeding, PCIJ Series A No. 1, pp. 6-8.

(b) Article 82 of the Rules of Court provides:

> "[a] State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings
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> ….
>
> Such a declaration may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute." [Emphasis added.]

186. Thus, the analogy that Canada and the Netherlands attempt to draw between joint submissions and joint interventions is baseless and ill-conceived.

187. Consequently, the joint declaration of intervention filed by Canada and the Netherlands does not conform to the requirements of the Statute and the Rules of Court and is inadmissible even on this basis alone.

III. SUBMISSIONS

188. In view of the foregoing, and bearing in mind its request, made at the outset, to hold an oral hearing on the admissibility of each of the Declarations individually, so that each can be addressed on its own merits, the Russian Federation respectfully requests the Court:

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

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

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

Agent of the Russian Federation

Alexander V. SHULGIN

The Hague, 24 March 2023