

International Court of Justice

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

(Ukraine v. Russian Federation)

Malta's Written Observations

On the Admissibility of Its Declaration of Intervention

13 February 2023

I. Introduction

1. By way of introduction, Malta notes that on 24 November 2022 it submitted to this Honourable Court (hereinafter ‘the Court’) a Declaration of Intervention (hereinafter referred to as ‘the Declaration’) pursuant to Article 63 paragraph 2 of the Statute of the International Court of Justice (hereinafter referred to as ‘the Statute’) in the Case concerning *The Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. The Russian Federation has pleaded to the Court to reject said Declaration on grounds of inadmissibility.
2. Malta categorically reaffirms the admissibility of its Declaration and shall, by way of the present observations, respond to the observations submitted by the Russian Federation on 30 January 2023, in so far as these relate to Malta, address its understanding of Article 63 of the Statute and illustrate that it is fully compliant with the requirements of an admissible Declaration.
3. In its observations, the Russian Federation has presented six grounds, referred to as ‘sections’, in substantiation of its pleadings on inadmissibility, namely:
 - a. The interventions are not genuine: Their real object is not the construction of the convention but pursuing a joint case with Ukraine;
 - b. The interventions would be incompatible with the principle of equality of the parties and the requirements of good administration of justice;
 - c. In any event, the Court cannot decide on the admissibility of the Declarations before it considers the Russian Federation’s preliminary objections;
 - d. The Declarations address, in effect, matters which presuppose that the Court has jurisdiction and/or that Ukraine’s application is admissible;
 - e. The reference to Article IX of the Convention is of no assistance for the purposes of intervention at the jurisdictional stage of the proceedings. The Declarants cannot intervene on Article IX of the Convention *per se*;
 - f. The Declarants seek to address issues unrelated to the construction of the Convention and their admission would prejudice questions relating to the Court’s jurisdiction *ratione materiae*.

II. Malta’s Declaration is admissible and fully complies with the requirements of the Statute

4. The relevant provisions addressing the admissibility or otherwise of a Declaration are Article 63 of the Statute and Article 82, paragraph 2 of the Rules of the Court (hereinafter referred to as ‘the Rules’) which are being laid out below for ease of reference:

Article 63 of the Statute:

"1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.¹

Article 82, paragraph 2 of the Rules of the Court:

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

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

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

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

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

5. Upon reading the above, it appears rather clear that Article 63 is unequivocal in its dictum that every party to the Genocide Convention (hereinafter referred to as 'the **Convention**') has a right to intervene. In conjunction with Article 82, paragraph 2 of the Rules, this right must then be exercised in terms of the four requirements laid out above. In simple words, a State must prove that its Declaration stems from the fact that it is a party to the Convention and that its intervention relates to an interpretation of the identified provisions of said Convention.
6. Malta submits that it has fully complied with the pre-requisites for admissibility under Article 63 of the Statute and 82 of the Rules. Malta has acceded to the Convention and deposited its instrument of accession in terms of Article XI, paragraph 4 of the Convention, on 6 June 2014, as stipulated in the Declaration itself.² Furthermore, just a cursory look at Malta's Declaration enables one to decipher that the intervention strictly relates to the interpretation of the Convention.³

¹ Bold and underlining is effected by the undersigned for purposes of emphasis.

² Annex B to Malta's Declaration of Intervention, submitted on the 24 November 2022.

³ Paragraphs 11, 13, 17, 18, 19, 20, 22, 23, 24, 26, 28, 29, 30 and 31 of Malta's Declaration of Intervention, submitted on the 24 November 2022.

7. Having dealt with some preliminary matters, Malta shall now proceed by rebutting the arguments, postulated in Sections 'A-F', by the Russian Federation in its observations submitted on 30 January 2023.

III. Malta's rebuttal to the Russian Federation's Section 'A', namely: "*The interventions are not genuine: Their real object is not the construction of the convention but pursuing a joint case with Ukraine*"

8. Malta submits that the Russian Federation alleges that Malta's Declaration is not genuinely motivated in so far as its real object is "*to side with, advocate for, or pursue a joint case with Ukraine.*"⁴ The pretext to the contention of the Russian Federation consists in the Joint Statements which "*show that the real intention of the Declarants is not to express their own views regarding the construction or interpretation of the relevant provisions of the Genocide Convention.*"⁵ In fact, the very last written observation before the commencement of Section 'B' is the following:

*"For these reasons, all the Declarations filed pursuant to the Joint Statements should be declared inadmissible."*⁶

9. This certainly cannot impinge upon the validity and admissibility of Malta's Declaration because Malta:
- a. Has **limited** its Declaration specifically to the prevailing jurisdictional issue, this being the construction of the compromissory clause contained in Article IX of the Convention;⁷
 - b. In view of its prospective status as non-permanent member of the United Nations Security Council, felt duty bound to embrace, in principle, the position adopted by the international community in so far as this is consistent with the United Nations Charter and the special status of the Convention itself. So much so that the **annexes filed by the Russian Federation do not refer to any such additional statement by Malta;**⁸
 - c. Has never wished or intended to "*become de facto co-applicant and pursue a joint case with Ukraine.*"⁹ On the contrary, Malta had declared that "*for the sake of clarity, Malta does not seek to become a party to the proceedings...*"¹⁰

⁴ Paragraph 15 of the written observations submitted by the Russian Federation on 30 January 2023.

⁵ Ibid.

⁶ Paragraph 35 of the written observations submitted by the Russian Federation on 30 January 2023.

⁷ Paragraph 13 of Malta's Declaration of Intervention submitted on the 24 November 2022.

⁸ See paragraphs 18(a)-(n) and 19 of the written observations submitted by the Russian Federation on 30 January 2023; see also all Annexes filed by the Russian Federation together with its written observations submitted on 30 January 2023.

⁹ Paragraph 21 of the written observations submitted by the Russian Federation on 30 January 2023.

¹⁰ Paragraph 15 of Malta's Declaration of Intervention submitted on the 24 November 2022. Bold text is effected by the undersigned for purposes of emphasis.

- d. Has never made any **core statements** in the context of the *Legality of Use of Force cases*;¹¹
 - e. Has never made reference to the prevention of genocide as an excuse or pretext for armed intervention, unilaterally.¹² It could not have done so multi-laterally because **Malta is not a NATO Member State**; and
 - f. Cannot be said to have made a “*sudden apparent change of legal positions that can be seen in the Declarants’ conduct*” in this regard.¹³ **Malta’s position has remained unchanged.** It has always safeguarded international law and strives to contribute to its progressive development, more so now that it enjoys non-permanent member status of the Security Council.
10. Consequently, Malta does not pursue a “*collective political strategy*” designed “*with the object of assisting, strengthening or bolstering Ukraine’s claims before the Court*”.¹⁴ It is indeed unfortunate that the Russian Federation (with the exception of its Section ‘G’), places all Declarants into one basket, rendering the validity of its written observations filed on 30 January 2023 questionable, or at the very least, equivocal and ambiguous. It is equally unfortunate that the Russian Federation seems to suggest that the Court can somehow be **swayed by numbers** when it cites from scholarly works to the effect that “*...the massive number of the interventions would put pressure on the Court to accept them.*”¹⁵
11. For the sake of clarity, Malta’s above stance shall, in no manner whatsoever, be construed or understood as suggesting that Declarations by Declarants which have subscribed to any additional statement or core statements have not been undertaken in good faith. In any case, the **exercise of a right** cannot be undertaken in bad faith, but at worst, for ulterior motives. Nothing prohibits this, although this is not the case in so far as such Declarations are concerned, especially Malta’s.
12. The allegation purporting that Malta’s Declaration lacks genuineness cannot even be made at this stage since it relies heavily on an **erroneous underlying assumption**, being “*a collective political strategy.*”¹⁶ Even if this underlying assumption were to be correct and were to be proved to the satisfaction of the Court, no legal impediment under Article 63 of the Statute exists which could render such Declarations inadmissible *ab initio*. This is especially and naturally so since the Russian Federation itself is

¹¹ Paragraph 29 of the written observations submitted by the Russian Federation on 30 January 2023.

¹² Paragraphs 30-32 of the written observations submitted by the Russian Federation on 30 January 2023.

¹³ Paragraph 34 of the written observations submitted by the Russian Federation on 30 January 2023.

¹⁴ Paragraph 21 of the written observations submitted by the Russian Federation on 30 January 2023. This is more so when one considers Malta’s neutrality which is constitutionally entrenched {Article 1 sub-article (3) and Article 66(2)(b) of the Constitution of Malta; see T.Borg, *A Commentary on the Constitution of Malta Second Edition*, Kite Group Malta, 2022, p. 29-32; *vide* also D.J.Attard, *The Maltese Legal System: Constitutional and Human Rights Law*, Vol II, Part A, Malta University Press, 2015, p. 31-33}.

¹⁵ Paragraph 28 of the written observations submitted by the Russian Federation on 30 January 2023.

¹⁶ Paragraph 21 of the written observations submitted by the Russian Federation on 30 January 2023.

contesting the jurisdiction of the Court. The Russian Federation cannot contest jurisdiction and elect to claim that Declarations are politically motivated because the latter, the alleged political motivation, cannot affect the former, the subsistence of jurisdiction or otherwise. Moreover, Malta invokes the legal maxim *electa una via non datur recursus ad alteram*.

13. Finally, it must be stated that Malta has not politicised its Declaration and/or arguments at all. Malta's arguments are in fact deemed legal and only legal since the Court upheld that a question has a legal character if it is framed in terms of law and raises problems of international law, or if it is related to a breach of obligations under international law, even if it had political aspects. In this vein, if the Court determines that a question is decided in accordance with the prevailing rules of law it has to consider such a question as **intrinsically juridical, irrespective of its political dimension or elements**.¹⁷ In this regard, mention must be made of the fact that "*the Court made it clear that a question is considered to be a legal one if it is by its nature susceptible of a reply based on law.*"¹⁸

IV. Malta's rebuttal to the Russian Federation's Section 'B', namely: "*the interventions would be incompatible with the principle of equality of the parties and the requirements of good administration of justice*"

14. This argument is intricately linked to, if not dependent upon, the previous Section 'A', so much so that the Russian Federation repeats its concern connected with "*a coordinated mass intervention before the Court*", referring to "*unprecedented circumstances*" as a result of which "*the Court should find the Declarations inadmissible.*"¹⁹
15. Malta submits that Malta's above written observations in relation to Section 'A' shall also serve to rebut the arguments raised by the Russian Federation under its Section 'B'. In addition to this Malta submits that the arguments raised by the Russian Federation under Section 'B' certainly cannot impinge upon the validity and admissibility of Malta's Declaration because Malta:

¹⁷ See, for example, *The Admission Case* (1948) ICJ Rep., 1948, pp. 61ff; *The Competence of the General Assembly for the Admission of a State to the United Nations Case* (1950), ICJ Rep., 1950, pp. 6ff; *The Peace Treaties Case* (1950) ICJ Rep., 1950, pp. 65ff; *The Western Sahara Case* (1975) ICJ Rep., 1975, pp. 18ff; *The WHO and Egypt Case* (1980) ICJ Rep., 1980, pp. 88ff; *The Legality of the Use by a State of Nuclear Weapons in Armed Conflict Case* (1996) ICJ Rep., 1996 pp.71-72; *The Legality of the Threat or Use of Nuclear Weapons Case* (1996) ICJ Rep., 1996, p. 233-234.

¹⁸ Mohamed Sameh M. Amr, *The Role of the International Court of Justice as the Principal Judicial Organ of the United Nations*, Kluwer Law International, 2003, p.87.

¹⁹ Paragraph 36 of the written observations submitted by the Russian Federation on 30 January 2023.

- a. Has **no Maltese national on the bench of the Court.**²⁰ However, even should Malta or any other State Party, have a national on the Bench of the Court, this would not impair the equality of the parties. Reference is hereby being made to the Court's order in the *Whaling case* to the following effect:

*"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."*²¹

Consequently, Articles 31 (5) of the Statute, and Articles 32 and 36 of the Rules, as quoted by the Russian Federation, do not apply. In any case, all **judges are bound to uphold their neutrality and impartiality** in accordance with Article 20 of the Statute,²²

- b. Has **limited** its Declaration specifically to the prevailing jurisdictional issue, this being the construction of the compromissory clause contained in Article IX of the Convention;²³
- c. In view of its prospective status as non-permanent member of the United Nations Security Council, felt duty bound to embrace, in principle, the position adopted by the international community in so far as this is consistent with the United Nations Charter and the special status of the Convention itself. So much so that the **annexes filed by the Russian Federation do not refer to any such additional statement by Malta**²⁴ whereas the Russian Federation claims that *"this in fact has already occurred when several States filed declarations of intervention, pursuant to the*

²⁰ Paragraphs 42 and 48 of the written observations submitted by the Russian Federation on 30 January 2023. See also paragraph 52 of the written observations submitted by the Russian Federation on 30 January 2023 in so far as this reveals increasing unease on the part of the Russian Federation on the composition of the Court and constitutes an implicit attack of its impartiality and independence.

²¹ *Whaling in the Antarctic (Australia vs Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p.3 at p.9, para 18. Bold text is effected by the undersigned for purposes of emphasis.

²² Article 20 of the Statute reads as follows: *"Every member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously."*

²³ Paragraph 13 of the Malta's Declaration of Intervention submitted on 24 November 2022.

²⁴ See paragraphs 18(a)-(n) and 19 of the written observations submitted by the Russian Federation on 30 January 2023; see also all Annexes filed by the Russian Federation together with its written observations submitted on 30 January 2023.

*Joint Statements, at the time when the Russian Federation had to prepare its Preliminary Objections, thereby causing considerable difficulties;*²⁵

- d. Has never wished or intended to become a “*de facto co-applicant*.”²⁶ On the contrary, Malta had declared that “*for the sake of clarity, Malta does not seek to become a party to the proceedings...*”²⁷ and
 - e. Has never made any **core statements** in the context of the *Legality of Use of Force cases*.²⁸
16. For the sake of clarity, Malta’s above stance shall, in no manner whatsoever, be construed or understood as suggesting that Declarations by Declarants which have subscribed to any additional statement or core statements have not been undertaken in good faith, or else that no equality of arms subsists in view of members of the bench who are nationals of Declarants.
17. With respect to the Russian Federation’s claim of inequality of arms, Malta notes that this most certainly is not the case. Instead, Malta wonders what the Russian Federation would have alleged had they been given only **eleven (11) days** to prepare and file these written observations in reply to a sixty-one (61) page document.²⁹ This said, Malta understands and appreciates that the Court’s intention is to expedite this phase of the proceedings as far as practicable. Hence Malta has made its best endeavours to satisfy the deadline imposed by the Court rather than request an extension of such time limit. This context and perspective, with all due respect towards the Russian Federation, manifests the unfairness of the arguments presented by the Russian Federation in Section ‘B’.
18. Additionally, Malta cannot but highlight contradictory dispositions in the written observations of the Russian Federation which unmask the fragility of its argumentation. Suffice to note, just by way of example, that positions and arguments presented in Declarations “*are, in substance and sometimes even in form, virtually – and in some cases, literally – identical to the submissions presented in Ukraine’s application and even its Memorial*”³⁰ (this being the former position), whereas, on the other hand, “*the*

²⁵ Paragraph 50 of the written observations submitted by the Russian Federation on 30 January 2023.

²⁶ Paragraph 49 of the written observations submitted by the Russian Federation on 30 January 2023.

²⁷ Paragraph 15 of Malta’s Declaration of Intervention submitted on 24 November 2022. Bold text is effected by the undersigned for purposes of emphasis.

²⁸ Paragraph 46 of the written observations submitted by the Russian Federation on 30 January 2023.

²⁹ See Annex 1 consisting in a communication sent on 2 February 2023 by H.E. Philippe Gautier, Registrar of the Court, with a deadline to reply to a 61-page document by 13 February 2023.

³⁰ Paragraph 26 of the written observations submitted by the Russian Federation on 30 January 2023. See also explicit reference to the contention that “*the Declarations are drafted in identical or almost identical terms to those earlier filed by other States seeking to intervene in support of Ukraine*” in paragraph 27 of the written observations submitted by the Russian Federation on 30 January 2023.

*Russian Federation would be forced to respond to numerous lengthy written pleadings by the interveners supporting Ukraine at different and critical stages of the proceedings, as well as to many statements at any oral phase,*³¹ totaling “*thirty-one different pleadings, in addition to those of Ukraine*”³² (this being the latter position). These positions are diametrically opposed and thus cannot co-exist. If the Russian Federation’s former observation is correct, then any and all oral pleadings could be expedited, and the Russian Federation would not be burdened in having to rebut pleadings of many States in so far as these are practically identical. Such common positions could reflect consistent and settled practice in so far as the position at law is one and only one. If, on the other hand, the Russian Federation’s latter observation is correct, the pretext upon which Sections ‘A’ and ‘B’ are grounded disintegrates like a house of cards because that would mean that the **pleadings of the intervenors are indeed distinct and different.**

19. Matters are further complicated by the Russian Federation’s reference to Declarants which “*either claim to address issues of jurisdiction only or allege that they seek to intervene to interpret provisions of the Convention that in their view relate not only to merits, but also to the Court’s jurisdiction.*”³³

V. **Malta’s rebuttal to the Russian Federation’s Section ‘C’, namely: “*in any event the Court cannot decide on the admissibility of the Declarations before it considers the Russian Federations preliminary objections.*”**

20. Malta disagrees with the Russian Federation’s arguments outlined under this section particularly because of the following reasons which are being laid out below.
21. In terms of Article 30(1) of the Statute, **the Court enjoys wide discretion** in so far as proceedings before it are concerned.³⁴
22. Whereas Article 30(1) of the Statute grants discretionary powers to the Court, Article 63 of the Statute burdens the Court with certain obligations, one of which is the duty to verify whether the conditions stipulated in Article 82(2) of the Rules are observed. In *Haya de la Torre*, the Court did not determine the subject matter of the dispute first, unlike as stated by the Russian Federation. On the contrary, the Court only ascertained whether the object of the Intervention of the Government of Cuba was in fact the interpretation of the Havana Convention regarding the question whether Colombia is under an obligation to surrender the refugee to the Peruvian Authorities.³⁵

³¹ Paragraph 51 of the written observations submitted by the Russian Federation on 30 January 2023.

³² Footnote 72 at page 29 of the written observations submitted by the Russian Federation on 30 January 2023.

³³ Paragraph 74 of the written observations submitted by the Russian Federation 30 January 2023.

³⁴ Article 30(1) of the Statute is being laid out for ease of reference: “*The Court shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.*”

³⁵ *Haya de la Torre (Colombia v. Peru)*, Judgment of 13 June 1951, I.C.J. Reports 1951, p.71, at p.77.

23. **Article 63 of the Statute does not distinguish between separate phases of the Court.** Its opening word ‘*whenever*’ clearly indicates that a State is allowed to intervene in all phases of the proceedings.³⁶
24. Interventions should be made *in limine litis*, hence at the very start of the proceedings, and before the oral hearing. In this vein, Article 82(1) of the Rules provides that declarations under Article 63 “*shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted.*”
25. Furthermore, in the first two cases quoted by the Russian Federation in support of its written observations (namely the *Military and Paramilitary Activities case* and the *Nuclear Tests case*) the Court had actually decided to split the proceedings in separate phases³⁷ before examining the admissibility of the subsequent interventions. In the present case, the Court did not order, under Article 79(1) of the Rules, to separate the proceedings after the filing of Russia’s preliminary objection. Rather, it has allowed Ukraine to address jurisdiction, admissibility and merits in a single memorial. Hence, **no authority can be drawn from the *Military and Paramilitary Activities* and *Nuclear Tests* for the purposes of the present case.** In *Military and Paramilitary Activities* and *Nuclear Tests*, there was a different jurisdictional/admissibility phase, whereas in the present case there is no such difference. Consequently, **the scenarios postulated by the Russian Federation are not analogous at all and cannot serve as a frame of reference or as a jurisprudential tool for the Court.** Even if the Court had separated the proceedings in two separate phases, nothing in the Court’s caselaw supports an obligation of the Court to refrain from deciding on the admissibility of an intervention during the jurisdictional phase. It seems that the Russian Federation has largely misread the Court’s rejection of El Salvador’s Declaration as inadmissible during the jurisdictional phase. In actual fact, the Court rejected El Salvador’s Declaration as inadmissible not because no intervention under Article 63 of the Statute could ever be admissible during the jurisdictional phase, but because it did not contain any construction of Article 36(2) and (5) of the Statute as the jurisdictional base of the case.
26. In any case, the written observations of the Russian Federation also take a restrictive view of the conclusions of the Court in relation to El Salvador’s intervention.³⁸ In fact,

³⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua vs United States of America)*, Intervention of El Salvador, Dissenting Opinion of Judge Schwebel, I.C.J. Reports 1984, p. 223, at p.234.

³⁷ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 169, at p. 187, Point D (separating jurisdiction and admissibility from the merits phase); *Nuclear Tests (New Zealand v. France)*, Interim Protection, Order of 22 June 1973, I.C.J. Reports 1973, p. 135, at p. 142.

³⁸ Paragraphs 56 and 57 of the written observations submitted by the Russian Federation on 30 January 2023.

scholarly writings confirm, in relation to El Salvador's intervention in *Military and Paramilitary Activities*, that:

"This intervention, if it had been examined by the Court, would have raised the question whether it is possible to rely on Article 63 in order to intervene in a preliminary phase of the proceedings, and in particular a phase devoted to questions of jurisdiction and admissibility. If for example a case is brought on the basis of the compromissory clause in a multilateral convention, the interpretation of that clause may be of interest to all the other States parties (or at least those of them who have not made a reservation to the clause). It would therefore seem that there is no reason why intervention under Article 63 should not be possible to argue a question of jurisdiction or admissibility, if that question involves the interpretation of a multilateral treaty. Sir Hersch Lauterpacht would have favoured intervention under Article 63 of States parties to the Statute itself, when the question arose, in the Norwegian Loans case, of the effect of an optional-clause declaration subject to an invalid condition. The practice of the Court has been to make the notification required by Article 63, paragraph 1, to the parties to a multilateral convention where such a convention is invoked as a basis for the jurisdiction of the Court (but not simply where questions of interpretation of the Statute may arise.

The decision on the intervention of El Salvador is not inconsistent with this practice; the intervention was not rejected on the basis of any general finding that intervention at a jurisdictional phase is premature, though the handling of the matter by the Court was less than adroit, and thus lent itself to misunderstanding on the point."³⁹

27. Likewise, in the *Nuclear Tests case*,⁴⁰ the Court deemed Fiji's Intervention as admissible, but it deferred the consideration thereof to the merits, since the intervention did not contain any construction of the jurisdictional basis of the case.
28. In *Nuclear Tests (Request for Examination)* the Court had an application before it together with four Declarations of Intervention. By way of an order issued in October 1995, the Court chose to reject both the application and the four interventions. Rather than separating the proceedings the Court, thus, simply enforced its discretion to dismiss the application together with the interventions, and nothing more. **Nowhere in said order can it be inferred that a precedent has been created by the Court to disregard an intervention before examining preliminary objections raised by the defendant of the proceedings. Therefore, the Russian Federation's arguments also cannot serve as a jurisprudential tool for the Court for the purpose of the present proceedings.**

³⁹ H. Thirlway, *The Law and Procedure of the International Court of Justice – Fifty Years of Jurisprudence Vol. I*, (OUP, 2013), p. 1031. Bold and underlining is effected by the undersigned for purposes of emphasis.

⁴⁰ *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p.324, at p.325.

29. At this juncture, mention must also be made of the very essence and need of the intervention which fits squarely within the parameters of the phrase *'if that question involves the interpretation of a multilateral treaty.'* Just a cursory look at Malta's intervention enables one to decipher that **the intervention strictly relates to the interpretation of the Convention.**⁴¹ When the intervention is sought in relation to a legal provision of a treaty the object of which is to safeguard a *jus cogens* norm of international law by criminalizing the act of genocide,⁴² admissibility should be presumed, at least on a *iuris tantum* basis. Under international law, the consequence of the categorisation of a norm enjoying *jus cogens* status, such as the prohibition of genocide, should lead this Court to conclude that any legal issue emanating from the interpretation of the Treaty which penalises the act of genocide itself does not *"impose limits on the will of states: rather it recognises that they have functional powers (or, if one prefers, collective rights) to be managed on behalf of the International community as a whole."*⁴³

VI. Malta's rebuttal to the Russian Federation's Section 'D', namely: *"the Declarations address in effect matters which presuppose that the Court has jurisdiction and/or that Ukraine's application is admissible."*

30. At the outset it must be pointed out that Sections 'C', 'D', 'E' and 'F' are intrinsically similar, so much so that the Russian Federation contends: *"Sections C and D explain that the court cannot, in any event, decide on the admissibility of the Declarations before it has made a decision on the Preliminary Objections, and that the Declarations address matters that presuppose that the Court has jurisdiction and/or that Ukraine's application is admissible."*⁴⁴ Remarkably, Sections 'D' and 'F' are nearly identical, to the extent that replies to Section 'D' herein serve to constitute replies to Section 'F' here below.

31. It is yet again unfortunate that the Russian Federation draws inferences from the mere existence of a declaration to intervene. Malta's Declaration to intervene cannot, *ab initio*, presuppose that the Court has jurisdiction and/or that Ukraine's application is admissible. The very reason for this is that a request for intervention could precede considerations on jurisdiction as reflected in the reply to Section 'C' here above, and for the reasons stated therein. To this effect, the same reply provided for Section 'C' serves to rebut Section 'D' of the Russian Federation. If the Court agrees with the reply to Section 'C' here above, a corollary thereof would necessarily entail that Malta could never have pre-supposed the Court's jurisdiction in so far as **Malta is merely exercising a right to intervene further to a notification by the Court Registrar.**

⁴¹ Paragraphs 11, 13, 17, 18, 19, 20, 22, 23, 24, 26, 28, 29, 30 and 31 of Malta's Declaration of Intervention submitted on 24 November 2022.

⁴² Paragraph 11 of Malta's Declaration of Intervention submitted on 24 November 2022.

⁴³ P. Picone, *The Distinction between jus cogens and obligations erga omnes*, p. 411-424, Chapter 24 in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, OUP, 2011, p.415.

⁴⁴ Para 9(c) of the written observations submitted by the Russian Federation on 30 January 2023.

32. It is undisputed that “*Article 63 speaks unequivocally of a right to intervene.*”⁴⁵ Such **plain wording refers to the Convention in its entirety, hence, including the compromissory clause.** Such reasoning is also consonant with an understanding of the object and purpose of Article 63 of the Statute. Therefore, the fact that Malta’s Declaration addresses the compromissory clause under Article IX of the Convention cannot render such intervention inadmissible. As a matter of fact, **the Court has never dismissed an intervention because it was, either entirely or predominantly, designed to interpret a compromissory clause.** Furthermore, the effect of Article 36(6) of the Statute, which legal provision mirrors the Court’s *kompetenz-kompetenz*, is rather significant since “*any other construction would deprive the compromissory clause of all its intended effectiveness.*”⁴⁶
33. The existence of this right is settled under international law because there is, in actual fact, no limitation under Article 63 of the Statute or Article 82 paragraph 2 of the Rules which can prevent any party to the Convention from exercising its right to intervene on the construction of the provisions of the Convention pertaining to issues of jurisdiction. Upon reading the text of Article 63 of the Statute it becomes very clear to the reader that a State is permitted to intervene “*whenever the construction of a convention to which it is a party is in question.*”⁴⁷

VII. Malta’s rebuttal to the Russian Federation’s Section ‘E’, namely: “*the reference to Article IX of the Convention is of no assistance for the purpose of intervention at the jurisdictional stage of the proceedings. The Declarants cannot intervene on Article IX of the Convention per se.*”

34. The Russian Federation seems to argue that Malta’s Declaration does not relate to the construction of the Convention but includes an incursion into the interpretation or application of other rules of international law which are separate and distinct from the conventional provision in question, and which emanate from different sources. In fact, the Russian Federation states that:

*“The Declarants, invoking Article IX of the Convention, are in fact seeking to use this reference as a gateway to comment on the Court’s jurisdiction *ratione materiae*, providing their views on other articles of the Convention that have not been identified by the Court as being “in question” between the Parties.”*⁴⁸

⁴⁵ H. Thirlway, *The Law and Procedure of the International Court of Justice – Fifty Years of Jurisprudence Vol. I*, (OUP, 2013), p. 1027.

⁴⁶ R. Kolb, *The Scope Ratione Materiae of the Compulsory Jurisdiction of the ICJ*, p. 442-470, Chapter 22 in P. Gaeta, *The UN Genocide Convention: A Commentary*, OUP, 2009, p.451. Bold and underlining is effected by the undersigned for purposes of emphasis.

⁴⁷ Bold and underlining is effected by the undersigned for purposes of emphasis.

⁴⁸ Paragraph 87 of the written observations submitted by the Russian Federation on 30 January 2023.

35. The Russian Federation sidelines and undermines the significance of the words “*interpretation*” and “*application*” within Article IX of the Convention. Jurists have confirmed that:

“*‘Interpretation’ is typically understood as the process of ‘explaining the meaning’ of a legal norm; ‘application’ is ‘the action of putting something in operation’ in a given case. Very often, disputes about the application of a particular treaty will be based on differences of interpretation; at the same time, differences of interpretation will only become relevant if some form of treaty application is at least considered...*

Disputes about the ‘fulfilment’ of the Convention will typically implicate the application (and possibly interpretation) of the Convention. On that basis it may indeed have been said that the addition of the word ‘fulfilment’ does not appear to be significant. If anything, it confirms the impression that by inserting all three alternative terms, drafters had sought to give a coverage as exhaustive as possible to the compromissory clause and to close down all possible loopholes.”⁴⁹

36. Moreover, the argument of the Russian Federation belies the very essence of treaty law. In fact, Article 31(3)(c) on the Vienna Convention on the Law of Treaties stipulates that the interpretation of a treaty may include “*any relevant rules of international law applicable in the relations between the parties*”. The notion of “*relevant rule*” includes various sources of international law such as treaty law, customary international law and the general principles of law.⁵⁰ Therefore, mentioning any other rule of international law deriving from conventional or customary law cannot be tantamount to “*impermissible incursions*”.⁵¹ On the contrary, such rules may serve as an interpretive tool for the purposes of Article IX of the Convention.

37. International law, as applied by this Court is one *corpus iuris*. You cannot disentangle one rule from another because international law, enriched by its various sources, not only allows but demands that the proceedings of this Court are also governed by separate and distinct legal instruments including, *inter alia*, the United Nations Charter. Consequently, “*the interpretation of Article IX has to take account of this ‘normative environment,’ as it has an immediate bearing on the application of Article IX.”⁵² This matter is settled even jurisprudentially, as follows:*

⁴⁹ C. Tams, *Article IX*, p.293-318, in C. Tams, L. Berster, B. Schiffbauer, *Convention on the Prevention of Punishment on the Crime of Genocide; a Commentary*, CH Beck, Hart Nomos, 2014, p.313.

⁵⁰ Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group of the ILC finalised by Mr Martti Koskenniemi, 13 April 2006, pp. 94-96. https://legal.un.org/ilc/documentation/english/a_cn4_1682.pdf.

⁵¹ Paragraph 108 of the written observations submitted by the Russian Federation on 30 January 2023.

⁵² C. Tams, *Article IX*, p.293-318, in C. Tams, L. Berster, B. Schiffbauer, *Convention on the Prevention of Punishment on the Crime of Genocide; a Commentary*, CH Beck, Hart Nomos, 2014, p.300-301. Bold and underlining is effected by the undersigned for purposes of emphasis.

“The acts undertaken by the contracting parties to prevent and to punish genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.”⁵³

VIII. Malta’s rebuttal to the Russian Federation’s Section ‘F’, namely: “the Declarants seek to address issues unrelated to the construction of the Convention and their admission would prejudice questions relating to the Court’s jurisdiction *ratione materiae*.”

38. Malta notes that the bulk of the points (arguments) raised in Section ‘F’ are very similar, if not identical, to those dealt with by the Russian Federation in Sections ‘A’-‘E’. Suffice to mention, *inter alia* the repeated reference to the absence of a “*genuine intervener*”⁵⁴ and the fact that the determination of the admissibility or otherwise of an intervenor under Article 63 of the Statute should not prejudice jurisdictional issues.⁵⁵
39. Moreover, this Section also lumps certain States with situations relating to other third states. By way of example, the Russian Federation argues that an intervenor “...*should not refer directly to matters of evidence...*”. Here again no account was taken of the fact that Malta, the intervention of which is not hybrid, has not referred to matters of evidence in its Declaration. In fact, just by way of example, Malta refers to the words ‘*use of force*’ only once in its entire Declaration, this being in paragraph 6 wherein it explains the claim put forward by Ukraine in these proceedings. Frankly, even if it did refer to evidentiary matters, this certainly does not render its request to intervene as inadmissible.

IX. Conclusion

40. For the reasons set out above, Malta hereby submits that its Declaration fully complies with the requirements under Article 63 of the Statute and Article 82 of the Rules of the Court.
41. Malta humbly and respectfully submits that the Court should decide that Malta’s Declaration of Intervention is admissible. Hence, the Court should allow Malta to present its written observations in good time in order to exercise its right to intervene as party to the Convention.

⁵³ Allegations of Genocide under the Convention on the Prevention and Punishment of the crime of Genocide (Ukraine vs Russia), Order of 16 March 2022, p.13 para 58.

⁵⁴ Paragraph 107 of the written observations submitted by the Russian Federation on 30 January 2023, reference to which is repeated throughout Section ‘A’.

⁵⁵ Paragraphs 111 and 113 of the written observations submitted by the Russian Federation on 30 January 2023, reference to which is repeated throughout Section ‘D’.

Respectfully,



Christopher Soler
STATE ADVOCATE
AGENT OF THE GOVERNMENT OF MALTA



Mark Pace
MALTA'S AMBASSADOR TO THE KINGDOM OF THE NETHERLANDS
CO-AGENT OF THE GOVERNMENT OF MALTA

Annex 1: Communication sent, on 2 February 2023, by H.E. Philippe Gautier, Registrar of the Court.