

**INTERNATIONAL COURT OF JUSTICE**

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

**(UKRAINE v. RUSSIAN FEDERATION)**

**OBSERVATIONS ON THE ADMISSIBILITY OF THE  
U.S. DECLARATION OF INTERVENTION  
UNDER ARTICLE 63 OF THE STATUTE OF THE  
INTERNATIONAL COURT OF JUSTICE  
SUBMITTED BY  
THE UNITED STATES OF AMERICA**

**FEBRUARY 13, 2023**

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OBSERVATIONS ON THE ADMISSIBILITY OF THE U.S. DECLARATION OF  
INTERVENTION UNDER ARTICLE 63 OF THE STATUTE OF THE  
INTERNATIONAL COURT OF JUSTICE

**I. INTRODUCTION**

1. On February 27, 2022, the Government of Ukraine instituted proceedings against the Russian Federation regarding “a dispute . . . relating to the interpretation, application and fulfilment” of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention” or “Convention”).<sup>1</sup>
2. As contemplated by Article 63, paragraph 1, of the Statute of the International Court of Justice (“Court’s Statute”) and on the instructions of the Court, the Registrar of the Court, by letter dated March 30, 2022, duly notified the Government of the United States as a party to the Convention that in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*:

[T]he [Convention] is invoked both as a basis of the Court’s jurisdiction and as a substantive basis of the Applicant’s claims on the merits. In particular, the Applicant seeks to found the Court’s jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of this instrument will be in question in the case.<sup>2</sup>

3. On September 7, 2022, the United States availed itself of the right to intervene conferred upon it by Article 63, paragraph 2, of the Statute by filing its Declaration of Intervention under Article 63 of the Statute (“U.S. Declaration”).
4. On October 17, 2022, Ukraine submitted its Written Observations on the Declaration of Intervention of the United States, conveying its view that the U.S. Declaration fulfills the requirements of Article 63 of the Court’s Statute and Article 82 of the Rules of Court and

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<sup>1</sup> Application Instituting Proceedings (hereinafter, “Application”), para 2.

<sup>2</sup> Letter from Philippe Gautier, Registrar, No. 156413, to the States parties to the Genocide Convention (except Ukraine and the Russian Federation) (Mar. 30, 2022) (hereinafter, “Registrar’s Letter of Mar. 30, 2022”).

is, accordingly, admissible.<sup>3</sup> On the same day, the Russian Federation submitted its Written Observations, contending that the U.S. Declaration was inadmissible.<sup>4</sup>

5. The Registrar, by letter dated January 31, 2023, informed the United States that, in light of the fact that the Russian Federation had filed objections to the admissibility of the U.S. Declaration, the Court, pursuant to Article 84, paragraph 2, of its Rules, has decided to hear the United States and the parties by means of a written procedure. To that end, the Court fixed February 13, 2023, as the time-limit for the United States to submit observations in writing on the admissibility of its Declaration, and March 13, 2023, as the time-limit for the parties to submit observations in writing on the admissibility of the U.S. Declaration.<sup>5</sup> The United States appreciates the opportunity to furnish its observations (“U.S. Written Observations”) on these questions.
6. The general purpose of Article 63 of the Court’s Statute is to promote the uniform interpretation of multilateral conventions as between the States Parties.<sup>6</sup> To that end, it provides States that are party to a convention at issue in contentious proceedings a right to intervene “[w]hensoever” those proceedings concern the construction of that convention.
7. The United States recognizes that the number of States Parties exercising the right to intervene in this case is unprecedented. But the fact that so many States feel compelled to intervene in this case does not render their intervention impermissible. By its very nature, Article 63 invites wide participation by States Parties to multilateral conventions. In this regard, the extent to which the States Parties availing themselves of the right to intervene under Article 63 are aligned in their views as to the proper construction of the convention at issue may be of relevance in the Court’s deliberations but is irrelevant to whether those States Parties may express those views under Article 63 as a threshold matter.

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<sup>3</sup> Written Observations of Ukraine on the Declaration of Intervention of the United States (October 17, 2022) (hereinafter, “Ukraine’s Written Observations”).

<sup>4</sup> The Russian Federation’s Written Observations on the Admissibility of the Declarations of Intervention Submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the United Kingdom, and the United States (hereinafter, “Russian Federation’s Written Observations”) (Oct. 17, 2022).

<sup>5</sup> Letter from Philippe Gautier, Registrar, No. 158475 (Jan. 31, 2023).

<sup>6</sup> ROBERT KOLB, *THE INTERNATIONAL COURT OF JUSTICE* 700 (2013) (hereinafter, “KOLB”) (“[Article 63] is concerned to ensure the greatest possible degree of uniformity in the interpretation of multilateral treaties, and to avoid divergent interpretations of their texts giving rise to disputes about the application of such treaties . . . . [I]n consequence, intervention under Article 63 is facilitated by the fact that the legal interest the third State has to establish is inherent in its being a party to the multilateral convention concerned, so that there is no need to demonstrate it specially.”).

8. Ukraine initiated proceedings under the Genocide Convention, a multilateral convention to which the United States has been party since 1988 and the proper construction of which the Court has recognized is of paramount concern to all States Parties.<sup>7</sup> The United States has availed itself of its right to intervene under Article 63, directed its Declaration to the construction of the provisions of the Genocide Convention that are in question in the present case, and satisfied the procedures set out in Article 82 of the Rules of Court. The U.S. Declaration is therefore admissible.
9. Throughout its Written Observations on Admissibility of the Declarations of Intervention Submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the United Kingdom, and the United States (“Russian Federation’s Written Observations”), the Russian Federation seeks to insert additional requirements not reflected in the Court’s Statute or Rules. These arguments are without merit, would severely and inappropriately constrain the right of States Parties to intervene under Article 63, and risk undermining the very purpose of that Article.
10. The Russian Federation’s Written Observations raise four principal arguments: (1) the object of the U.S. Declaration is not the construction of the relevant provisions of the Genocide Convention and it is therefore inadmissible under Article 63 of the Court’s Statute;<sup>8</sup> (2) the U.S. Declaration should be found inadmissible in this phase of the proceedings as premature or prejudging jurisdiction over Ukraine’s Application;<sup>9</sup> (3) allowing the intervention would be incompatible with the equality of the parties before the Court and the good administration of justice;<sup>10</sup> and (4) the U.S. Declaration should be found inadmissible on the basis of a U.S. reservation to Article IX of the Convention.<sup>11</sup>
11. These U.S. Written Observations address each of the Russian Federation’s objections, and are organized in the following manner. **Section II** describes how the U.S. Declaration meets all of the requirements for intervention under Article 63. **Section III** explains that

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<sup>7</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28) (States Parties to the Genocide Convention “do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention.”). As noted in the U.S. Declaration, such a common interest, in the view of the Court, indicates that the provisions of the Convention are obligations *erga omnes partes*. Declaration of Intervention under Article 63 of the Statute Submitted by the United States of America (Sept. 7, 2022) (hereinafter “U.S. Declaration”), para. 9 (citing authorities).

<sup>8</sup> Russian Federation’s Written Observations, Section II.A.

<sup>9</sup> *Id.*, Sections II.C-E.

<sup>10</sup> *Id.*, Section II.B.

<sup>11</sup> *Id.*, Section II.F.

the United States' reservation to Article IX has no bearing on its right to intervene under Article 63. **Section IV** demonstrates that interventions under Article 63 may extend to issues of jurisdiction and must therefore be considered prior to the Court's judgment on those issues. **Section V** explains that intervention under Article 63 does not require a showing of "genuine intention." **Section VI** addresses why intervention under Article 63 does not adversely impact the equality of the parties before the Court or inhibit the Court's ability to manage proceedings in accordance with the requirements of the good administration of justice. Finally, **Section VII** contains the United States' Submissions.

## **II. THE U.S. DECLARATION SATISFIES THE REQUIREMENTS OF ARTICLE 63 OF THE COURT'S STATUTE AND ARTICLE 82 OF ITS RULES AND IS THEREFORE ADMISSIBLE**

12. Article 63 of the Court's Statute sets forth conditions under which a party to a convention may exercise a right to intervene in proceedings before the Court. Article 63, paragraph 1, establishes the predicate condition for intervention: "Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith." Article 63, paragraph 2, continues that "[e]very state so notified has the right to intervene in the proceedings." Paragraph 2 additionally states the consequence for a party invoking this right: "[I]f [a party to the convention] uses this right, the construction given by the judgment will be equally binding upon it."
13. Article 82 of the Rules of Court sets forth the procedures by which a State may "avail itself of the right of intervention conferred upon it by Article 63 of the Statute." A State desiring to do so must file a declaration to that effect "as soon as possible and not later than the date fixed for the opening of the oral proceedings." The declaration shall state the name of an agent, specify the case and the convention to which it relates, and contain:
  - (a) particulars of the basis on which the declarant State considers itself a party to the convention;
  - (b) identification of the particular provisions of the convention the construction of which it considers to be in question;
  - (c) a statement of the construction of those provisions for which it contends;
  - (d) a list of the documents in support, which documents shall be attached.
14. The U.S. Declaration satisfies each of these requirements and conditions, a fact that the Russian Federation does not contest. The United States received the notice from the

Registrar and filed its Declaration as soon as possible—well before the opening of oral proceedings (the date of which has not yet been fixed). Consistent with all requirements of Article 82, paragraph 2, of the Rules of Court, the U.S. Declaration named an agent, specified the case and convention to which the declaration relates, and indicated that the United States deposited its instrument of ratification to the Genocide Convention in accordance with Article XI of the Convention on November 25, 1988, and remains a party to the Convention. The U.S. Declaration identified Articles I, II, III, IV, VIII, and IX of the Convention as the provisions the construction of which the United States considers to be in question, and contained a statement of the construction of those provisions for which the United States contends. Lastly, the U.S. Declaration included a list of the necessary documents in support, which were included with the Declaration. The U.S. Declaration also recognized that, by availing itself of the right to intervene under Article 63 of the Statute, the construction of the Convention given by the judgment in this case will be equally binding upon the United States.

15. Article 63 interventions are unqualified and as of right, and provided that the conditions stated in Article 63 are fulfilled, the intervention should be admitted.<sup>12</sup> Nothing further is required of a State seeking to exercise its right to intervene under Article 63 of the Court’s

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<sup>12</sup> See, e.g., *Military and Paramilitary Activities (Nicaragua v. United States of America)*, 1984 I.C.J. Reports 219, para. 1, Separate Opinion of Judges Ruda, Moser, Ago, Sir Robert Jennings and De Lacharrière (hereinafter, “Sep. Op. of Judges Ruda, Moser, Ago, Sir Robert Jennings and De Lacharrière”), (Order of Oct. 4) (“Article 63 of the Statute of the Court provides for a right of intervention in proceedings before it, ‘Whenever the construction of a convention to which States other than those concerned in the case are parties is in question.’ Where those conditions are fulfilled, a State wishing to intervene has a right to do so, and it is not for the Court to grant or withhold permission. Nevertheless, it is for the Court to decide in each case whether or not the conditions for such intervention, laid down in Article 63, are fulfilled.”); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene*, 1984 I.C.J. 55, 58, para. 9, Separate Opinion of Judge Jiménez de Aréchaga (“Whereas Article 63 confers an unqualified right on the State party to the convention, and the Court merely performs the function of verifying formal admissibility, under Article 62 the Court must reach a judicial decision, by means of a judgment, as to whether permission ‘should be granted’ in accordance with Rule 84.”); *Continental Shelf (Libyan Arab Jamahiriya/Malta), Application by Italy for Permission to Intervene*, 1984 I.C.J. 131, 144, paras. 31-32, Dissenting Opinion of Judge Schwebel (hereinafter, “Diss. Op. of Judge Schwebel”) (observing that “Article 63 unconditionally authorizes intervention where the State seeking it is party to a treaty” and that “Article 63 speaks of a ‘right to intervene’ because all that need be ascertained is that a State which seeks to exercise that right is party to the convention whose construction is at issue”). See also ROSENNE’S LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920-2015, Vol. III (Procedure) 1492 (Malcolm N. Shaw QC ed. 5<sup>th</sup> ed. 2016) (hereinafter, “ROSENNE’S LAW AND PRACTICE”) (quoting the Permanent Court of International Justice Advisory Committee of Jurists, *Procès-Verbaux of the Proceedings of the Committee, June 16<sup>th</sup>-July 24<sup>th</sup> 1920 with Annexes*: “[T]here is one case in which the Court cannot refuse a request to be allowed to intervene; that is in questions concerning the interpretation of a Convention in which States, other than the contesting parties, have taken part; each of these is to have the right to intervene.”).

Statute. The U.S. Declaration meets all of the requirements for intervention under Article 63 of the Statute and Article 82 of the Rules of Court and, accordingly, is admissible.

### **III. THE UNITED STATES' RESERVATION TO ARTICLE IX OF THE GENOCIDE CONVENTION HAS NO BEARING ON ITS RIGHT TO INTERVENE UNDER ARTICLE 63 OF THE COURT'S STATUTE**

16. The Russian Federation seeks to import into Article 63 a condition that a State must have consented to the Court's jurisdiction over contentious proceedings with respect to the convention at issue in order to intervene. Specifically, the Russian Federation asserts that the U.S. reservation to Article IX of the Genocide Convention obviates its right to intervene under Article 63.<sup>13</sup> The U.S. reservation, entered with its instrument of ratification, reads as follows:

That with reference to Article IX of the Convention, before any dispute to which the United States is a party may be submitted to the jurisdiction of the International Court of Justice under this article, the specific consent of the United States is required in each case.<sup>14</sup>

17. The fact that the United States ratified the convention in question subject to a reservation is irrelevant under Article 63. The United States takes its obligations under the Convention seriously and has a substantial interest in the interpretation of its provisions,

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<sup>13</sup> Russian Federation's Written Observations, Section II.F. The United States notes at the outset that its intervention is not limited to the construction of Article IX of the Genocide Convention. As detailed in its Declaration, the United States seeks to exercise its right to intervene under Article 63 with respect to the construction of Articles I, II, III, IV, VIII, and IX of the Genocide Convention. The Russian Federation also appears to suggest that the U.S. Declaration should be held inadmissible with respect to all articles, including Article IX, on the basis of its second reservation. That reservation provided that "nothing in the Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States." As with the other reservation of the United States, the Russian Federation at no time objected to this reservation, and only now belatedly asserts that this reservation "subordinates the interpretation and application of the Convention to its own internal law." Russian Federation's Written Observations, para. 109. The Russian Federation does not further expand on its concerns or explain how this reservation is inconsistent with "an essential element of the treaty" or "its general tenour." International Law Commission, Guide to Practice on Reservations to Treaties, Guideline 3.1.5.5, Y.B. OF THE INT'L L. COMM'N (2011), Vol. II(2) ("A reservation . . . to modify the legal effect of certain provisions of a treaty . . . may be formulated only insofar as it does not affect an essential element of the treaty nor its general tenour."). Nor does the Russian Federation explain how this reservation may bear on the United States' right to intervene under Article 63 of the Court's Statute.

<sup>14</sup> U.S. Reservations, Understandings, and Declarations *in* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277, Reservation 1. The U.S. reservation did not exclude the application of Article IX. Instead, it provided a precedent condition to be satisfied prior to the referral of a dispute to the Court's jurisdiction—namely, the specific consent of the United States. The United States was one of several States Parties to ratify the Genocide Convention subject to a reservation to Article IX.



notwithstanding the fact that the United States has not consented to the Court's jurisdiction over all contentious proceedings under the Convention.<sup>15</sup>

18. A State Party's submission of a reservation has no bearing on its right to intervene under Article 63. "[W]hen the object of the suit before the Court is the interpretation of an international convention, *any State which is a party* to this convention has, under Article 63 of the Statute, the right to intervene in the proceedings instituted by others."<sup>16</sup> Unlike Article 62, which refers to circumstances in which "a state considers that it has an interest of a legal nature which may be affected by the decision in the case," Article 63 assumes that States Parties have a broader interest in the construction of their convention.<sup>17</sup> There is nothing in the text of Article 63 that conditions the right to intervene on the absence of a reservation to the convention at issue.
19. Article 63's scope is further elucidated by the distinction between the procedural requirements of Article 81 and Article 82 of the Rules of Court. Article 81 of the Rules provides that an application for permission to intervene under the terms of Article 62 must specify "the interest of a legal nature which the State applying to intervene considers may be affected by the decision in that case." Such a request must state "the precise object of the intervention" and "any basis of jurisdiction which is claimed to exist as between the State applying to intervene and the parties to the case." Article 82 of the Rules of Court, by contrast, requires a State Party that desires to avail itself of the right of intervention conferred by Article 63 to show the "particulars of the basis on which the declarant State considers itself a party to the convention" and to identify "the particular provisions of the convention the construction of which it considers to be in question."

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<sup>15</sup> As noted in the U.S. Declaration, the United States has a long history of supporting efforts to prevent and punish genocide, including through its active participation in the negotiations of the Genocide Convention, its support for the establishment of international and hybrid criminal tribunals with jurisdiction over genocide, and its prior invocation of Article VIII in calling on the United Nations to address genocide in the territory of another State Party. U.S. Declaration, para. 10.

<sup>16</sup> *S.S. "Wimbledon" Question of Intervention by Poland (Britain. et al. v. Germany)*, 1923 P.C.I.J. (ser. A) No. A01 (June 28), at 12 (emphasis added). See also THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 1742 (Andrea Zimmerman and Christian J. Tams, eds. 3<sup>rd</sup> ed. 2019) 1742 (hereinafter, "Zimmerman and Tams") (observing that Article 62 "is a procedural device for protecting the concrete and individualized interests of third States, which may be affected by a decision of the Court, while [Article 63] is based on the assumption that States party are the natural guardians of their conventions"); *id.* at 1743 (observing that Article 63 "build[s] bridges between the interpreters, foster[s] uniform interpretation of a convention, and thus promote[s] the harmonious development of international law").

<sup>17</sup> ROSENNE'S LAW AND PRACTICE 1492.

20. Nothing about the U.S. reservation changes the right conferred under Article 63. As the International Law Commission's Guide to Practice on Reservations to Treaties makes clear, "[a] reservation, acceptance of a reservation or objection to a reservation neither modifies nor excludes any rights and obligations of their authors under other treaties to which they are parties," including in this matter the Court's Statute.<sup>18</sup> The U.S. reservation also does not affect the status of the United States as a party to the Genocide Convention, or the existence of treaty relations between it and the Russian Federation or Ukraine.<sup>19</sup> As is clear from the depositary status list, the United States ratified the Convention on November 25, 1988, and the Court itself noted in *Legality of Use of Force (Yugoslavia v. United States of America)* that "it is not disputed that both Yugoslavia and the United States are parties to the Genocide Convention."<sup>20</sup> Moreover, neither the Russian Federation (nor its predecessor, the Soviet Union) nor Ukraine (nor its predecessor, the Ukrainian Soviet Socialist Republic) objected to the U.S. reservation.<sup>21</sup>

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<sup>18</sup> International Law Commission, Guide to Practice on Reservations to Treaties, Guideline 4.4.1, Y.B. OF THE INT'L L. COMM'N (2011), Vol. II(2). Further, "[a] reservation does not modify the provisions of the treaty for the other parties to the treaty *inter se*." *Id.* at Guideline 4.6.

<sup>19</sup> This conclusion is further reinforced by the Court's jurisprudence. The Court in *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* concluded that "a State which has made and maintained a reservation which has been objected to by one or more of the parties to the Convention but not by others, can be regarded as being a party to the Convention if the reservation is compatible with the object and purpose of the Convention . . ." *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 29 (May 28).

<sup>20</sup> *Legality of Use of Force (Yugoslavia v. United States of America)*, 1999 I.C.J. 916, 923 (Order on the Request for the Indication of Provisional Measures) (June 2). Because Yugoslavia had not objected to the U.S. reservation to Article IX, and the United States had not consented to the Court's jurisdiction in that case, the Court could not exercise jurisdiction over the case, and removed it from its list. *See id.* at 925-26.

<sup>21</sup> In fact, both the Soviet Union and the Ukrainian Soviet Socialist Republic ratified the Convention subject to similar reservations. The U.S.S.R. and Ukrainian S.S.R. reservations, respectively, provided that:

As regards Article IX: The Soviet Union does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Soviet Union will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

As regards Article IX: The Ukrainian SSR does not consider as binding upon itself the provisions of Article IX which provides that disputes between the Contracting Parties with regard to the interpretation, application and implementation of the present Convention shall be referred for examination to the International Court at the request of any party to the dispute, and declares that, as regards the International Court's jurisdiction in respect of disputes concerning the interpretation, application and implementation of the Convention, the Ukrainian SSR will, as hitherto, maintain the position that in each particular case the agreement of all parties to the dispute is essential for the submission of any particular dispute to the International Court for decision.

21. The Russian Federation nevertheless contends that, because of the U.S. reservation to Article IX of the Convention, the U.S. Declaration fails to meet what it purports are additional requirements of Article 63. Regardless of how these purported conditions are framed—whether as requiring a “special interest,” “reciprocity,” or a “jurisdictional link”—they are neither found within Article 63’s text nor implicated by the U.S. reservation.

**A. Article 63 does not require a “special interest” by a State Party exercising its right to intervene**

22. The Russian Federation asserts that, as a result of the U.S. reservation, the United States lacks some requisite “special interest” in the provisions at issue,<sup>22</sup> and thereby is not entitled to exercise its right to intervene under Article 63. The Russian Federation’s understanding cannot be reconciled with the text of Article 63.

23. Article 63 refers only to “a convention to which states other than those concerned in the case are parties” and makes clear that such states have “the right to intervene in the proceedings.”<sup>23</sup> It imposes no requirement with respect to whether a State Party ratified or acceded to the convention subject to a reservation. Nor does Article 63 by its terms require an inquiry into whether one or both of the parties in the case have filed objections to the reservation of a State seeking to intervene.

24. Ultimately, an Article 63 intervention recognizes interests (*i.e.*, a State Party’s interests in a treaty’s interpretation) that do not depend on whether that State Party has accepted the Court’s jurisdiction as pertains to becoming a party to contentious proceedings, such as either under the Court’s Statute or a compromissory clause. To that end, the United States is seeking to intervene not as a party to the proceeding, but rather for the limited purpose of providing its views on the correct construction of particular provisions of the Convention put into question by the underlying proceedings. The fact that the U.S. reservation would preclude it from being a respondent in a contentious case without its specific consent has no bearing on its right to intervene under Article 63. Furthermore, the United States accepts

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U.S.S.R. and Ukrainian S.S.R. Reservations, Understandings, and Declarations *in* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, S. Exec. Doc. O, 81-1, 78 U.N.T.S. 277. The U.S.S.R. and Ukrainian S.S.R., both of which ratified the Convention in 1954, subsequently withdrew their reservations relating to Article IX on March 8 and April 20, 1989, respectively.

<sup>22</sup> Russian Federation’s Written Observations, paras. 103, 106 and 107.

<sup>23</sup> See Zimmerman and Tams, at 1757 (“There is no reason to consider that the term ‘party’ in Article 63 of the Statute is different from general international law.”).

that if its intervention is permitted, the construction of the provisions of the Convention to be given by the Court in this case will be binding on the United States, regardless of whether any other State is able to invoke the jurisdiction of this Court in a future case involving the United States.

25. A contrary understanding would leave Article 63's application unclear. There would exist a question, for example, whether the Court should look to whether all parties to a proceeding have accepted the reservation of the State intervening under Article 63, objected to the reservation only, or objected in a manner that indicated they also did not consider the reserving State a party to the convention.
26. Moreover, even if the Russian Federation were correct that a State seeking to exercise its right to intervene under Article 63 must demonstrate some "special interest" in the provisions of the convention at issue, any State Party to the Genocide Convention, even one that ratified the Convention subject to a reservation, would have such an interest.<sup>24</sup> As the Court has stated: "The Convention was manifestly adopted for a purely humanitarian and civilizing purpose," as "its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality."<sup>25</sup> The Court further explained: "In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention."<sup>26</sup> The Court continued:

Consequently, *in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties.* The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.<sup>27</sup>

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<sup>24</sup> See *Whaling in the Antarctic (Australia v. Japan)*, Order on the Declaration of Intervention of New Zealand, Separate Opinion of Judge Cançado Trindade (hereinafter, "Sep. Op. of Judge Cançado Trindade"), 2013 I.C.J. 14, 34, paras. 56-57 (Feb. 6): ("The nature of treaties addressing matters of general or common interest and counting on *collective guarantee* (by States parties) for their implementation has an incidence on their process of interpretation. And it could not be otherwise. There is no space, under treaties of the kind, for unilateral State action, or even for bilateral reciprocal concessions: States parties to such treaties are bound by the contracted obligations to seek jointly the realization or fulfilment of the object and purpose of the treaties at issue.") (emphasis omitted).

<sup>25</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* (emphasis added).

27. As the Court has made clear, “such a common interest implies that the obligations in question are owed by any State party to all the other States parties to the relevant convention; they are obligations *erga omnes partes*, in the sense that each State party has an interest in compliance with them in any given case.”<sup>28</sup> Accordingly, any State Party to the Genocide Convention would have the “special interest” the Russian Federation contends is required under Article 63.<sup>29</sup>
28. This would hold equally true for a State Party with a reservation to Article IX seeking to direct its intervention to the construction of Article IX, among other articles. The commentary accompanying the predecessor to Article IX in the first draft of the Genocide Convention notes that “[s]ince the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community, any dispute is a matter affecting all the parties to the Convention.”<sup>30</sup> Moreover, as the Court has previously recognized, Article IX is not “a standard dispute provision” due, in part, to the “unusual feature of the wording,” namely the inclusion of the phrase “including those [disputes] relating to the responsibility of a State for genocide or any of the other acts enumerated in Article III.”<sup>31</sup> Article IX also adds “fulfilment” to the provision conferring on the Court jurisdiction over disputes as to the “interpretation and application” of the

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<sup>28</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 2022 I.C.J. 1, 36, para. 107 (Judgment on the Preliminary Objections) (July 22); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Preliminary Objections (Bosnia and Herzegovina v. Yugoslavia)*, 1996 I.C.J. 595, 616, para. 31 (July 11) (explaining that “the rights and obligations enshrined by the Convention are rights and obligations *erga omnes*”).

<sup>29</sup> See generally Sep. Op. of Judge Caçado Trindade, paras. 53-60; Juliette McIntyre, *Crawford’s Multilateralism and the International Court of Justice*, 40(1) AUSTRALIAN Y.B. OF INT’L L., 271, 289 (“What the concept of *erga omnes* adds to the right already available to States under Article 63 is an endorsement of the intervention procedure as a form of collective moral opprobrium.”).

<sup>30</sup> U.N. Econ. & Soc. Council, *Draft Convention on the Crime of Genocide (prepared by the Secretary-General of the United Nations in pursuance of the resolution of the Economic and Social Council dated 28 March 1947)*, E/447 (June 26, 1947), at 50 (“The International Court of Justice would appear to be the judicial authority best qualified to deal with such disputes. Since the Convention is not intended to regulate the particular relations between States but to protect an essential interest of the international community, any dispute is a matter affecting all the parties to the Convention. Hence, such dispute should not be settled by an authority arbitrating between two or more States exclusively, for then its decision would lack any claim to be binding on other States. The International Court of Justice, on the contrary, is an organ of the United Nations established by virtue of the Charter itself; it is a court whose authority is recognized by all the Members of the United Nations, and should consequently be given jurisdiction to settle the disputes concerned.”); see Robert Kolb, *The Compromissory Clause of the Convention*, in THE U.N. GENOCIDE CONVENTION: A COMMENTARY 407, 409 (Paola Gaeta ed. 2009) (“By this statement, the Secretary-General did obviously not mean that a decision by the Court would be legally binding on non-parties to the dispute, contrary to Article 59 of the Statute. He rather underscored the enhanced value of precedents set by the main judicial body of the UN with regard to all member states of that organization.”).

<sup>31</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007 I.C.J. 43, 114, paras. 168-169 (Feb. 26).

Convention.<sup>32</sup> Significantly, the Court has looked to the unique framing of Article IX and its drafting history (among other things) in interpreting the Convention, which is primarily focused on issues relating to individual criminal responsibility, to find that States Parties are prohibited from committing genocide and the other acts enumerated in Article III through the actions of their organs or persons or groups whose acts are attributable to them.<sup>33</sup> Given the significance of the Court’s construction of Article IX in its jurisprudence on issues relating to State responsibility for genocide, a State Party with a reservation to Article IX would still have a “special interest” in the construction of that Article in a dispute relating to the responsibility of another State Party for genocide.

**B. Article 63 does not require “reciprocity” beyond that already provided in its text**

29. The Russian Federation also invokes the principle of reciprocity as a basis for reading additional restrictions into Article 63.<sup>34</sup> However, here too the Russian Federation conflates intervention under Article 63 with becoming a party to the proceedings. The Russian Federation would, in effect, 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,<sup>35</sup> while maintaining all the limitations inherent in Article 63 with respect to the scope of a State Party’s intervention, namely construction of the convention itself. It is difficult to see under the Russian Federation’s reading what purpose Article 63 would serve, or why it would ever be invoked.
30. In any event, Article 63 by its own terms already enshrines the principle of reciprocity. Under Article 63, in deciding to intervene to provide the Court with its views as to a convention’s construction, the State Party is also thereby equally bound by the construction given by the Court. The intervening State Party submits itself to the Court’s interpretation

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<sup>32</sup> *Id.*, para. 168.

<sup>33</sup> *Id.*, paras. 168-179.

<sup>34</sup> Russian Federation’s Written Observations, para. 119 *et seq.*

<sup>35</sup> The U.S. Declaration points to the *S.S. Wimbledon* case as support for the position that the United States’ reservation to Article IX does not inhibit the right of the United States to intervene (U.S. Declaration at n. 11, p. 8, citing *S.S. Wimbledon (Britain et al. v. Germany)*, Question of Intervention by Poland, P.C.I.J., Series A, No. 1, pp. 11, 12). The Russian Federation seeks to distinguish the decision in *S.S. Wimbledon* on the basis that Poland had accepted the PCIJ’s compulsory jurisdiction, which the Court had found extended to issues under the Treaty of Versailles. See Russian Federation’s Written Observations, para. 127. Regardless, the Court allowed the application on the basis that it could affirm that “the interpretation of certain clauses of the Treaty of Versailles [were] in fact involved in the suit and that the Polish Republic [was] one of the States which [were] Parties to this Treaty” - not that there was additionally a compromissory clause in effect that likewise bound Poland. *S.S. Wimbledon*, 1923 P.C.I.J. (ser. A) No. A01 (June 28), at 13.

of the provisions that form the basis of the Article 63 intervention, and that construction is binding under international law, regardless of whether there is a compromissory clause or other mechanism by which another State Party may invoke the Court’s jurisdiction against the intervenor.

**C. Article 63 does not require a “jurisdictional link” between the parties and the State seeking to exercise its right to intervene**

31. The Russian Federation’s assertion that a “jurisdictional link” is necessary between the parties to the case and the interveners under Article 63 is not reflected in Article 63 or its history.<sup>36</sup> In support of this argument, the Russian Federation cites Article 63’s predecessor as requiring party consent for other States to intervene in the proceedings. According to the Russian Federation, “[i]t cannot be the right approach to suggest that the abandonment of the compulsory jurisdiction system means abandoning the consent requirement for purposes of Article 63 of the Statute. . . .”<sup>37</sup>
32. As already discussed, it cannot be disputed that the United States is a party to the Genocide Convention, or that the Convention, to include Article IX, is in effect as between the United States and the Russian Federation and between the United States and Ukraine. Nor is practice establishing the need for a party to consent to a proceeding, on which the Russian Federation relies, relevant in the context of Article 63.<sup>38</sup>
33. Similarly, the history of Article 63 does not support the Russian Federation’s interpretation. While it is true that Articles 62 and 63 were conceived in the context of the Court exercising compulsory jurisdiction over legal disputes, “the Advisory Committee’s report suggests that, as regards intervention, this was not a primary consideration in its mind and that the Committee was focusing more on the possible extension of the force of the *res judicata* . . . .”<sup>39</sup> As Rosenne explains:

It is sometimes averred that inadvertence or even carelessness on the part of those responsible for drafting the Statute . . . led to the consequence that both Article 62 and Article 63 were retained unchanged from the original text submitted by the Advisory Committee. In this regard, however, the report submitted to the League Council by the representative of France . . . is significant. This report explains both the approach of the Council to the

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<sup>36</sup> See Russian Federation’s Written Observations, para. 110 *et seq.*

<sup>37</sup> *Id.*, para. 114.

<sup>38</sup> See ROSENNE’S LAW AND PRACTICE, at 1524 (“In sharp distinction from Article 81 [of the Rules of Court], but following Article 63 of the Statute, Article 82 makes no mention of any possible jurisdiction link between the intervenor and the parties in the case.”).

<sup>39</sup> *Id.* at 1493.

question of intervention, and the relation of intervention to the *res judicata* . . . and even more, to the development of the law. It indicates that retention of the two provisions unchanged was calculated and deliberate.<sup>40</sup>

34. Simply put, “[p]articipation in a multilateral treaty is sufficient for *jus standi in judicio* in a legal dispute concerning the interpretation of that treaty.”<sup>41</sup>

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35. For the aforementioned reasons, the U.S. reservation neither implicates nor modifies its right to intervene under Article 63. The United States shares the same interests as other States Parties in the construction of the Genocide Convention. The Russian Federation’s efforts to create exceptions to Article 63’s application should be rejected.

#### **IV. INTERVENTIONS UNDER ARTICLE 63 MAY EXTEND TO ISSUES OF JURISDICTION AS WELL AS THE MERITS**

36. The Russian Federation in its Written Observations contends that Article 63’s scope does not allow States Parties to intervene at the jurisdictional stage, even where the construction of the relevant convention’s compromissory clause is in question. The Russian Federation presents three overlapping arguments to this effect: first, that the Court must consider preliminary objections before the admissibility of declarations of intervention such as that by the United States;<sup>42</sup> second, that the U.S. Declaration presupposes the Court has jurisdiction;<sup>43</sup> and third, that the U.S. Declaration prejudices questions relating to the Court’s jurisdiction *ratione materiae*.<sup>44</sup> There is no basis for reading such limitations into the text of Article 63.<sup>45</sup>

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<sup>40</sup> *Id.* at 1493; *see also id.* at 1494 (quoting the report submitted to the League Council that the “interest of the harmonious development of the law” and “influence on the future development of law” by non-litigant states were “considerations [that] undoubtedly contain elements of great value” and that “[t]he Hague Jurists have not moreover disregarded the necessity of bearing in mind consideration which, if not exactly identical, are at least in the same order of ideas”).

<sup>41</sup> *Id.* at 1504. *See also* Zimmerman and Tams, at 1751 (“Under Article 63 the required nexus between the intervener and the parties is supplied by the common membership in the relevant treaty.”).

<sup>42</sup> Russian Federation’s Written Observations, Section II.C.

<sup>43</sup> *Id.*, Section II.D.

<sup>44</sup> *Id.*, Section II.E.

<sup>45</sup> The U.S. Declaration addresses issues of construction that go to both jurisdiction and the merits. In expressing its views under Article 63, the United States would address its arguments to the relevant phase of the proceedings.



**A. There is no basis to defer consideration of the U.S. Declaration until after the Preliminary Objections phase**

37. The Russian Federation’s position that the Court must examine the Russian Federation’s preliminary objections before deciding on the admissibility of declarations under Article 63 is wholly unsupported. There is nothing in the Court’s Statute, Rules, or jurisprudence requiring such a sequencing. Furthermore, the effect of such sequencing would be to deprive States of the right to intervene under Article 63 on matters of construction relevant to the Court’s jurisdiction.
38. The Russian Federation contends that because the Court has not concluded the existence or subject matter of a dispute, there is no provision of the Genocide Convention the construction of which is yet in question. The Russian Federation ignores that the U.S. Declaration follows the Registrar’s notification, which stated that, as Ukraine has invoked the Convention “both as a basis of the Court’s jurisdiction and as a substantive basis of [its] claims on the merits . . . [i]t therefore appears that the construction of this instrument will be in question in the case.”<sup>46</sup> This notification was transmitted during these proceedings’ preliminary stages. This timing was consistent with that in other cases and enables States to intervene early in the proceedings, including on preliminary issues.<sup>47</sup> Moreover, Article 82(1) of the Rules requires that a party to a convention file its declaration of intervention “as soon as possible.” Accepting the Russian Federation’s understanding of Article 63 would in effect amend this requirement by adding the qualifier “unless the respondent State challenges the Court’s jurisdiction.”<sup>48</sup> This is contrary to Article 63’s unqualified text and

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<sup>46</sup> Registrar’s Letter of Mar. 30, 2022.

<sup>47</sup> See for example the notifications addressed to UNCLOS States Parties after Kenya raised preliminary objections in *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, 2017 I.C.J. 3, 9, paras. 5-6 (Judgment on the Preliminary Objections) (Feb. 2), the notice to States Parties to the Pact of Bogota in *Question of the Delimitation of the Continental Shelf Between Nicaragua and Colombia Beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, 2016 I.C.J. 100, 107, paras. 5-6 (Judgment on the Preliminary Objections) (Mar. 17), the timing of the notification in *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, 2016 I.C.J. 3, 9, paras. 5-6 (Judgment on the Preliminary Objections) (Mar. 17), and in *Case Concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, 2011 I.C.J. 70, 77, paras. 11-12 (Judgment on the Preliminary Objections) (Apr. 1). See also *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, 2014 I.C.J. 226, 235 paras. 8-12 (March 31) (New Zealand declaration under Article 63 admitted unconditionally after Japan as respondent filed counter-memorial raising jurisdictional objections).

<sup>48</sup> See Zimmerman and Tams, at 1763 (“There appears to be no reason within the Statute, or its *travaux préparatoires* why intervention should not be allowed for the purpose of challenging the Court’s jurisdiction or the admissibility of the case.”) (footnote omitted).

its express reference to the right to intervene “[w]hensoever” the construction of a convention to which states other than those concerned in the case are parties is in question.<sup>49</sup>

39. In its Application, Ukraine invokes Article IX of the Genocide Convention as the basis of the Court’s jurisdiction. Russia has now submitted preliminary objections, including to the jurisdiction of the Court.<sup>50</sup> The United States has not seen the Russian Federation’s preliminary objections, but to the extent resolving those objections would require the Court to issue a binding judgment as to provisions of the Convention, those provisions would be “in question” during the preliminary objections phase of the proceedings. States Parties to the Genocide Convention have a right under Article 63 to express views as to the construction of those provisions and should be given the opportunity to do so. In any event, nothing about the decision of States Parties to the Genocide Convention to present their views as to how the Convention should be interpreted, or the timing thereof, prejudices the Court’s consideration of the Russian Federation’s preliminary objections.

**B. The U.S. Declaration does not “presuppose” the Court’s jurisdiction, but rather addresses the construction of Article IX of the Convention, as well as additional articles, and is therefore admissible**

40. The Russian Federation’s second argument contends that the U.S. Declaration presupposes that the Court may exercise jurisdiction over Ukraine’s Application. In support, the Russian Federation cites *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* as a case wherein the Court rejected an intervention by El Salvador purportedly related to jurisdiction because it *in effect* reached merits issues.<sup>51</sup> The Russian Federation follows this by pointing to the fact that the U.S. Declaration seeks to intervene as to the interpretation of provisions of the Genocide Convention that would go to the merits of the case.<sup>52</sup>

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<sup>49</sup> See *id.* at 1763 (“The wording of Article 63 is unqualified in asserting ‘[w]hensoever the construction of a convention . . . is in question’ which implies that it is applicable in all phases of the case.”). See also *Certain Norwegian Loans (France v. Norway)*, 1957 I.C.J. 34, 63-64 (Separate Opinion of Judge Sir Lauterpacht on the Preliminary Objections of July 6); Diss. Op. of Judge Schwebel at 235 (“There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional.”).

<sup>50</sup> Russian Federation’s Written Observations, para. 2. See also *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 (March 7, 2022) (addressing, *inter alia*, whether the Government of Ukraine has put forward a dispute that falls within the scope of Article IX of the Genocide Convention).

<sup>51</sup> Russian Federation’s Written Observations, *e.g.*, paras. 70-74 and 76.

<sup>52</sup> *Id.*, para. 80, n.91.

41. As explained in the U.S. Declaration, Ukraine’s Application raises the question of whether the Court may exercise jurisdiction under Article IX of the Genocide Convention, where a Contracting Party commits aggression against another Contracting Party on the pretext of preventing or punishing genocide. Likewise, it raises a question relevant to the merits of whether the scope of obligations set forth under certain other articles of the Convention permit one Contracting Party to commit aggression against another Contracting Party on the pretext of preventing or punishing genocide.
42. Accordingly, the United States seeks to exercise its right to intervene with respect to the construction of several articles of the Genocide Convention. The United States considers that interpretation of these provisions may go to both issues of jurisdiction and the merits in the dispute between Ukraine and the Russian Federation relating to the interpretation, application, or fulfilment of the Genocide Convention.<sup>53</sup> This is, in part, a reflection of the fact that the Convention’s compromissory clause is among the articles in question.<sup>54</sup> As Rosenne observes, the intent behind Article 63 was to allow States Parties to a convention to intervene in any phase of the proceedings where the dispute over jurisdiction relates to the interpretation of a multilateral treaty containing a compromissory clause:

If the dispute over jurisdiction relates to the interpretation of a multilateral treaty which contains a compromissory clause or any other provision including another instrument intrinsically linked to that treaty, it is not self-evident why any other party to that treaty cannot intervene under Article 63 in any phase of the proceedings: close examination of the legislative history of that provision in 1920 and of the initial Rules of Court of 1922 strongly indicates that this was precisely the intention behind the provision.<sup>55</sup>

43. Nothing in the Court’s Statute or Rules precludes a State Party to a convention from identifying in its declaration provisions going to both issues of jurisdiction and the merits.

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<sup>53</sup> U.S. Declaration, paras. 15-17.

<sup>54</sup> See *Appeal Relating to the Jurisdiction in the ICAO Council (India v. Pakistan)*, 1972 I.C.J. 46, 56, ¶ 18(a) (Aug. 18) (“Although a jurisdictional decision does not determine the ‘ultimate merits’ of the case, it is a decision of a substantive character, inasmuch as it may decide the whole affair . . . [a] decision which can have that effect is of scarcely less importance than a decision on the merits . . . . A jurisdictional decision is therefore unquestionably a constituent part of the case, viewed as a whole . . . .”); Diss. Op. of Judge Schwebel, at 235 (“[T]he terms of Article 63 and the Rules which the Court has adopted in implementation of those terms both indicate that intervention under Article 63 in the jurisdictional phase of a case is permitted. The sense of Article 63 implies no less . . . . There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional.”). See also ROSENNE’S LAW AND PRACTICE, at 1531 (noting relevance of intervention under Article 63 on preliminary issues of jurisdiction and admissibility where “construction of a multilateral treaty is in question”).

<sup>55</sup> ROSENNE’S LAW AND PRACTICE, at 1533.

On the contrary, Article 82 of the Rules of Court requires that a declaration contain “identification of the particular provisions of the convention the construction of which it considers to be in question” as well as “a statement of the construction of those provisions for which it contends.” It makes no distinction between provisions relevant to issues of jurisdiction and the merits.

44. It is unclear from the Russian Federation’s Written Observations whether in its view States should file multiple declarations. Article 82 by its terms only contemplates a State filing “a declaration”—not multiple declarations. Moreover, it is not clear how a State could wait to file a second declaration addressing issues of merits, but still be considered to have filed it “as soon as possible.” Given a respondent’s ability to raise jurisdictional objections as both preliminary objections and in its counter-memorial, such an interpretation would leave States Parties to a convention, and the parties to the proceeding itself, guessing as to when a declaration is timely and properly submitted.
45. The Court’s order in *Military and Paramilitary Activities* finding El Salvador’s Article 63 declaration inadmissible does not counsel for a different result. There, following the Court’s Order to limit the written proceedings to the question of jurisdiction, the Court decided that El Salvador’s declaration of intervention was “inadmissible inasmuch as it relates to *the current phase* of the proceedings.”<sup>56</sup> Moreover, El Salvador’s declaration did not contain “the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase . . . ; nor of the construction of such provision or provisions for which it contends.”<sup>57</sup> Here, by contrast, there has been no order on jurisdiction and the U.S. Declaration clearly articulates each of the articles it considers to be in question, including with respect to the Convention’s compromissory clause, and their proposed construction. Thus, the U.S. Declaration expressly goes to issues relevant to the question of jurisdiction, a question the Russian Federation argues the Court must address at this juncture.

**C. The U.S. Declaration addresses questions concerning construction of the Convention and does not “prejudge” the Court’s jurisdiction *ratione materiae***

46. The Russian Federation’s third and final argument is that the U.S. Declaration seeks to address rules of international law unrelated to the construction of the Genocide Convention

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<sup>56</sup> *Military and Paramilitary Activities (Nicaragua v. United States of America)*, 1984 I.C.J. 215, 216 (Declaration of Intervention Order of Oct. 4) (emphasis added).

<sup>57</sup> See Sep. Op. of Judges Ruda, Moser, Ago, Sir Robert Jennings and De Lacharrière, at para. 3.

that, if accepted, would prejudge questions relating to the Court’s jurisdiction *ratione materiae*. This is incorrect.

47. More specifically, the Russian Federation points to paragraphs 29 and 31 of the U.S. Declaration as indicating that the United States “intends to address matters related to the use of force and territorial acquisition.”<sup>58</sup> In fact, in these paragraphs, the U.S. Declaration refers to these matters in the context of expressing its views as to the interpretation of Articles I-IV, VIII, and IX of the Genocide Convention. As paragraph 29 states in full, it is the position of the United States that “[n]o provision of the Genocide Convention, properly interpreted in good faith, explicitly or implicitly authorizes a Contracting Party, acting on the pretext of preventing or punishing genocide, to commit aggression, including territorial acquisition resulting from aggression.” Whether the Genocide Convention authorizes aggression to prevent and punish genocide, or whether Article IX is meant to encompass disputes involving a use of force on the pretext of preventing or punishing a genocide the other party denies has occurred, are clearly issues of construction of provisions of the convention at issue in this case. The U.S. Declaration is therefore consistent with the requirements of Article 63.

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48. For the reasons set forth above, there is no basis to exclude matters of jurisdiction from the right to intervene under Article 63, including on the construction of a compromissory clause. For that right to have meaning, such interventions must be considered before the Court has issued its judgment on those issues. The Russian Federation’s objections should be rejected.

## **V. INTERVENTION UNDER ARTICLE 63 DOES NOT REQUIRE A SHOWING OF “GENUINE INTENTION”**

49. Although the U.S. Declaration meets the requirements of Article 63, the Russian Federation further alleges that for the Court to admit the U.S. Declaration, it must establish that the “genuine intention” of the United States is limited to making submissions of the interpretation of the treaty provisions at issue.<sup>59</sup>

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<sup>58</sup> Russian Federation’s Written Observations, para. 85(k).

<sup>59</sup> *See id.*, paras. 13, 14, and 23.

50. Nowhere in the Court’s Statute or Rules, including Articles 63 and 82, respectively, is there a “genuine intention” requirement. Nor is there any support for such a requirement in the Court’s jurisprudence. The Russian Federation’s attempt to derive such a requirement from the Court’s judgment in *Haya de la Torre* is not only unavailing, but also misleading. In that case, Peru similarly challenged the admissibility of Cuba’s declaration of intervention on the grounds that its true object was something other than the proper construction of the convention at issue in the case.<sup>60</sup> While the Court agreed initially that Cuba’s Declaration did not “satisfy the conditions of a genuine intervention” because it addressed almost entirely issues that the Court had already determined with *res judicata* effect,<sup>61</sup> Cuba later clarified that its intervention was based on construction of an aspect of the Havana Convention that the Court had not previously considered. The Court then acknowledged that Cuba’s intervention conformed to the conditions of Article 63 of the Statute and admitted Cuba’s intervention.<sup>62</sup>
51. Thus, the Court in *Haya de la Torre* did not introduce any new requirements as to admissibility, but rather limited its analysis to the requirements now set forth in Article 82 of its Rules.<sup>63</sup> The U.S. Declaration squarely meets those requirements, including by identifying the articles of the Convention the construction of which the United States considers to be in question in the present case based on Ukraine’s Application.
52. Nevertheless, the Russian Federation suggests that the “real purpose” of the States seeking to intervene, including the United States, is not to submit views on the construction of the Genocide Convention, but rather to pursue a “joint case with Ukraine.”<sup>64</sup> The Russian Federation further alleges that the statements of the States seeking to intervene are “clear evidence of a collective political strategy” to assist or bolster Ukraine’s claims before the Court.<sup>65</sup>
53. It is true that the United States has strenuously objected to the Russian Federation’s further invasion of Ukraine. The mere fact that the United States has voiced its objections to actions by the Russian Federation that have also been condemned by the United Nations

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<sup>60</sup> See *Haya de la Torre Case (Colombia v. Peru)*, 1951 I.C.J. 71, 76 (June 13).

<sup>61</sup> *Id.* at 77.

<sup>62</sup> *Id.*

<sup>63</sup> Article 82 of the Rules of Court subsequently implemented the Court’s decision in *Haya de la Torre*. See SHABTAI ROSENNE, INTERVENTION IN THE INTERNATIONAL COURT OF JUSTICE 75 (1993).

<sup>64</sup> Russian Federation’s Written Observations, para. 15.

<sup>65</sup> *Id.*, para. 19.

General Assembly does not affect the United States' right to intervene or its interests in the proper interpretation of a convention to which it is a party. It is in any case unsurprising that a case before this Court would have both legal and political dimensions.<sup>66</sup> Whether such dimensions are present in this case is irrelevant.<sup>67</sup> What is relevant is that the State seeking to intervene wishes to provide views on the proper construction of provisions of the Genocide Convention at issue in this case. The United States wishes to do so. As such, the United States, as a party to the Convention, has availed itself of its right to intervene.

54. The Russian Federation's contention that the U.S. Declaration is not "genuine" because the construction of the Genocide Convention it seeks to advance is purportedly different from arguments the United States put forward in the *Legality of Use of Force* proceedings does not alter this conclusion.<sup>68</sup> In making such an argument, the Russian Federation appears to recognize that the U.S. Declaration does contain, in accordance with Article 82 of the Rules, the requisite "statement of the construction of those provisions for which it contends." The United States disagrees with the Russian Federation's contention regarding U.S. arguments in the *Legality of Use of Force* proceedings, but in any event, the Court will have occasion to consider the parties' and intervening States' arguments concerning the construction of Article IX and other relevant provisions in due course.

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<sup>66</sup> Cf. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004 I.C.J. 136, 155, para. 41 (Advisory Opinion of July 9) ("[T]he Court cannot accept the view . . . that it has no jurisdiction because of the "political" character of the question posed. As is clear from its long-standing jurisprudence on this point, the Court considers that the fact that a legal question also has political aspects, "as, in the nature of things, is the case with so many questions which arise in international life, does not suffice to deprive it of its character as a 'legal question' and to 'deprive the Court of a competence expressly conferred on it by its Statute'. Whatever its political aspects, the Court cannot refuse to admit the legal character of a question which invites it to discharge an essentially judicial task, namely, an assessment of the legality of the possible conduct of States with regard to the obligations imposed upon them by international law." (internal citations omitted)); *United States Diplomatic and Consular Staff in Tehran (United States of America v. Islamic Republic of Iran)*, 1980 I.C.J. 3, 20, para. 37 (May 24) ("[L]egal disputes between sovereign States by their very nature are likely to occur in political contexts, and often form only one element in a wider and long-standing political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.").

<sup>67</sup> Even if the Court were to determine that it must assess whether a party intervening under Article 63 is exclusively or predominantly (the Russian Federation's Written Observations do not specify) motivated by presenting the Court with its interpretation of the provisions of the relevant convention, nothing in the statements the Russian Federation cites suggests that the United States is not genuine in its efforts to share its views on the Convention's construction.

<sup>68</sup> Russian Federation's Written Observations, para. 29.

55. In short, the United States has fulfilled the requirements for intervention under Article 63 and Article 82 of the Rules. The Court should therefore admit the U.S. Declaration and allow the United States to avail itself of its right to intervene.

## **VI. INTERVENTION UNDER ARTICLE 63 DOES NOT IMPACT THE EQUALITY OF THE PARTIES BEFORE THE COURT OR PREVENT THE FAIR ADMINISTRATION OF JUSTICE**

56. The Russian Federation asks the Court to find the U.S. Declaration inadmissible owing to generalized concerns about the integrity of the judicial process. Specifically, the Russian Federation suggests that the number of declarations of intervention, compounded by the fact that those declarations indicate views that align with Ukraine, are incompatible with the principle of equality of the parties and the good administration of justice.<sup>69</sup>

57. The Russian Federation supports its view by again contending that the States seeking to exercise their right to intervene should be understood as “*de facto* co-applicants.”<sup>70</sup> The Court rejected similar arguments raised by Japan in *Whaling in the Antarctic*.<sup>71</sup> Japan raised concerns regarding “the context of the co-operation between Australia and New Zealand in which this intervention takes place, as evidenced by the joint statement from their respective Foreign Ministers”<sup>72</sup> announcing that “Australia and New Zealand agree on strategy for whaling legal case.”<sup>73</sup> The Court concluded that because interveners do not become parties to the proceedings under Article 63, an intervention “cannot affect the equality of the Parties to the dispute.”<sup>74</sup> For the same reason, intervening States do not

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<sup>69</sup> See generally Russian Federation’s Written Observations, Section II.B.

<sup>70</sup> *Id.*, para. 44.

<sup>71</sup> See *Whaling in the Antarctic*, 2013 I.C.J. at 9, para. 18 (Order on the Declaration of Intervention by New Zealand of Feb. 6) (“Whereas the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention, as set out in Article 63 of the Statute and Article 82 of the Rules of Court; whereas intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and whereas such an intervention *cannot affect the equality of the Parties to the dispute.*”) (emphasis added).

<sup>72</sup> *Whaling in the Antarctic*, Written Observations of Japan on New Zealand’s Written Observations, at 2 (May 31, 2013) (citation omitted).

<sup>73</sup> Joint Media Release, December 15, 2010, available at <https://www.beehive.govt.nz/release/joint-statement-australia-and-new-zealand-agree-strategy-whaling-legal-case>.

<sup>74</sup> *Whaling in the Antarctic*, 2013 I.C.J. at 9, para. 18 (Order on the Declaration of Intervention of New Zealand of Feb. 6); see also *id.*, Sep. Op. of Judge Cançado Trindade, para. 70 (“It is true . . . that intervention, in the terms of Article 63 of the Statute, cannot — does not — affect the procedural equality of the contending Parties.”); *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Separate Opinion of Judge Oda on the Application to Intervene, 1981 ICJ Reports 23, 31, para. 17 (Apr. 14) (observing that with respect to Articles 62 and 63 that “[i]t may be objected that the States which may be affected by the interpretation of such principles and rules by the



enjoy rights conferred by the Statute upon the parties to the proceeding.<sup>75</sup> The Russian Federation's invocation of various of the Court's Rules and its jurisprudence relating to parties in the same interest is therefore inapposite.<sup>76</sup>

58. The fact that a large number of States Parties to the Genocide Convention are seeking to intervene in this case cannot be grounds to render them inadmissible. Article 63 provides only that where construction of a multilateral convention is in question, the other States Parties to that convention have a right to intervene. There is nothing in the Court's Statute or Rules that imposes a limit on the number of States Parties that may avail themselves of this right or requires an assessment as to whether the views they wish to express are in line with those put forward by the Applicant or Respondent or other States seeking to intervene.
59. Intervention by a greater number of States further serves the purposes of Article 63 in interpretation of a multilateral convention,<sup>77</sup> providing the Court with the views on interpretation of a greater number of States while also ensuring broader applicability of the resulting judgment. It is particularly valuable with respect to the construction of a multilateral convention like the Genocide Convention, where States Parties have a "common interest" in the accomplishment of the convention's "humanitarian and civilizing purpose."<sup>78</sup> As Judge Cançado Trindade stated in his separate opinion in *Whaling in the Antarctic*,

. . . States parties to multilateral treaties are committed to contribute to their proper interpretation . . . . This is, in my perception, even more compelling when such treaties embody matters of *collective interest*, and are endowed with *collective guarantee* of the observance of the obligations contracted by the States parties.<sup>79</sup>

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Court will be without number, and that, if an interpretation of the principles and rules of international law can open the door of the Court to all States as interveners, this will invite many future instances of intervention . . . . Yet this cannot be the reason why a request for intervention which is actually pending should be refused when the requesting State claims that its legal interest may be affected by the Court's rulings on the principles and rules of international law").

<sup>75</sup> Intervening States, for example, do not have the right to apply for a revision or interpretation of the judgment under Article 61, or the right to appoint a judge *ad hoc* under Article 31. As the Court noted in *Whaling in the Antarctic*, because an intervenor does not have the status of a party to the proceedings, an intervenor and a party could not be regarded as parties in the same interest and that consequently the presence of a judge of the nationality of the intervening State had no effect on the right of the judge *ad hoc* chosen by the applicant. *Whaling in the Antarctic*, 2013 I.C.J. at 9, para. 21 (Order on the Declaration of Intervention of New Zealand of Feb. 6).

<sup>76</sup> See Russian Federation's Written Observations, paras. 39-42.

<sup>77</sup> KOLB, at 695 (recognizing that "[i]t is possible to enhance the judgment's harmonising influence by providing that the interpretation in the judgment will [as Article 63 expressly provides] be binding on such intervening States").

<sup>78</sup> *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, 1951 I.C.J. 15, 23 (May 28).

<sup>79</sup> Sep. Op. of Judge Cançado Trindade, para. 53.

60. The United States further notes the Court’s experience and discretion in managing contentious proceedings and implementing procedural safeguards in keeping with the requirements of the good administration of justice.<sup>80</sup> These include requiring written or oral submissions, amending the time available for a party or intervenor to respond, or adopting other practical arrangements such as are envisioned in Article 48 of the Court’s Statute.<sup>81</sup> As to the observation by the Russian Federation that seven of the Court’s Judges are nationals of States that intend to intervene,<sup>82</sup> the United States has no doubt—as the Russian Federation itself appears to concede—that the Members of the Court will continue to uphold their duty of impartiality.

## VII. SUBMISSIONS

61. In light of the foregoing, the United States submits that it has met all requirements under Article 63 of the Court’s Statute and Article 82 of the Rules of Court. The Russian Federation’s attempts to inject new requirements—none of which are reflected in the Court’s Statute, Rules, or jurisprudence—should be rejected. The United States respectfully requests that the Court find the U.S. Declaration admissible and thereby allow the United States to avail itself of the right to intervene under Article 63 of the Court’s Statute, and provide its views, appropriately addressed to the relevant phase of the proceedings, with respect to the construction of Articles I, II, III, IV, VIII, and IX of the Genocide Convention.

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<sup>80</sup> *See, e.g.*, Zimmerman and Tams, at 977 (observing that the principle of the “proper administration of justice” grants the Court, among other things, “a power to act or to ascertain that one or another condition of a fair and satisfactory process has been, or is, more or less strictly respected”); *see also id.* at 981 (observing that with respect to the proper administration of justice, the Court may invoke inherent powers to fill certain gaps in the rules applicable to its procedure and that the principle “leaves a certain margin of discretion to the Court . . . which the judge can invoke whenever he feels it is necessary, especially in circumstances when there is no specific rule in the applicable instruments, namely the Statute and the Rules of Court”).

<sup>81</sup> *See id.*, at 1352 (explaining that “Article 48 enshrines in the Statute the inherent power of every judicial body to take the necessary measures to organize and control the judicial process”); *see also id.* at 1370 (noting that “Article 48 gives the Court the general power to make orders to organize and direct the conduct of the case as well as to protect the rights at issue while the case is pending . . . should a situation not specifically be provided for in the Statute of the Rules, it would still be possible for the Court to deal with it through Article 48”).

<sup>82</sup> Russian Federation’s Written Observations, para. 48.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "Richard C. Vissek". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

Richard C. Vissek

Agent of the United States of America

February 13, 2023

**CERTIFICATION**

I, Richard C. Visek, Agent of the United States of America, hereby certify that the copies of this pleading are true copies of the original.

A handwritten signature in blue ink, appearing to read "R. C. Visek", with a long horizontal flourish extending to the right.

Richard C. Visek

Agent of the United States of America

February 13, 2023