

## OBSERVATIONS ON THE ADMISSIBILITY OF AUSTRIA'S DECLARATION OF INTERVENTION

13 February 2023

To the Registrar of the International Court of Justice, the undersigned being duly authorized by the Republic of Austria:

1. On behalf of the Republic of Austria, I have the honour to refer to the Registrar's Letter No. 158444 of 31 January 2023 and submit to the Court the following Observations on the admissibility of Austria's Declaration of Intervention filed on 12 October 2022 ("Declaration") pursuant Article 63, paragraph 2, of the Statute of the International Court of Justice ("Statute"), in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

2. On 15 November 2022, the Russian Federation filed objections to the admissibility of the Declarations of Intervention submitted by Austria and nine other Parties to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention").<sup>1</sup> The Russian Federation's objections to the admissibility of Austria's Declaration are addressed below.

### **I. Article 63 of the Statute provides for a *Right to Intervene***

3. At the outset, it is worthwhile to reiterate that Article 63 of the Statute provides for the possibility of interventions by other Parties of a convention *as of right*.<sup>2</sup> As long as the prerequisites of an intervention under Article 63 of the Statute are fulfilled, which is for the Court to determine, the intervention is admissible.<sup>3</sup> Unlike Article 62 of the Statute, the decision on admissibility under Article 63 does not entail an element of discretion.<sup>4</sup>

4. Notably, an intervention under Article 63 of the Statute does not require the intervening State to show any "interest of a legal nature which may be affected by the decision in the case",<sup>5</sup> a core requirement of interventions under Article 62. Under Article 63, such interest is presupposed: every Party of a convention *ipso facto* has an interest in the proper construction of the convention, which also determines the other Parties' own rights and obligations under

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<sup>1</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, The Russian Federation's Written Observations on Admissibility of the Declarations of Intervention submitted by Australia, Austria, Denmark, Estonia, Finland, Greece, Ireland, Luxembourg, Portugal and Spain of 15 November 2022 ("Written Observations of the Russian Federation").

<sup>2</sup> See also *Haya de la Torre (Colombia v. Peru)*, Judgment of 13 June 1951, I.C.J. Reports 1951, p. 71, at p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application by Malta for Permission to Intervene, Judgment of 14 April 1981, I.C.J. Reports 1981, p. 3, at pp. 13, 15, paras. 21, 26; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application by Honduras for Permission to Intervene, Judgment of 4 May 2011, I.C.J. Reports 2011, p. 420, at p. 433, para. 35.

<sup>3</sup> See *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at pp. 5-6, paras. 7-8; *S.S. "Wimbledon" (Britain et al. v. Germany)*, Question of Intervention by Poland, Judgment of 28 June 1923, P.C.I.J. Series A, No. 1, p. 12, at p. 13; *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application for Permission to Intervene of Italy, Judgment of 21 March 1984, Dissenting Opinion of Sir Robert Jennings, I.C.J. Reports 1984, p. 148, at pp. 156-157, paras. 25-26.

<sup>4</sup> J. Quintana, "Intervention under Article 63 of the Statute", in J. Quintana (ed.), *International Litigation in Practice*, Vol. 10 (2015), p. 941.

<sup>5</sup> Article 62, paragraph 1, Statute of the International Court of Justice.

international law. This is especially true with regard to a convention of such importance as the Genocide Convention. For this reason, Article 63 of the Statute vests every State Party, such as Austria, with a right to express its views on the construction of the Genocide Convention.

5. The prerequisites for the admissibility of interventions under Article 63 are limited to those stated in the Statute and the Rules of Court. In addition to certain procedural requirements, all of which Austria has satisfied and none of which were put into question by the Russian Federation, there are only few substantive requirements to be determined by the Court.

6. First and foremost, the Court must determine whether a *convention*, to which the intervening State is a Party, is in question in the relevant case.<sup>6</sup> The Russian Federation has neither denied that the Genocide Convention is in question, nor that Austria is a State Party to the Convention.

7. Second, an intervention under Article 63 must be limited to the *construction* of the convention in question. The Russian Federation claims that the existence of a dispute – a notion addressed in detail in Austria’s Declaration – is not a question of construction of the Genocide Convention.<sup>7</sup> However, this argument disregards the fact that the term “dispute” is a central term in Article IX of the Genocide Convention, the provision which Austria wishes to construe in its intervention.<sup>8</sup>

8. Article IX hinges on the question of what does or does not constitute a dispute. It would be virtually impossible to formulate a construction of Article IX without assessing the scope of the term “dispute”. In the same vein, Austria invokes the question of good faith and abuse of rights only as tools of treaty interpretation that form part of its statement on the construction of Article IX. More specifically, the notions of good faith interpretation and abuse of rights inform Austria’s view that the abusive interpretation of the Genocide Convention may result in a dispute under Article IX.

8. Contrary to what the Russian Federation claims,<sup>9</sup> Austria’s Declaration does not discuss the factual question as to whether a genocide has been or may be committed in Ukraine.

9. None of the other objections of the Russian Federation pertain to prerequisites for the admissibility of interventions under Article 63. It is not a prerequisite that only a certain number of States may intervene in a given case. It is also not a prerequisite that intervening States may not share the legal views of one of the disputing Parties, as confirmed in the PCIJ’s *Wimbledon*<sup>10</sup> and the Court’s *Haya de la Torre*<sup>11</sup> and *Whaling* cases.<sup>12</sup> Nor does the principle of equality of arms or the requirement of good administration abrogate the right of other Parties

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<sup>6</sup> J. Quintana, “Intervention under Article 63 of the Statute”, in J. Quintana (ed.), *International Litigation in Practice*, Vol. 10 (2015), pp. 932-933.

<sup>7</sup> Written Observations of the Russian Federation, para. 106(b).

<sup>8</sup> See Austria’s Declaration, paras. 29 *et seq.*

<sup>9</sup> Written Observations of the Russian Federation, para. 106(b).

<sup>10</sup> *S.S. “Wimbledon”* (Britain et al. v. Germany), Application to Intervene by Poland, 22 May 1923, P.C.I.J. Series A, No. 1, p. 9; *S.S. “Wimbledon”* (Britain et al. v. Germany), Question of Intervention by Poland, Judgment of 28 June 1923, P.C.I.J. Series A, No. 1, p. 12.

<sup>11</sup> *Haya de la Torre* (Colombia v. Peru), Judgment of 13 June 1951, I.C.J. Reports 1951, p. 71; *Haya de la Torre* (Colombia v. Peru), Declaration of intervention by the Government of Cuba, 13 March 1951, p. 117.

<sup>12</sup> *Whaling in the Antarctic* (Australia v. Japan), Written observations of Japan on the Declaration of Intervention by New Zealand, 21 December 2012; *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, para. 21.

to the Convention to intervene, as the Statute and the Rules of Court vest the Court with appropriate tools to ensure procedural fairness and efficiency.<sup>13</sup>

10. Accordingly, it is submitted that Austria's Declaration complies with all prerequisites for the admissibility of its intervention under Article 63 of the Statute. For the avoidance of doubt, the following sections of Austria's Observations will rebut the objections raised by the Russian Federation, even though the purported additional conditions invoked by the Russian Federation have no legal basis in the prerequisites prescribed by the Statute, the Rules of Court, and the Court's case law.

## II. The Intervention is "genuine"

11. The Russian Federation claims that Austria effectively seeks to become a *de facto* co-applicant by virtue of its intervention.<sup>14</sup> Austria explicitly stated in its Declaration that it does not wish to become a Party to the proceedings.<sup>15</sup> Contrary to how the Russian Federation interprets Austria's Declaration, the objective of Austria's Declaration is for the Court to take note of Austria's views on the proper construction of the Convention, as the Court's construction of the Convention affects Austria's rights and obligations as a Party. These rights and obligations also entail the compromissory clause in Article IX of the Convention.

12. As the Russian Federation points out itself, "the only point which it is necessary to ascertain is whether the object of the intervention of [the intervening government] is in fact the interpretation of the [treaty in question] ...".<sup>16</sup> Austria solely requests to intervene with respect to the construction of Article IX of the Convention, the interpretation of which forms part of the present dispute; Austria's Declaration addresses no other points.

13. Whether an intervention concerns the subject-matter of the respective case is to be determined by reference to the text of the Declaration of Intervention. The political context of an intervention is immaterial to determining the subject-matter of the intervention as well as the dispute.<sup>17</sup> The Court confirmed this in its *Continental Shelf* case between Tunisia and Libya, where it "... emphasize[d] that it does not [have] any general discretion to accept or reject a request for permission to intervene for reasons simply of policy. On the contrary, in the view of the Court the task entrusted to it ... is to determine the admissibility or otherwise of the request by reference to the relevant provisions of the Statute."<sup>18</sup> Although this quotation stems from a judgment on an intervention under Article 62 of the Statute, it applies *a fortiori* for the

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<sup>13</sup> See *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, para. 18.

<sup>14</sup> Written Observations of the Russian Federation, paras. 22, 24, 34, 48.

<sup>15</sup> Austria's Declaration, para. 7.

<sup>16</sup> *Haya de la Torre* (Colombia v. Peru), Judgment of 13 June 1951, I.C.J. Reports 1951, p. 71, at p. 77.

<sup>17</sup> *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, I.C.J. Reports 2021, p. 9, at pp. 27-28, para. 59; *Whaling in the Antarctic* (Australia v. Japan), Written observations of Japan on the Declaration of Intervention by New Zealand, 21 December 2012; *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, paras. 18-21.

<sup>18</sup> *Continental Shelf* (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment of 14 April 1981, I.C.J. Reports 1981, p. 3, at p. 12, para. 17.

admissibility of interventions *as of right* under Article 63, in contrast to discretionary interventions under Article 62.

14. It is thus immaterial that Austria had publicly expressed its intention to intervene prior to filing its Declaration. Yet, if the Russian Federation insists on probing Austria's "true intentions",<sup>19</sup> Austria reiterates that its "true" and stated<sup>20</sup> intention is the proper construction of the Genocide Convention by all member States and that the rule of law be upheld.

15. Therefore, Austria's Declaration must be distinguished from the intervention lodged in the Court's *Haya de la Torre* case, where the Court limited the admissibility of Cuba's intervention to arguments that concerned the subject-matter of the proceedings. In *Haya de la Torre*, Cuba aimed to intervene on matters that were not the subject-matter of the case but had already been decided by the Court in a previous judgment, making them *res judicata*. These matters were declared inadmissible, whereas Cuba's other submissions, which the Parties' submissions had not even addressed, were admitted, as they concerned the construction of a relevant Convention.<sup>21</sup> Austria's Declaration, by contrast, concerns the same subject-matter on which both Parties to the present case have already presented their legal views.<sup>22</sup> As a result, the Russian Federation's invocation of *Haya de la Torre* to argue that Austria's intervention is not "genuine" is inapposite.

16. Further, it is possible and has indeed been a common occurrence that an intervening State's views on the proper construction of a convention overlap with the views of one of the disputing Parties<sup>23</sup> – this does not turn the intervening State into a "co-applicant".<sup>24</sup> The intervening State enjoys a distinct, statutory right to have its legal position heard, irrespective of what the other States may choose to argue.

17. Finally, Austria's openness to its intervention being grouped together by the Court with like-minded intervening States<sup>25</sup> is meant to assist the Court in the good administration of justice, not to confer its right to intervene to another State.

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<sup>19</sup> Written Observations of the Russian Federation, para. 23.

<sup>20</sup> Statement by the Austrian Minister of Foreign Affairs of 23 August 2022, available at <http://www.eza.gv.at/en/the-ministry/press/speeches/2022/08/statment-of-foreign-minister-schallenberg-at-the-krim-plattform/>.

<sup>21</sup> *Haya de la Torre* (Colombia v. Peru), Judgment of 13 June 1951, I.C.J. Reports 1951, p. 71, at pp. 76-77.

<sup>22</sup> *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Application instituting proceedings of 26 February 2022, pp. 4-8; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Request for the indication of provisional measures, 26 February 2022, pp. 2-4; *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide* (Ukraine v. Russian Federation), Document (with annexes) from the Russian Federation setting out its position regarding the alleged "lack of jurisdiction" of the Court in the case, 7 March 2022, pp. 1-6.

<sup>23</sup> *Whaling in the Antarctic* (Australia v. Japan), Written observations of Japan on the Declaration of Intervention by New Zealand, 21 December 2012, paras. 2-5; *Whaling in the Antarctic* (Australia v. Japan), Written Observations of Japan on the written observations submitted by New Zealand, 31 May 2013, pp. 5-6, para. 9.

<sup>24</sup> Written Observations of the Russian Federation, para. 22; *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, paras. 18-21.

<sup>25</sup> Written Observations of the Russian Federation, para. 28.

### **III. Austria's Declaration of Intervention is in Line with the Principle of Equality of the Parties and the Requirement of Good Administration of Justice**

18. Article 63 Statute creates a distinct right for intervening States, which exists in parallel to the principles of equality of the Parties and the requirement of good administration.

19. The Court has the requisite procedural tools and flexibility to reconcile the good administration of justice with multiple interventions. Consequently, denying States the right to intervene is *not necessary* to ensure the requirement of good administration of justice and would be contrary to the right enshrined in Article 63 of the Statute.

20. This was confirmed by the Court in the *Whaling* case: as long as an intervention under Article 63 of the Statute only concerns the construction of a convention, the equality of the parties is not at issue.<sup>26</sup>

21. Russia's argument on the nationality of the Judges on the bench puts their impartiality and independence unduly into question.<sup>27</sup> The Judges' nationality is immaterial for the admissibility of interventions and is thus not a consideration under the Statute and the Rules of Court. The Court's case law confirms this, most recently in the *Whaling* case, where the fact that Judge Keith shared the nationality of the intervening State did not affect the admissibility of the intervention.<sup>28</sup>

### **IV. Austria's Declaration of Intervention is Admissible in the Jurisdictional Phase of these Proceedings**

22. Austria's Declaration focuses entirely on jurisdictional questions, namely the compromissory clause of the Genocide Convention. Therefore, the jurisdictional phase is the only phase of the proceedings when Austria can exercise its right to intervene on the construction of Article IX of the Convention in an effective and meaningful manner. If Austria's Declaration was only admitted in the merits phase, its intervention would be moot. In turn, this would amount to a *de facto* denial of Austria's right to intervene as provided for under Article 63 of the Statute. It must also be borne in mind that Rule 82 (1) of the Rules of Court states unequivocally that "(s)uch a declaration shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings." If Article 63 were to only allow for interventions on substantive provisions, Rule 82 (1) would have tied the time limit for Declarations to the "opening of the oral proceedings *on the merits*", which it does not.

23. The reason for the lack of case law on interventions in the jurisdictional phase is that so far none of the interventions under Article 63 of the Statute presented views on the construction of a jurisdictional clause.<sup>29</sup> Consequently, and contrary to what the Russian Federation would like the Court to draw from this, nothing can be derived from the absence of case law on

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<sup>26</sup> *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, para. 18.

<sup>27</sup> Written Observations of the Russian Federation, para. 51.

<sup>28</sup> *Whaling in the Antarctic* (Australia v. Japan), Declaration of Intervention by New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, para. 21.

<sup>29</sup> J. Quintana, "Intervention under Article 63 of the Statute", in J. Quintana (ed.), *International Litigation in Practice*, Vol. 10 (2015), pp. 929-931.

interventions in the jurisdictional phase. The case at hand is the first time the Court is called upon to decide on this matter.

## **V. Austria's Declaration of Intervention does not presuppose the Court's Jurisdiction**

24. The Russian Federation claims that Austria's Declaration presupposes the Court's jurisdiction, when in fact, the Declaration does the exact opposite: it revolves entirely around the Court's jurisdiction under the Genocide Convention.

25. The Court's decision on El Salvador's Declaration in *Nicaragua* cannot serve as a precedent for Austria's Declaration. Not even one of El Salvador's points was related to the jurisdictional clause of the case. Conversely, Austria's Declaration concerns only the compromissory clause of the Genocide Convention and does not construe any substantive provisions. Accordingly, and in distinction to El Salvador's Declaration, Austria's Declaration does not touch upon the merits of the case. Rather than presupposing the Court's jurisdiction, the question of jurisdiction takes centre stage in Austria's Declaration.

## **VI. Article IX can be the Subject of Interventions *per se***

26. The Russian Federation claims that Article IX of the Genocide Convention cannot be the subject of construction in interventions under Article 63 of the Statute.<sup>30</sup> The Russian Federation's Written Observations do not, however, state any valid reasons why Article IX – an integral part of the Genocide Convention – should be treated differently from the substantive provisions of the Convention.

27. The fact that the dissenting Judge *ad hoc* Kreća in the Court's *Bosnian Genocide* case called Article IX a "standard" compromissory clause does not explain why it should be impermissible for Austria to express its views on the proper construction of that provision.

28. Further, and contrary to what the Russian Federation claims,<sup>31</sup> the *travaux préparatoires* of Article 63 of the Statute and its predecessor, Article 63 in the PCIJ Statute, do *not* exclude the construction of compromissory clauses from the purview of interventions under Article 63.<sup>32</sup> That the intervention must relate to the "subject-matter" of the case is in no way equivalent to a condition that the intervention relate to substantive provisions of the convention in question.<sup>33</sup> Such a limitation to substantive provisions is neither stated in the Statute and Rules of Court nor would this align with their context or object and purpose.<sup>34</sup>

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<sup>30</sup> Written Observations of the Russian Federation, para. 93.

<sup>31</sup> *Ibid.*

<sup>32</sup> *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), Declaration of Intervention of the Republic of El Salvador, Order of 4 October 1984, Dissenting Opinion of Judge Schwebel, 223, at pp. 234-236; A. Miron/C. Chinkin, "Article 63", in Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019), p. 1741, at p. 1758, para. 46.

<sup>33</sup> Cf. Written Observations of the Russian Federation, para. 95.

<sup>34</sup> M. Shaw (ed.), *Rosenne's Law and Practice of the International Court 1920-2015* (5th edn., Vol III, 2016), p. 1533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol I, 2013), p. 1031; A. Miron/C. Chinkin, "Article 63", in Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2019), p. 1741, at p. 1763, para. 46.

29. In fact, the subject-matter currently litigated in the present proceedings is of a non-substantive nature, as Russia opposes the Court's jurisdiction with Preliminary Objections. The Russian Federation contends, in a single sentence, that "[t]he mere fact that the Preliminary Objections were filed does not attest to the existence of a dispute on interpretation of this Article."<sup>35</sup> It remains unclear what the Russian Federation's manifest opposition to Ukraine's invocation of the Court's jurisdiction could be, other than a dispute on the subject-matter of jurisdiction.

### **VIII. Conclusion**

30. For the reasons set out above, Austria respectfully requests the Court to decide that the Declaration of Intervention filed by Austria on 12 October 2022 is admissible.

For the Republic of Austria

*H. Tichy*

Ambassador Helmut Tichy, Agent

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<sup>35</sup> Written Observations of the Russian Federation, para. 92.