

**WRITTEN OBSERVATIONS OF THE GOVERNMENT  
OF ROMANIA ON THE ADMISSIBILITY OF ITS  
DECLARATION OF INTERVENTION  
IN THE CASE CONCERNING  
ALLEGATIONS OF GENOCIDE UNDER THE  
CONVENTION ON THE PREVENTION AND  
PUNISHMENT OF THE CRIME OF GENOCIDE  
(UKRAINE V. RUSSIAN FEDERATION)**

## **I. Introduction**

1. On 13 September 2022, the Government of Romania filed with the Registrar a Declaration of Intervention in the case concerning *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia Federation)* on the basis of Article 63, paragraph 2 of the Statute of the International Court of Justice.
2. On 17 October 2022, the Russian Federation formulated written observations on admissibility of, *inter alia*, the Declaration of Intervention of the Government of Romania, requesting the Court to:
  - a. dismiss the Declaration on the grounds of inadmissibility; if not,
  - b. dismiss the Declaration as inadmissible inasmuch as they relate to the jurisdictional phase of the proceedings;
  - c. defer consideration of the admissibility of the Declaration until after the Court has made a decision on the Russian Federation's Preliminary Objections.
3. On the same date, Ukraine filed written observations with the Court, in relation to, *inter alia*, the Declaration of Intervention of the Government of Romania, by which it did not challenge its admissibility.
4. On 31 January 2023, the Government of Romania received a letter from the Registrar of the Court by which it was informed of the deadline of 13 February 2023 fixed by the Court in order for the Government of Romania to submit observations in writing on the admissibility of its Declaration of Intervention following the Russian Federation's objections to the admissibility of this Declaration.
5. The following written observations are submitted by the Government of Romania in reply to the mentioned request from the Court.

## **II. Arguments in support of the admissibility of the Declaration of Intervention of Romania**

6. The Russian Federation contests the admissibility of the Declaration of Intervention of the Government of Romania under the following points, which will be addressed in turn:

- a. The declaration underscores an intention to intervene which is not genuine, but part of a joint enterprise in support of Ukraine's application, thus frustrating the proper administration of justice and the equality of the Parties to the case;
- b. The Declaration of Intervention is premature and based on the presumption that the Court has jurisdiction to entertain the case;
- c. The Declaration of Intervention illustrates the intention of the Government to address issues that go beyond the mere construction of the Genocide Convention.

### **A. The declaration underscores an intention to intervene which is not genuine, but part of a joint enterprise in support of Ukraine's application, thus frustrating the proper administration of justice and the equality of the Parties to the case**

7. As mentioned in the Declaration of Intervention, the legal basis for its submission is represented by Article 63, paragraph 2 of the Statute of the International Court of Justice.

8. According to 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.*



9. The correct construction of Article 63 implies that all State Parties to a certain international convention the construction of which is in question before the International Court of Justice (other State Parties than the Parties themselves to the case) *have the right to intervene*<sup>1</sup> in the case, being within their discretion to make use of that right or not. When making this decision, States must be aware that the judgment of the Court on the construction of that particular Convention will be binding on the intervening States, as well.
10. The Government of Romania, as a State Party to the Genocide Convention, received the notification referred to in paragraph 1 from the Registrar and decided to make use of *its right to intervene* as mentioned in paragraph 2. The rationale of this decision as explained in the Declaration lies in the *erga omnes* value of the rights and obligations under the Convention, as determined by the Court itself.<sup>2</sup>
11. The process of the preparation of the Declaration of Intervention was guided by the requirements under Article 82, paragraph 2 of the Rules of the Court and was organized in such a manner as to follow those requirements.
12. The Government of Romania explicitly underlined in its Declaration of Intervention, and reiterates, that the scope of the intervention is limited to those issues pertaining to the construction of the provisions of the Genocide Convention as they appear relevant in the context of this case, without the intention of becoming a Party in the case.
13. The Government of Romania further identified the provisions in relation with which arguments would be brought in order to illustrate what would be, in the view of the Government of Romania, their correct construction, and also provided a statement of the construction of those provisions for which it contended.

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<sup>1</sup> Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3 at para. 7 and the jurisprudence cited therein.

<sup>2</sup> See paragraph 11 of the Declaration of Intervention of the Government of Romania.

14. Therefore, the Declaration of Intervention of the Government of Romania fulfills the legal conditions as established for that purpose.
15. As confirmed by the jurisprudence of the Court, in the process of assessing the admissibility of any declaration of intervention, the Court limits itself to checking the fulfillment of the conditions stipulated in the Statute and in the Rules of the Court for that purpose.<sup>3</sup> Therefore, the Court does not seek to clarify the intention under which a State intervenes on the basis of Article 63 of the Statute. To the contrary, the Court clearly delimitates between the scope of intervention under Article 62 of the Statute and the scope of intervention under Article 63 of the Statute by clarifying that

*the Court, when presented with a “declaration” of intervention based on Article 63 of the Statute, is not required to ascertain whether the State which is the author of that declaration has “an interest of a legal nature” which “may be affected by the decision [of the Court]” in the main proceedings, as it is obliged to do when it is seised of an “application” for permission to intervene under Article 62 of the Statute.<sup>4</sup>*

16. The Russian Federation refers, in support of its arguments that the intervention is not genuine, to the decision of the Court in the *Haya de la Torre* case.
17. In that case, the Court admitted the intervention of Cuba, but limited it to those points concerning the construction of the Havana Convention which were relevant to the case and which have not been addressed with the authority of *res judicata* in the previous judgment of the Court (of 20 November 1950).
18. However, the Court did not depart from its general approach to the issue of interventions based on Article 63 of the Statute, but simply limited itself to admit the intervention in relation only to the construction of those Articles of the Havana Convention which have

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<sup>3</sup> Whaling (para. 8).

<sup>4</sup> *Idem* (para. 7).



not been previously clarified by the Court in a different case. Otherwise, the Court simply verified the fulfillment of the same criteria for admissibility of such intervention.

19. Nevertheless, given the points made by the Russian Federation in order to argue that the true intention of the States wishing to intervene in the case is for them to become co-applicants, the Government of Romania would like to make the following principled points.
20. Should the argument of the Russian Federation be upheld,<sup>5</sup> according to which a convergence of views of States wishing to intervene, which are also in line with the views of one of the Parties to the case as to the construction of the Convention in question, would indicate a political intention of those States to become co-applicants, would have as an effect the frustration of the exercise of the right to intervene that each State Party to the Convention in question has.
21. It is our view that if all State Parties to a Convention hypothetically acted in furtherance of their right to intervene in the case before the Court, and if such Convention (as is the case with the Genocide Convention)<sup>6</sup> had a high number of State Parties, there would be a high probability of convergence of views between State Parties confirming an approach or another in relation to the construction of the Convention, which could coincide with the views taken by any of the Parties to the case before the Court.
22. In any case, there is nothing in Article 63 that would prevent States wishing to make use of their right to intervene to do so if their views coincide with those of any of the Parties to the case. The Statute and the Rules of the Court framed the object of such declarations of intervention in order to protect the equality of the Parties.
23. The Declaration of Intervention of the Government of Romania closely follows the scope of such type of declaration, being limited to aspects pertaining to the construction of the

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<sup>5</sup> See for reference paragraph 19 of the of the Russian Federation's Written Observations on Admissibility of the declarations of intervention submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the UK and the US, 17 October 2022.

<sup>6</sup> 153 States are Parties to the Genocide Convention.

Genocide Convention; thus, it cannot be considered as affecting the equality of the Parties *per se*.

24. The fact that the views of the Government of Romania on the construction of the Genocide Convention coincide with the arguments upheld by Ukraine cannot be held against it or against the admissibility of its declaration, since only by the simple fact of them having been in alignment with the position of the Russian Federation would not have made the Declaration *ipso facto* admissible.
25. Moreover, Article 63 itself is designed to contribute to the proper administration of justice and to the protection of an interest of a legal nature that may be affected by the interpretation to be given by the Court to the multilateral convention the construction of which is in question in proceedings before it.<sup>7</sup>
26. It is for the Court to determine on the basis of the declarations themselves whether they are in conformity with the legal requirements and decide on their admissibility.
27. In conclusion, the Government of Romania kindly asks the Court to acknowledge that it seeks to intervene in the case as a non-Party, in order to put forward its own views on the construction of relevant Articles of the Genocide Convention in exercise of its right conferred by Article 63, paragraph 2 of the Statute.

**B. The Declaration of Intervention is premature and based on the presumption that the Court has jurisdiction to entertain the case**

28. In the view of the Russian Federation, the jurisprudence of the Court indicates that it has never admitted interventions at the jurisdictional phase and in any case not before having determined the existence of the dispute and having established its jurisdiction following the consideration of the Preliminary Objections raised.<sup>8</sup>

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<sup>7</sup> Shabtai Rosenne, *The Law and Practice of the International Court 1920-2005*, Volume III Procedure, 4<sup>th</sup> edition, Martinus Nijhoff Publishers, Leiden/Boston, 2006, p. 1466.

<sup>8</sup> See for reference paragraphs 50, 66-67 of the Russian Federation's Written Observations.



29. The Russian Federation further argues that the submissions included in the declarations of intervention largely refer to the issues of substance of the alleged dispute and do not include, but only in appearance, arguments pertaining to the jurisdiction. Acting in this manner, the States wishing to intervene act, in view of the Russian Federation, with the aim of overcoming the impossibility to introduce the declarations of interventions at the preliminary objection stage.<sup>9</sup>
30. It further contends that the way in which the declarations are written indicate that they are premised on the assumption that the Court has jurisdiction to entertain the dispute.<sup>10</sup>
31. The Government of Romania recalls that according to Article 82 of the Rules of the Court, if a State Party to a convention the construction of which appears in a case before the Court wishes to intervene, it should deposit the declaration of intervention "as soon as possible", but before the date set for the opening of the oral proceedings.
32. According to Article 84 of the Rules of the Court, it is for the Court to decide on the declaration of intervention "as a matter of priority" (this is the rule) unless "in view of the circumstances of the case the Court shall otherwise determine" (this is the exception).
33. There is, hence, no duty for the Court to first decide on the preliminary objections and only thereafter to decide on the admissibility of the declarations of intervention; the Court is at liberty to decide on the organization of the proceedings in light of the circumstances of the case.
34. Moreover, under Article 63 of the Statute, a State Party to a Convention the construction of which is before the Court has the right to intervene irrespective of which provisions in the Conventions are in question (the substantive or the procedural ones or both).
35. Even if the Court has so far rejected the interventions on the basis of Article 63 of the Statute in the jurisdictional phase, it has done so not on the premise that there is no right

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<sup>9</sup> See for reference paragraphs 69, 80 of the Russian Federation's Written Observations.

<sup>10</sup> See for reference paragraphs 79, 82 of the Russian Federation's Written Observations.



to intervention in this procedural phase, but rather due to the circumstances pertaining to each case and the assessment of the elements included in the declarations of intervention.

36. In support of its position, the Russian Federation scrutinized the relevant jurisprudence of the Court, giving it, however, a particularly biased interpretation.

37. Out of the three cases relied upon by the Russian Federation in its written observations,<sup>11</sup> only the *Military and Paramilitary Activities* case might be a relevant precedent for the present proceedings.

38. In this particular case, El Salvador formulated a Declaration of Intervention on the basis of Article 63 of the Statute of the Court referring exclusively to matters pertaining to the merits of the proceedings, and not to the jurisdiction of the Court. This circumstance, assessed against the decision of the Court to split the proceedings and to first address the question of jurisdiction, led the Court to declare inadmissible the intervention of El Salvador “inasmuch as it relates to the current phase of the proceedings”.<sup>12</sup> The separate opinions appended to the Order by which the Court decided that the Declaration of Intervention of El Salvador is inadmissible inasmuch as it relates to the current phase of the proceedings, confirm that the decision of the Court was taken in view of the fact that El Salvador’s declaration was mainly concerned with questions pertaining to the merits of the case. In any case, the Court did not determine that the declarations of intervention based on Article 63 of the Statute are *ipso facto* inadmissible during the jurisdictional phase.

39. In the other two cases invoked by the Russian Federation the interventions were based on Article 62 of the Statute of the Court.

40. In the *Nuclear Tests (Australia v France)* case, the Court similarly decided to split the proceedings and to first address the issue of jurisdiction. Hence, since the intervention sought by Fiji was mainly focused on issues pertaining to the merits of the case, the Court

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<sup>11</sup> *Military and Paramilitary Activities* case; *Nuclear Tests* case and *Nuclear Tests (Request for Examination)* case.

<sup>12</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I. C.J. Reports 1984, p. 215.

“decided to defer its consideration of the application of the Government of Fiji for permission to intervene in the proceedings instituted by Australia against France until it has pronounced upon the questions [of jurisdiction]”.<sup>13</sup>

41. In the *Nuclear Tests (Request for Examination)* case, the Court dismissed the “Request for an Examination of the Situation” and, in the same decision, dismissed all the requests for intervention introduced on the basis of Article 62 of the Statute.<sup>14</sup>
42. The jurisprudence of the Court confirms that it enjoys a wide discretion in organizing the proceedings in light of the circumstance of each case. The jurisprudence of the Court does not confirm that declarations of intervention based on Article 63 of the Statute are inadmissible in the jurisdictional phase or premature if formulated before the Court has dealt with the preliminary objections.
43. Nevertheless, the Government of Romania underscores that in its Declaration of Intervention it expressed its intention to put forward its views also in relation to Article IX of the Convention – which includes the compromissory clause that would give the Court jurisdiction to entertain a case relating to the interpretation, application or fulfillment of the Convention.
44. It is the view of the Government of Romania that a correct construction of this particular procedural Article, which is essential for the determination of the Court’s jurisdiction, implies that the Court would have jurisdiction even when it were called to determine that there was no act of genocide committed and to confirm that a State Party acted in good faith in the fulfillment of the Convention. This issue set aside, there is also the aspect of the interpretation of the notion of *dispute* within the meaning of Article IX, and the Government put forward considerations on that notion as well, recalling the well-known jurisprudence of the Court.

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<sup>13</sup> *Nuclear Tests (Australia v. France)*, Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973, p. 320.

<sup>14</sup> Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the *Nuclear Tests (New Zealand v. France)* Case, I. C. J. Reports 1995, p. 288.



45. The statements put forward by Romania in its Declaration are strictly concerned with the construction of Article IX of the Genocide Convention and do not make under any circumstance a determination as to the existence of the jurisdiction of the Court in this case. Such a determination would imply an analysis of the law against the factual circumstances of the case, analysis which an intervener has no right to do under the legal rules underpinning this institution.
46. Therefore, contrary to what the Russian Federation claims,<sup>15</sup> the Government of Romania identified that particular procedural provision as being a provision the construction of which is in question in the context of the case, within the meaning of Article 63 of the Statute.
47. Thus, by this simple fact it is evident that the Government of Romania did not construe its intervention as lying on the presumption of jurisdiction, or as being solely directed to the merits of the case (meaning addressing only aspects pertaining to the construction of substantive provisions of the Genocide Convention).
48. Subsequently, it cannot be inferred – as the Russian Federation does<sup>16</sup> – that only because the statement of reasons in relation to the jurisdictional aspects occupy a smaller part in the economy of the Declaration, it concerns solely the merits phase.

**C. The Declaration of Intervention illustrates the intention of the Government to address issues that go beyond the mere construction of the Genocide Convention**

49. One last objection of the Russian Federation is based on allegations that the Declaration of Intervention of the Romanian Government addresses issues unrelated to the construction of the Genocide Convention.<sup>17</sup>

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<sup>15</sup> Paragraphs 81-83 of the Russian Federation's Written Observations on Admissibility of the declarations of intervention submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the UK and the US, 17 October 2022.

<sup>16</sup> See paragraph 80 of the Russian Federation's Written Observations.

<sup>17</sup> Point E of the Russian Federation's Written Observations (p.40 to 44); the reference to the Romanian Declaration is at para. 85 (h).



50. Contrary to these allegations, the Government of Romania has put forward in its Declaration of Intervention, elements strictly pertaining to the construction of Articles I, II, III and VIII of the Genocide Convention, in addition to those concerning Article XII.
51. The interpretation of these provisions entail, in the view of this Government, reference to other norms of international law, as international law itself functions as a system. Therefore, the incidental reference to other norms of international law is strictly made in the context of the construction of the relevant Articles of the Genocide Convention; in other terms, the Articles of the Genocide Convention do not serve as a pretext for statements in relation to other norms of international law.
52. The interpretation given by this Government to those provisions relies on the customary rules of treaty interpretation as codified in Article 31 of the Vienna Convention on the Law of Treaties.<sup>18</sup>
53. It is to be noted that according to paragraph 3(c) of that Article, the interpretation of a treaty may include
- any relevant rules of international law applicable in the relations between the parties.*
54. It should be further noted that “any relevant rules of international law” include customary international law, general principles of law and treaty law.<sup>19</sup> Therefore, it is not impermissible that the provisions of the Genocide Convention be interpreted in light of other norms of international law. When doing so, the objective of interpreting the provisions of relevant Articles of the Genocide Convention is preserved, the reliance on other norms of international law serving simply to ensuring a consistent and systemic interpretation of those norms as part of international law.
55. This Court, when assessing the scope of the duties under Article I of the Convention, ruled that when acting upon the duty to prevent genocide a State Party cannot go beyond

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<sup>18</sup> See paragraph 13 of the Declaration of intervention of the Government of Romania.

<sup>19</sup> Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law: Report of the Study Group in the ILC finalized by Mr. Martti Koskenniemi, 13 April 2006, pp. 94-96 consulted at [https://legal.un.org/ilc/documentation/english/a\\_cn4\\_1682.pdf](https://legal.un.org/ilc/documentation/english/a_cn4_1682.pdf) (last visited 8 February 2023)

the limits of international law.<sup>20</sup> Hence, the assessment of the acts committed in the performance of the duties under Article I is done against the assessment of other norms of international law.

56. The *pacta sunt servanda* principle is a fundamental principle of international law, underlying the obligations of States to fulfill in good faith all international obligations incumbent upon them. The reference to this principle only serves as guidance in determining the scope of relevant Articles of the Genocide Convention operating under the presumption of good faith performance.

57. The Government of Romania contends that its intention is to refer only to the construction of relevant provisions of the Genocide Convention, taking into consideration other relevant norms of international law for this purpose.

### III. Conclusion

58. For the reasons mentioned above (indent II) the Government of Romania contends that its Declaration of Intervention fully complies with the requirements of Article 63 of the Statute and of Article 82 of the Rules of the Court.

59. The Government of Romania kindly requests the Court to reject the arguments put forward by the Russian Federation against the Declaration of Intervention of the Government of Romania and to decide that this intervention is admissible.

Respectfully,



Dr. Bogdan Aurescu

Agent of the Government of Romania

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<sup>20</sup> Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007, p. 43, at p. 221 (paragraph 430).