

**INTERNATIONAL COURT OF JUSTICE**

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

**(UKRAINE V. RUSSIAN FEDERATION)**

**WRITTEN OBSERVATIONS OF UKRAINE ON THE ADMISSIBILITY  
OF THE DECLARATIONS OF INTERVENTION**

**24 March 2023**

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## **I. Introduction**

1. Thirty-three States have exercised their right to file declarations of intervention under Article 63 of the Statute of the Court in the above-captioned case (the “Declarations” or “Interventions”). Each of these States (together, the “Declarants”) is a Contracting Party to the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”), the construction of which is at issue in this proceeding. Ukraine and the Russian Federation have submitted observations on each of these Declarations in submissions to the Court dated 17 October 2022, 15 November 2022, 16 December 2022, and 30 January 2023. The Russian Federation objected to the admissibility of the Declarations, and pursuant to the Court’s letter of 31 January 2023, the Declarants submitted observations on the admissibility of their Declarations on 13 February 2023.

2. In accordance with the same letter, Ukraine submits its further observations on the admissibility of the Declarations. For the reasons provided below, in the view of the Government of Ukraine, Russia’s objections to admissibility should be rejected. Russia’s objections are inconsistent with the limited nature of the admissibility inquiry where States exercise a right to intervene under Article 63. Russia’s arguments further presuppose that Russia is correct in its construction of the Convention, and that Ukraine and the Declarants are wrong. Rather than showing that the Interventions are inadmissible, Russia’s arguments merely confirm that the object of the Interventions is the construction of the Convention, and thus are admissible.

## **II. The Declarations of Intervention Are Admissible**

### **A. The Object of the Declarations Is the Interpretation of the Genocide Convention.**

3. Article 63 confers a “right to intervene in the proceedings” to a State notified of a case involving the construction of a convention to which the State is a party. In assessing whether a declaration is consistent with Article 63, this Court has previously observed that “the only point which it is necessary to ascertain is whether the object of the intervention . . . is in fact the interpretation of the [relevant] Convention in regard to the question” at issue in

the dispute.<sup>1</sup>

4. The object of the Declarations is the interpretation of the Genocide Convention — the convention at issue in this dispute — and thus this requirement under Article 63 is satisfied.<sup>2</sup> As Ukraine noted in its initial observations on the individual declarations, each declaration also fulfils the procedural requirements of Article 82 of the Rules of the Court.<sup>3</sup> There are no other preconditions to the admissibility of a declaration of intervention. As

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<sup>1</sup> *Haya de la Torre Case (Colombia v. Peru), Intervention, Judgment of 13 June, I.C.J. Reports 1951*, p. 77. See also *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, pp. 5–6, paras. 7–8.

<sup>2</sup> See Declaration of Intervention Under Article 63 of Australia, paras. 21–55; Declaration of Intervention Under Article 63 of Austria, paras. 16–45; Declaration of Intervention Under Article 63 of the Kingdom of Belgium, paras. 16–46; Declaration of Intervention Under Article 63 of Bulgaria, paras. 19–28; Joint Declaration of Intervention Under Article 63 of Canada and the Kingdom of the Netherlands, paras. 18–41; Declaration of Intervention Under Article 63 of the Republic of Croatia, paras. 17–31; Declaration of Intervention Under Article 63 of the Republic of Cyprus, paras. 14–33; Declaration of Intervention Under Article 63 of the Czech Republic, paras. 21–31; Declaration of Intervention Under Article 63 of Denmark, paras. 16–42; Declaration of Intervention Under Article 63 of Estonia, paras. 25–51; Declaration of Intervention Under Article 63 of Finland, paras. 17–33; Declaration of Intervention Under Article 63 of the French Republic, paras. 14–47; Declaration of Intervention Under Article 63 of the Federal Republic of Germany, paras. 22–52; Declaration of Intervention Under Article 63 of the Hellenic Republic, paras. 23–41; Declaration of Intervention Under Article 63 of Ireland, paras. 13–25; Declaration of Intervention Under Article 63 of Italy, paras. 20–53; Declaration of Intervention Under Article 63 of the Republic of Latvia, paras. 25–55; Declaration of Intervention Under Article 63 of the Principality of Liechtenstein, paras. 14–24; Declaration of Intervention Under Article 63 of the Republic of Lithuania, paras. 19–25; Declaration of Intervention Under Article 63 of Luxembourg, paras. 19–46; Declaration of Intervention Under Article 63 of the Republic of Malta, paras. 17–31; Declaration of Intervention Under Article 63 of New Zealand, paras. 15–33; Declaration of Intervention Under Article 63 of the Kingdom of Norway, paras. 13–33; Declaration of Intervention Under Article 63 of Poland, paras. 18–41; Declaration of Intervention Under Article 63 of Portugal, paras. 17–41; Declaration of Intervention Under Article 63 of Romania, paras. 18–45; Declaration of Intervention Under Article 63 of the Slovak Republic, paras. 24–49; Declaration of Intervention Under Article 63 of the Republic of Slovenia, paras. 17–30; Declaration of Intervention Under Article 63 of Spain, paras. 17–30; Declaration of Intervention Under Article 63 of Sweden, paras. 20–54; Declaration of Intervention Under Article 63 of the United Kingdom of Great Britain and Northern Ireland, paras. 18–45; Declaration of Intervention Under Article 63 of the United States of America, paras. 15–31.

<sup>3</sup> See Ukraine’s Observations on the Intervention Declarations filed on 17 October 2022, 15 November 2022, 16 December 2022, and 30 January 2023.

intervention under Article 63 is an intervention as of right and the Declarations satisfy the requirements of Article 63 and Article 82, the Court should accordingly admit all of the Declarations.<sup>4</sup>

5. In its initial observations, the Russian Federation contends that the Court must establish “whether the conditions of a *genuine* intervention are satisfied,” and argues that the Declarations filed are not “genuine” because Declarants do not “submit their own views regarding the construction or interpretation of the relevant provisions of the Genocide Convention . . . but rather [] side with, advocate for, or pursue a joint case with Ukraine.”<sup>5</sup> Nothing in the Court’s Statute, Rules, or jurisprudence, however, contemplates an inquiry into the motivations of a State choosing to exercise its right under Article 63. The “object of the intervention” can and should be ascertained by the text of the declaration of intervention itself. But even if it were appropriate to further consider the “genuineness” of each intervention, the interventions satisfy such a standard.

6. In order to determine whether the object of the intervention is the construction of the treaty, the Court has limited itself to considering the declaration and pleadings of the intervening State. In *Haya de la Torre*, the Court focused on the memorandum Cuba had submitted to the Court (which the Court viewed as not concerned with construction of the convention at issue because it focused on different legal matters), and then the pleadings of Cuba during oral argument (based on which the Court accepted the representation of Cuba’s agent as to what “the intervention was based on,” and which did concern the construction of the convention at issue).<sup>6</sup> Contrary to Russia’s suggestion, *Haya de la Torre* does not support

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<sup>4</sup> Statute of the Court, art. 63(2); see *Haya de la Torre Case (Colombia v. Peru), Intervention, Judgment of 13 June, I.C.J. Reports 1951*, p. 76; *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya), Application to Intervene, Judgment, I.C.J. Reports 1981*, p. 13, para. 21; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2011*, p. 433, para. 35.

<sup>5</sup> Russia’s Observations of 17 October 2022, paras. 14–15 (emphasis added); Russia’s Observations of 15 November 2022, paras. 15–16; Russia’s Observations of 16 December 2022, paras. 15–16; Russia’s Observations of 30 January 2023, paras. 14–15.

<sup>6</sup> *Haya de la Torre Case (Colombia v. Peru), Intervention, Judgment of 13 June, I.C.J. Reports 1951*, p. 77.

a free-standing inquiry into the subjective political motivations of States exercising their right to intervene under Article 63.

7. Moreover, even if some language in a declaration extends beyond the construction of the convention at issue, that does not render the declaration inadmissible. For example, in *Haya de la Torre*, Cuba’s memorandum attached to its declaration was “almost entirely” devoted to questions the Court did not consider relevant to the construction of the convention at issue, but because Cuba’s agent clarified one respect in which Cuba was concerned with construction of the convention, the Court determined that the intervention was admissible.<sup>7</sup> The Court’s approach in *Haya de la Torre* refutes the Russian Federation’s myopic focus on specific language in the Declarations referring to the broader context of this case in order to suggest that the object of the interventions as a whole is not the construction of the Genocide Convention.<sup>8</sup>

8. It is not appropriate for the Russian Federation to object to interventions on the basis of joint statements made outside of these proceedings, as well as individual statements made by certain Declarants. Russia argues that these statements show that the “real purpose” of the interventions is “not to submit their own views regarding the construction or interpretation of the relevant provisions of the Genocide Convention” but to “pursue a joint case with Ukraine.”<sup>9</sup> The “object” of the Declarations is plain from the

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<sup>7</sup> *Ibid.*

<sup>8</sup> Russia’s Observations of 17 October 2022, paras. 20–21; Russia’s Observations of 15 November 2022, paras. 23–24; Russia’s Observations of 16 December 2022, paras. 23–24; Russia’s Observations of 30 January 2023, paras. 22–23.

<sup>9</sup> Russia’s Observations of 17 October 2022, para. 15; Russia’s Observations of 15 November 2022, para. 16; Russia’s Observations of 16 December 2022, para. 16; Russia’s Observations of 30 January 2023, para. 15.

Declarations themselves and what the declaring State represents to this Court.<sup>10</sup> As this Court has recognized in other contexts, States may have varying political motivations for choosing to exercise a right accorded to it by the Statute of the Court, which is simply not relevant to the admissibility of a State’s decision to avail itself of such a right.<sup>11</sup>

9. In any event, even if the Court were to consider these statements, they do not undermine the conclusion that the Declarations themselves are concerned with the construction of the Genocide Convention and thus are admissible. For example, Russia quotes language from a 13 July 2022 joint statement which notes that “[i]t is in the interest of all States Parties to the Genocide Convention . . . that the Convention not be misused or abused. *That is why* the signatories of the present declaration . . . intend to intervene.”<sup>12</sup> That expressed interest directly concerns the construction of the Genocide Convention: Russia asserts that a misuse or abuse of the Convention is not governed by the provisions of the Convention, whereas Ukraine argues that such a misuse and abuse constitutes a violation of the Convention.<sup>13</sup> It is entirely appropriate for Contracting Parties of the Genocide Convention

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<sup>10</sup> See *Haya de la Torre Case (Colombia v. Peru), Intervention, Judgment of 13 June, I.C.J. Reports 1951*, p. 77.

<sup>11</sup> See *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1980*, p. 20, para. 37 (noting that “legal 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 longstanding political dispute between the States concerned”); *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52 (noting that “the Court is aware that political aspects may be present in any legal dispute brought before it” and rejecting an objection to the admissibility of an application because the objection was “based on an alleged political inspiration of the proceedings”).

<sup>12</sup> Russia’s Observations of 17 October 2022, para. 16 (quoting European Commission, *Joint Statement on Supporting Ukraine in its Proceedings at the International Court of Justice* (13 July 2022)) (emphasis added); see also Russia’s Observations of 15 November 2022, para. 17; Russia’s Observations of 16 December 2022, para. 17; Russia’s Observations of 30 January 2023, para. 16.

<sup>13</sup> See Ukraine’s Memorial, Chapter 3; Russia’s Preliminary Objections, Chapter IV, Section E; Ukraine’s Written Statement, Chapter 3.

to have an interest in the Court’s resolution of that question of interpretation, and Article 63 gives them a right to be heard on this question.<sup>14</sup>

10. Additionally, the Russian Federation’s argument that the Declarations address issues like the existence of a dispute or principles of good faith, that “do not concern the ‘construction’ of the Convention,” is misplaced.<sup>15</sup> To the extent the Declarations raise such issues, it is in connection with the interpretation of the Genocide Convention. For example, the United Kingdom describes the obligation to implement the undertaking in Article I in good faith as a “construction of Article I.”<sup>16</sup> Similarly, Germany refers to the existence of a dispute in the context of discerning “the proper construction of the Genocide Convention’s compromissory clause, i.e. its Article IX.”<sup>17</sup> These topics are related to questions of interpretation Ukraine raised in its Memorial, with which Russia disagrees in its Preliminary Objections.<sup>18</sup> The language in the Declarations to which Russia refers simply confirms there are competing constructions of the Convention at issue, and the Declarants are properly providing their views on these questions of construction.<sup>19</sup>

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<sup>14</sup> Further, the joint statement of 20 May 2022 stated the signatories intend “to explore all options to support Ukraine in its efforts before the ICJ *and* to consider a possible intervention in these proceedings.” *Joint Statement on Ukraine’s Application Against Russia at the International Court of Justice* (20 May 2022) (emphasis added). Notably, the statement referred in the conjunctive to “support[ing] Ukraine in its efforts before the ICJ,” and to “consider[ing] a possible intervention.” Supporting Ukraine in its efforts before the ICJ could take various forms, such as the sharing of evidence. Intervention was presented as a separate possibility.

<sup>15</sup> Russia’s Observations of 17 October 2022, para. 21; Russia’s Observations of 15 November 2022, para. 24; Russia’s Observations of 16 December 2022, para. 24; Russia’s Observations of 30 January 2023, para. 23.

<sup>16</sup> Declaration of Intervention Under Article 63 of the United Kingdom of Great Britain and Northern Ireland, paras. 54–55.

<sup>17</sup> Declaration of Intervention Under Article 63 of the Federal Republic of Germany, paras. 23–24.

<sup>18</sup> See Ukraine’s Memorial, Chapters 3 & 5; Russia’s Preliminary Objections, Chapters III & IV.

<sup>19</sup> The Declarants answered Russia’s State-specific arguments in their observations filed with the Court on 13 February 2023.



11. Russia is also wrong to suggest that where a declarant agrees with one party's construction of the Convention, its intervention must not be "genuine."<sup>20</sup> To the contrary, where two competing constructions of a treaty are put forward, and a State exercises its Article 63 right to put forward its own construction, it is natural to expect that its construction may align with that of one party or the other. In light of the requirement that a State exercising its right to intervene binds itself to "the construction given by the judgment," it cannot be inferred that an intervening State lacks sincerity in expressing its interpretation.<sup>21</sup> Russia simply disregards the obvious possibility that numerous Contracting Parties to the Genocide Convention agree with Ukraine's construction of that convention, and disagree with Russia's construction of it, because they believe Ukraine's construction is correct.

12. Finally, Russia argues that statements by some of the Declarants "manifestly contradict" what they said during the proceedings in the *Legality of Use of Force* cases.<sup>22</sup> However, as noted by the United Kingdom, the *Legality of Use of Force* cases "concern[ed] whether a use of force was a breach of the Genocide Convention" by constituting an act of genocide within the meaning of Article II of the Convention, while in the present case, "[t]he construction of Articles I and IX . . . is not related to whether a use of force, or any other conduct, constitutes a breach of Article II of the Convention."<sup>23</sup> In any event, if Russia wishes to argue that the construction of the Convention put forward by certain Declarants should be

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<sup>20</sup> Russia's Observations of 17 October 2022, para. 24; Russia's Observations of 15 November 2022, para. 28; Russia's Observations of 16 December 2022, para. 27; Russia's Observations of 30 January 2023, para. 27.

<sup>21</sup> Statute of the Court, art. 63(2).

<sup>22</sup> Russia's Observations of 17 October 2022, para. 25; Russia's Observations of 15 November 2022, para. 29; Russia's Observations of 30 January 2023, para. 29.

<sup>23</sup> Declaration of Intervention Under Article 63 of the United Kingdom of Great Britain and Northern Ireland, para. 43.

discounted because of a different position they have supposedly taken, Russia is free to make that argument at a later stage. At present, Russia’s (incorrect) argument that certain Declarants have contradicted their prior positions regarding the construction of the Convention does not change the fact that the Declarants have put forward a construction of the Convention, and that suffices to make their Declarations admissible.

**B. The Declarations of Intervention Are Compatible with the Equality of the Parties and the Sound Administration of Justice.**

13. The Russian Federation argues that admitting the interventions would impair the principle of equality before the Court and be contrary to good administration of justice.<sup>24</sup> The Court has already rejected the same arguments as those now made by Russia in its decision to admit the declaration of intervention submitted by New Zealand under Article 63 in *Whaling in the Antarctic*. There, the Court held that intervention under Article 63 “cannot affect the equality of the Parties to the dispute.”<sup>25</sup> The Court also rejected an argument that Australia and New Zealand could be “parties of the same interest” under Article 31(5) of the Court’s Statute — the same argument now raised by Russia — because an Article 63 intervener is not a party to the proceedings.<sup>26</sup>

14. The question as to whether it is consistent with the good administration of justice for States to intervene concerning the construction of a convention to which they are party is answered by the Statute of the Court itself, which confers a “right” to such intervention. An additional, case-specific inquiry into whether such an intervention is contrary to the good administration of justice, even though the requirements of Article 63 of the Statute of the Court and Article 82 of the Rules of the Court are satisfied, is not appropriate.

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<sup>24</sup> Russia’s Observations of 17 October 2022, Section II(B); Russia’s Observations of 15 November 2022, Section II(B); Russia’s Observations of 16 December 2022, Section II(B); Russia’s Observations of 30 January 2023, Section II(B).

<sup>25</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. 9, para. 18.

<sup>26</sup> *Ibid.*, para. 21.

15. The Court should reject Russia’s argument to the contrary here. Intervention does not affect the equality of the parties before the Court, nor does it affect the sound administration of justice. Rather, as noted by Judge Mbaye in his separate opinion in *Continental Shelf (Libya v. Malta)*:

[I]ntervention is, above all, a rule deriving from the sound administration of justice. It is part of the policy of throwing the maximum light on the circumstances surrounding a case brought before the Court . . . . It enables the Court to have a wider range of information pertinent to the problem submitted to it, to reach its decision in the light of the fullest possible information . . . .<sup>27</sup>

16. Russia improperly suggests that judges of the same nationality as the Declarants may feel “pressure” due to the interventions and public statements such that “conflicts of interests may also arise.”<sup>28</sup> That judges of the Court share the same nationality as interveners is not a basis for the Court to conclude an intervention is inadmissible, as confirmed by the Court’s jurisprudence. For example, in *Whaling in the Antarctic*, the fact that Judge Keith was a national of the intervening State did not affect the admissibility of the

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<sup>27</sup> *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Application to Intervene, Judgment, I.C.J. Reports 1984*, Separate Opinion of Judge Mbaye, p. 43. While Judge Mbaye was addressing an application to intervene under Article 62, this particular discussion was on the role of intervention generally. He goes on to discuss how the administration of justice differs from Articles 62 and 63:

However, it was required by the legislator that the information to be supplied by the intervening State in this connection must be of a special kind. It must consist of specifying an interest of a legal nature which is involved in the dispute. This results from the wording of Article 62 of the Statute which in my view requires, not for the submission of an intervention, but for it to be admitted, that the State should *demonstrate* (subject to verification by the Court) that in the dispute in progress, there is an ‘interest of a legal nature which may be affected’ . . . . Here again we find a difference with Article 63, which *presumes* that the intervening State possesses an interest.

*Ibid.*

<sup>28</sup> Russia’s Observations of 17 October 2022, para. 48; Russia’s Observations of 15 November 2022, para. 51; Russia’s Observations of 16 December 2022, para. 47; Russia’s Observations of 30 January 2023, para. 52.

intervention in that case.<sup>29</sup> This is also consistent with the procedure for States to present their views in advisory proceedings, where judges of the same nationality as States presenting their views are not considered to have a conflict of interest. Ukraine agrees with the observation of several of the Declarants that the fact that some judges share the same nationality as some of the Declarants is not relevant to the equality of the parties.<sup>30</sup> Further, Russia itself states that “[t]he Russian Federation believes that the Judges will uphold their impartiality and neutrality in accordance with Article 20 of the Statute.”<sup>31</sup>

17. While Russia argues that admitting all of the interventions would impair the administration of justice in this case, the significant number of interventions is instead a reflection of the importance of the Genocide Convention, its *erga omnes* obligations, and the potential ramifications of an interpretation of the Convention that would permit it to be abused without consequence. Given these considerations, it is understandable that so many Contracting Parties would wish to be heard on the construction of this Convention. Hearing from all Contracting Parties concerned with this consequential question of construction of the Genocide Convention advances, rather than undermines, the sound administration of justice.

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<sup>29</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.9, para. 21.

<sup>30</sup> *See, e.g.*, Written Observations of the French Republic on the Admissibility of its Declaration of Intervention, paras. 42–45; Spain’s Written Observations on the Admissibility of Its Declaration of Intervention, para. 20; Written Observations of the United Kingdom of Great Britain and Northern Ireland on the Admissibility of its Declaration of Intervention Under Article 63, para. 27.

<sup>31</sup> Russia’s Observations of 17 October 2022, para. 48; Russia’s Observations of 15 November 2022, para. 51; Russia’s Observations of 16 December 2022, para. 47; Russia’s Observations of 30 January 2023, para. 52.

### **C. The Interventions Are Not Premature.**

18. The Russian Federation argues that the Court cannot admit interventions until it first establishes its jurisdiction and the admissibility of Ukraine’s claims in order to confirm that construction of a convention is at issue.<sup>32</sup> This cannot be the case in situations where the application and memorial submit to the Court an issue directly implicating the interpretation of a convention’s provisions — including those argued by at least one party to be relevant to jurisdiction. Indeed, the Russian Federation has filed preliminary objections in which it expressly asks this Court to interpret provisions of the Convention in order to conclude that it lacks jurisdiction.<sup>33</sup> The Court’s Statute and Rules underscore the right of parties to a convention to be heard on the construction of such a convention, and this includes the construction of any provision that may be relevant to the Court’s jurisdiction. It cannot be the case, as Russia’s approach entails, that at the preliminary objections phase the Court may interpret the provisions of a multilateral treaty without States who are parties to that treaty having an opportunity to exercise their right to be heard.

19. Nothing in the text of the Court’s Statute or Rules precludes intervention under Article 63 in a case where preliminary objections to jurisdiction are submitted. On the contrary, Article 63 of the Statute reads:

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.

Nothing in the text of the article restricts intervention to certain stages of the proceedings. In fact, it indicates that the Registrar shall notify the appropriate States “whenever” construction of a convention is in question. The provision also confirms that the “right” to intervene exists

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<sup>32</sup> Russia’s Observations of 17 October 2022, paras. 64–65; Russia’s Observations of 15 November 2022, paras. 67–68; Russia’s Observations of 16 December 2022, paras. 63–64; Russia’s Observations of 30 January 2023, paras. 68–69.

<sup>33</sup> See Russia’s Preliminary Objections, para. 163.

“whenever” the State is notified, such that exercising this right cannot be premature. Consistent with Article 63, in the present case, the Court invited “any State that intends to avail itself of the right of intervention conferred on it by Article 63 [to] file its declaration not later than Thursday 15 December 2022,” which was during the preliminary phase of proceedings.<sup>34</sup> By filing within the time-frame invited by the Court, the Declarations cannot be premature.

20. Similarly, nothing in the text of Article 82 of the Rules limits intervention under Article 63 to any particular phase of proceedings. To the contrary, Article 82(1) provides that intervention declarations should be filed “as soon as possible” but in any event before “the opening of oral proceedings.” The text of the Rule contradicts the Russian Federation’s argument that interventions should be deferred until after the Court has decided on jurisdiction.

21. Russia’s argument that intervention is not appropriate at the jurisdictional stage also risks nullifying the right afforded under Article 63.<sup>35</sup> The scope of the Court’s jurisdiction under the Genocide Convention depends on the Court’s interpretation of Article IX, which raises a question of construction of the Convention.<sup>36</sup> Further, in addition to the need to interpret Article IX, the Russian Federation in its Preliminary Objections urges the Court “to carry out, at this stage, a proper interpretation of the provisions invoked by Ukraine

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<sup>34</sup> Letter from the Registrar of the International Court of Justice, dated 31 October 2022.

<sup>35</sup> See *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011*, pp. 125–126, paras. 133–134 (rejecting an interpretation because “a key phrase of this provision would become devoid of any effect” and would render the phrases “meaningless and no legal consequences would be drawn from them contrary to the principle that words should be given appropriate effect whenever possible”); *Application of the Interim Accord of 13 September 1995 (The Former Yugoslav Republic of Macedonia v. Greece), Judgment of 5 December, I.C.J. Reports 2011*, p. 673, para. 92 (rejecting an interpretation because it would render a phrase “without legal effect”).

<sup>36</sup> See Ukraine’s Written Statement, Chapter 3, Section A.

(Articles I and IV of the Convention) to determine the obligations contained therein and the scope of the Court’s jurisdiction *ratione materiae*.<sup>37</sup> If the Court were to accept Russia’s proposal to treat the Declarations as premature and thus inadmissible, and then accept Russia’s proposal to interpret Articles I and IV of the Genocide Convention at the preliminary objections stage, the Court will have interpreted provisions of the Convention without the Contracting Parties having the ability to exercise their right to provide their views on the construction of the Convention. That is directly contrary to the existence of such a right in Article 63 of the Statute of the Court. To be clear, Ukraine maintains that Articles I and IV should be interpreted at the merits stage, and this is an issue on which the parties disagree.<sup>38</sup> But as long as Russia insists on the interpretation of a provision of the Convention at the preliminary objections stage, it cannot properly object to Contracting Parties wishing to provide their views on the construction of that provision from exercising their right to do so.

22. The Court does not have a “long-standing practice” against admitting declarations prior to the resolution of preliminary objections, as Russia claims.<sup>39</sup> Russia is incorrect that the Court did not admit El Salvador’s intervention in *Military and Paramilitary Activities* because it first needed “to consider the United States’ preliminary objections against Nicaragua’s” claim.<sup>40</sup> Rather, unlike in this case, the Court had ordered a separate phase of proceedings at the outset of the case and limited the parties’ initial pleadings only to questions

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<sup>37</sup> Russia’s Preliminary Objections, para. 163.

<sup>38</sup> See Ukraine’s Written Statement, Chapter 3, Section B.

<sup>39</sup> Russia’s Observations of 17 October 2022, paras. 50–53; Russia’s Observations of 15 November 2022, paras. 53–56; Russia’s Observations of 16 December 2022, paras. 49–52; Russia’s Observations of 30 January 2023, paras. 54–57.

<sup>40</sup> Russia’s Observations of 17 October 2022, para. 50(a); Russia’s Observations of 15 November 2022, para. 53(a); Russia’s Observations of 16 December 2022, para. 49(a); Russia’s Observations of 30 January 2023, para. 54(a).

of jurisdiction and admissibility.<sup>41</sup> Thus, when El Salvador submitted an intervention that largely discussed issues on the merits and did not clearly set forward its interpretation of any relevant convention provisions, the Court found it was not appropriate to admit such an intervention at that time.<sup>42</sup> Fiji's Article 62 declaration was deferred in the *Nuclear Tests* cases for the same reason – the Court had ordered the parties to file a memorial and counter-memorial limited to questions of jurisdiction and admissibility and Fiji's declaration focused on merits issues.<sup>43</sup> Similarly, in *Nuclear Tests (Request for Examination)*, the Court received *aides-mémoires* from the parties and heard argument on specific jurisdictional questions at the outset of the case.<sup>44</sup> None of the cases cited by Russia involved the filing of preliminary objections before the decision on intervention was reached. Russia's reference to three cases where there was no preliminary objections phase is not relevant to the question of whether intervention is permitted when preliminary objections are filed.<sup>45</sup>

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<sup>41</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. 216, para. 1.

<sup>42</sup> *Ibid.*, para. 3; *see also ibid.*, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, p. 219, para. 3:

We have voted with the majority of the Court in deciding that El Salvador's declaration of intervention is inadmissible in the present phase of the proceedings, because we have not been able to find, in El Salvador's written communications to the Court, the necessary identification of such particular provision or provisions which it considers to be in question in the jurisdictional phase of the case between Nicaragua and the United States ; nor of the construction of such provision or provisions for which it contends.

<sup>43</sup> *Nuclear Tests (New Zealand v. France), Application to Intervene, Order of 12 July 1973, I.C.J. Reports 1973*, p. 325, para. 3.

<sup>44</sup> *See 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*, pp. 293–296, paras. 15–27.

<sup>45</sup> Russia's Observations of 17 October 2022, para. 51; Russia's Observations of 15 November 2022, para. 54; Russia's Observations of 16 December 2022, para. 50; Russia's Observations of 30 January 2023, para. 55.



23. On the contrary, leading commentators — including those cited by the Russian Federation — support the view that such interventions are permissible. For example, Hugh Thirlway disagrees with the precise argument Russia advances:

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.<sup>46</sup>

24. Shabtai Rosenne notes this was precisely what was considered in the drafting of the Rules:

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 that provision.<sup>47</sup>

25. Additionally, a leading commentary on the Statute of this Court emphasizes that intervention at the jurisdictional phase of the case under Article 63 accords with the basic purpose underlying Article 63: “Article 63 does not differentiate between types of treaty provisions, or types of treaty. The purpose of Article 63 is to allow parties to a multilateral

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<sup>46</sup> Hugh Thirlway, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE*, Vol. I (Oxford University Press 2013), p. 1031 (internal citations omitted).

<sup>47</sup> ROSENNE’S *LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2017, VOLUME III PROCEDURE* (Malcolm N. Shaw QC ed., 5th ed. 2016), p. 1533 (internal citation omitted). *See also* Jerzy Sztucki, *Intervention Under Article 63 of the ICJ Statute in the Phase of Preliminary Proceedings: The ‘Salvadoran Incident,’* 79 AM. J. INT’L L. 1005, 1017 (1985) (“intervention under Article 63 in the phase of preliminary objections is fully consistent with—indeed, inherent in—the text of the article”).

convention to put their construction of the convention to the Court in proceedings to which they are not parties.”<sup>48</sup>

26. Russia also argues that the Declarations “presuppose” or “prejudge” questions of jurisdiction.<sup>49</sup> For the reasons outlined above, the question is not whether the Declarations address questions of the merits or jurisdiction, but whether they address the construction of the provisions of the Convention, and they do so. Further, it is Russia’s objection to the interventions that presupposes that Russia’s interpretation of the Convention is correct. For example, Russia complains that many of the Declarations refer to what Russia describes as “the doctrine of abuse of rights,” which in Russia’s view does not “concern the ‘construction’ of the Convention.”<sup>50</sup> Ukraine argues, however, that questions of good faith and abuse are relevant to the proper interpretation of Articles I and IV of the Convention.<sup>51</sup> Similarly, Russia asserts that the Declarations address “the use of force” as a matter that is irrelevant to the construction of the Genocide Convention, whereas under Ukraine’s interpretation of Article I, a State may act to prevent and punish genocide only within the limits of international law.<sup>52</sup> Russia’s view — that none of these issues concerns the construction of the Genocide Convention — presupposes that Russia’s interpretation will be adopted and Ukraine’s

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<sup>48</sup> Alina Miron & Christine Chinkin, *Article 63*, in *THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY* (Zimmerman et al. eds., 3rd ed. 2019), p. 1763 (internal citation omitted).

<sup>49</sup> Russia’s Observations of 17 October 2022, Section II(D)–(E); Russia’s Observations of 15 November 2022, Section II(D), (F); Russia’s Observations of 16 December 2022, Section II(D), (F); Russia’s Observations of 30 January 2023, Section II(D), (F).

<sup>50</sup> Russia’s Observations of 17 October 2022, para. 88; Russia’s Observations of 15 November 2022, para. 109; Russia’s Observations of 16 December 2022, para. 102; Russia’s Observations of 30 January 2023, para. 107.

<sup>51</sup> Ukraine’s Memorial, Chapter 3; Ukraine’s Written Statement, Chapter 3, Section C.

<sup>52</sup> Russia’s Observations of 17 October 2022, para. 89; Russia’s Observations of 15 November 2022, para. 110; Russia’s Observations of 16 December 2022, para. 103; Russia’s Observations of 30 January 2023, para 108. *See* Ukraine’s Memorial, Chapter 3, Section A(3); Ukraine’s Written Statement, Chapter 3, Section C(3).

interpretation rejected. This dispute over construction of the Convention is precisely what the Declarants have a right to address pursuant to Article 63.

**D. The United States' Declaration Is Admissible.**

27. The United States' maintenance of a reservation to Article IX of the Genocide Convention has no bearing on its right to intervene under Article 63.<sup>53</sup> As noted by the United States in its Written Observations, Article 63 does not impose requirements of “special interest,” “reciprocity,” or a “jurisdictional link” in order to intervene.<sup>54</sup> The United States' reservation provides that its specific consent must be obtained before a dispute under the Convention is brought to the Court, but it does not change the fact that the United States is a party to the Genocide Convention with an interest in its interpretation by this Court. For example, there is no question that Article I of the Convention is in force as to the United States, and the interpretation of Article I is at issue in this case. Article 63 gives the United States a right to put forward its construction of Article I, provided it agrees — as the United States has — to be bound by the Court's construction.

**E. The Joint Declaration Is Admissible.**

28. Russia's argument against the admissibility of a joint declaration is also incorrect.<sup>55</sup> As noted by Canada and the Netherlands, nothing in the Court's Statute or Rules prevents intervening States from filing a joint declaration of intervention.<sup>56</sup> Rather, because these States have the same view on the construction of the Convention, a joint filing serves judicial economy. The joint submission of Canada and the Netherlands satisfies Article 63 of the Statute and Article 82 of the Rules, and is thus admissible.

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<sup>53</sup> Russia's Observations of 17 October 2022, Section II(F).

<sup>54</sup> Observations on the Admissibility of the U.S. Declaration of Intervention Under Article 63 of the Statute of the International Court of Justice (dated 13 February 2023), Section III.

<sup>55</sup> Russia's Observations of 30 January 2023, Section II(G).

<sup>56</sup> Written Observations of the Governments of Canada and the Kingdom of the Netherlands on the Admissibility of their Joint Declaration of Intervention, Section D.

### **III. Submission**

29. For the reasons discussed above and in Ukraine's initial observations on the individual declarations of intervention, Ukraine respectfully requests that the Court reject the objections of the Russian Federation and admit the thirty-two Declarations of Intervention under Article 63.

24 March 2023

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Mr. Anton Korynevych

Agent of Ukraine

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Ms. Oksana Zolotaryova

Co-Agent of Ukraine