

DECLARATION OF VICE-PRESIDENT GEVORGIAN

Mass interventions create significant tension between the right conferred by Article 63 of the Statute of the Court and the fair administration of justice — Article 63 of the Statute leaves no discretion to reject declarations of intervention once the procedural requirements are met — Several declarations address matters unrelated to the construction of the Genocide Convention.

1. I have voted in favour of today's Order, which declares as admissible 31 out of the 32 Declarations of intervention filed at this stage of the proceedings. I did so because the Court does not have discretion under Article 63 of its Statute to reject interventions once all formal requirements have been met. Nevertheless, I retain serious concerns regarding how the tool of intervention is being utilized in the present case, and how it may affect the equality of the Parties in the subsequent proceedings. Moreover, I would like to highlight that a significant number of Declarations of intervention address issues that go beyond the construction of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention"), and therefore circumvent the scope of what it is permissible under Article 63 of the Statute.

I. EFFECT OF THE INTERVENTIONS ON THE SOUND ADMINISTRATION
OF JUSTICE AND THE EQUALITY OF THE PARTIES

2. There is no doubt that the intervening States in this case engaged in "active collaboration in litigation strategy"¹ for the purpose of pursuing their common political interests. However, I also accept that intervention under Article 63 of the Statute constitutes a right conferred upon each State party, and that this right cannot be curtailed by virtue of a State's underlying political motives. Indeed, the Court has previously noted that it has no "general discretion to accept or reject a request for permission to intervene for reasons simply of policy"². Nevertheless, I would like to voice my concern regarding

¹ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, declaration of Judge Owada, p. 12, para. 5.

² *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application by Malta for Permission to Intervene, Judgment, I.C.J. Reports 1981*, p. 12, para. 17; *Territorial and Maritime Dispute (Nicaragua v. Colombia), Application by Honduras for Permission to Intervene, Judgment, I.C.J. Reports 2011 (II)*, p. 434, para. 36. While the Court has said this in the context

the use of such a litigation strategy and its impact upon the sound administration of justice and the equality of the Parties in the present case.

3. In today's decision, the Court relies on its Order in the *Whaling in the Antarctic (Australia v. Japan)* case (hereinafter *Whaling* case), where, faced with an attempt by New Zealand to intervene in support of Australia, the Court held that an intervention under Article 63 of the Statute "cannot affect the equality of the Parties to the dispute"³. However, the circumstances of the present case differ quite substantially. First, contrary to Japan in the *Whaling* case, the Russian Federation has explicitly objected to the admission of the Declarations of intervention. Second, whereas the decision in the *Whaling* case concerned a single intervention, the present case involves an unprecedented number of no less than 32 Declarations of intervention filed by 33 States. These Declarations make submissions that exclusively support Ukraine and its positions. This leads to a situation where the views of the Applicant are significantly amplified and the Respondent, in this case the Russian Federation, finds itself in a position where it has to defend itself against 33 written submissions (those of Ukraine and those of the interveners) at once. This inequality could be further exacerbated in future oral proceedings.

4. Under such circumstances, there is inherent tension between a right explicitly granted by the Statute — the right to intervene under Article 63 — and a principle that is not explicitly stated but is nevertheless reflected in the Statute as a whole, namely the fair administration of justice, which includes the principle of equality of the parties⁴. Indeed, it has been recognized that the equality of the parties to a dispute is a "basic principle"⁵ for the Court and amounts to a general principle of law underlying all types of judicial and arbitral proceedings⁶.

5. I appreciate that the Court has taken the Respondent's objections seriously, and that it has recognized the necessity to organize the proceedings in a manner that ensures both "the equality of the parties and the good administration of justice"⁷. While this statement alleviates some of my concerns,

of attempts to intervene under Article 62 of the Statute, the same applies *a fortiori* to interventions under Article 63.

³ *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.

⁴ *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against UNESCO, Advisory Opinion, I.C.J. Reports 1956*, p. 86.

⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 26, para. 31.

⁶ See e.g. Robert Kolb, "General Principles of Procedural Law" in Andreas Zimmermann et al., *The Statute of the International Court of Justice: A Commentary* (3rd ed., Oxford University Press, 2019), p. 969; Malcolm Shaw, *Rosenne's Law and Practice of the International Court: 1920-2015*, Vol. III (Brill/Nijhoff, 2016), p. 1079.

⁷ Order, para. 52.

it does not fully resolve them. In this regard, I recall Judge Owada's view, who argued that

“the Court, should it find it necessary under the particular circumstances of the case, is in a position to examine and determine *proprio motu* whether such intervention would be in keeping with the principles of ensuring the fair administration of justice, including, *inter alia*, the equality of the Parties in the proceedings before the Court . . . The Court has the discretion to rule such a declaration inadmissible if its admission should unduly compromise fundamental principles of justice underlying its jurisdiction or the fairness of the proceedings.”⁸

6. I do not argue that the Court should have declared the 32 Declarations of intervention as outright inadmissible in this case. However, I think the Court could have engaged in a more substantive analysis regarding how the admission of the Declarations may compromise the equality of parties and whether this principle could in theory be compromised to an extent that the sound administration of justice would require the rejection of otherwise admissible Declarations of intervention.

7. I also note that the Respondent has taken the position that the mass intervention strategy pursued by the intervening States amounts to an “abuse of process”⁹. In its Order, the Court took the view that a declaration of intervention “should be found inadmissible on the ground of abuse of process only in exceptional circumstances”¹⁰. While I believe that the circumstances of the present case are indeed “exceptional”, the Court has never upheld an argument based upon an alleged abuse of process. I therefore understand that the Court is reluctant to open this Pandora's box in view of the precedent it may set.

II. CIRCUMVENTION OF THE PERMISSIBLE SCOPE OF INTERVENTIONS UNDER ARTICLE 63

8. Finally, I would like to highlight that intervention under Article 63 is limited to the construction of the provisions in question at the relevant stage of the proceedings, in this case Article IX of the Genocide Convention. Regrettably, several Declarations make submissions that go beyond this limited scope and make claims, *inter alia*, on the existence of a dispute between the Parties¹¹ or on the compliance of the Respondent with the

⁸ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, declaration of Judge Owada, p. 11, para. 1.

⁹ Written Observations of the Russian Federation on the Admissibility of the Declarations of intervention, 24 March 2023, paras. 64-74.

¹⁰ Order, para. 57.

¹¹ See e.g. Declaration of Germany, para. 30; Declaration of Liechtenstein, para. 18; Declaration of Portugal, para. 31.

Court's provisional measures Order of March 2022¹². Other States have used their Declarations to opine on the facts of the case or to make political statements and legal allegations against the Russian Federation¹³.

9. In this regard, I welcome the Court's statement that it "will not consider" such remarks¹⁴. Nevertheless, the fact that such statements have been made en masse and are publicly available, including on the website of the Court, creates a significant amount of political pressure on judges to decide this case in a particular way. I fear that such litigation strategies therefore have the potential to compromise the Court's fair and impartial administration of justice.

(Signed) Kirill GEVORGIAN.

¹² See e.g. Declaration of Estonia, para. 10; Declaration of Spain, para. 8; Declaration of Ireland, para. 8.

¹³ See e.g. Declaration of Lithuania, para. 16; Declaration of New Zealand, para. 11.

¹⁴ Order, para. 84.