DISSENTING OPINION OF JUDGE XUE

1. Much to my regret, I am unable to join the majority in finding the Declarations of intervention admissible at this preliminary objections stage. The questions of jurisdiction and admissibility fall within the domain of judicial functions of the Court. It is for the Court to decide whether or not it has jurisdiction in the case. Moreover, in dealing with such a massive number of declarant States, the Court should, in my view, be mindful of the principle of equality of the parties to ensure good administration of justice. This is imperative for the present case as well as for the judicial practice of the Court in general. As obliged by the Statute, I shall explain the reasons for my position.

I. The Scope of Article 63

2. Article 63 of the Statute reads as follows:

> "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."

3. Article 82 of the Rules of Court further lays down detailed conditions concerning the submission of a declaration of intervention under Article 63 of the Statute. In the present case, I agree with the majority that all the Declarations except for the one submitted by the United States have met these conditions. Notwithstanding that finding, the Court must ascertain whether, in the circumstances of the case, the object of each Declaration is *in fact* the interpretation of the relevant convention and therefore constitutes "a genuine intervention" (*Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 77). As the Court stated in the *Whaling* case,

> "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" (*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. In the present case, after the Respondent raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application, the proceedings were bifurcated into two parts: the jurisdictional phase and the merits phase. During the present phase, the Court will determine whether the jurisdiction of the Court in the case can be established pursuant to Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "Convention") and whether the Application of Ukraine against the Russian Federation is admissible. Should the Court render a judgment in the affirmative, the case will then proceed to the second phase.

5. Although all declarant States refer to Article IX of the Genocide Convention in their Declarations, the question remains whether an intervention under Article 63 may deal with matters of jurisdiction, and consequently, whether an intervening State may be permitted to appear at the hearing on preliminary objections.

6. It is true that Article 63 makes no distinction as to the type of provisions in respect of which a State party may be allowed to intervene to give its construction. It may also be argued that Article IX is one of the provisions of the Genocide Convention that could be construed by the States parties. However, since the admissibility of declarations of intervention rests with the Court, notwithstanding that it is a "right" of the States parties to intervene, it is for the Court to determine how this right should be exercised in the judicial proceedings. In the past, when a State party sought to intervene under Article 63, the Court declined to grant permission when the question of jurisdiction was not yet decided. As will be explained below, this approach has its good reasons.

7. In the *Military and Paramilitary Activities* case, El Salvador submitted a Declaration of intervention under Article 63 at the jurisdictional phase. It argued that the Court had no jurisdiction in the case, among other aspects relating to the dispute between the parties. The Court observed that the Declaration of intervention of El Salvador "addresse[d] itself also in effect to matters, including the construction of conventions, which *presuppose* that the Court has jurisdiction to entertain the dispute" between the parties and that Nicaragua's Application was admissible (*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. 2, emphasis added). The Court therefore decided not to hold an oral hearing for El Salvador's intervention and ruled that "the declaration of intervention of the Republic of El Salvador is inadmissible *inasmuch as it relates to the current phase of the proceedings* brought by Nicaragua against the United States of America" (*ibid*., point (ii) of the operative paragraph, emphasis added).

8. In the present Order, the Court also refers to the 1984 decision in the *Military and Paramilitary Activities* case and is of the view that El Salvador's Declaration was rejected because it failed to identify the provisions of any convention, the interpretation of which would be in question at the jurisdictional phase (Order, para. 65). With due respect, I must confess that my reading of that decision is different from the majority. First of all, in its Declaration of intervention, El Salvador did refer to Article 36 of the Statute on which Nicaragua sought to found the jurisdiction of the Court and other legal instruments the construction of which, in El Salvador's view, were in question at the jurisdictional phase in the case (*I.C.J. Pleadings, Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, Declaration of intervention of the Republic of El Salvador, 15 August 1984, Vol. II, pp. 456-457, para. XIV; see also the letter from El Salvador submitted to the Registrar on 10 September 1984, at *ibid*., pp. 461-462). Moreover, the Court did not give that reason in its Order. That view was expressed by some judges in their joint separate opinion, which, however, did not agree with the Court's decision not to grant an oral hearing to El Salvador (*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*, separate opinion of Judges Ruda, Mosler, Ago, Jennings and de Lacharrière, p. 219, para. 3). To fully appreciate the Court's decision in 1984, attention should also be given to other judges' opinions, which shed further light on the judicial considerations of the Court.

9. In explaining his individual position, Judge Nagendra Singh observed that El Salvador's Declaration in effect was directed to the merits of the case. In support of the Court's Order, he stated that

> "if a hearing were ever to be granted to El Salvador at the present first phase there would inevitably be arguments presented touching the merits, which aspect belongs to the second phase of the case after the Court's jurisdiction to deal with the dispute has been established. If, therefore, El Salvador's request for a hearing had been granted at this stage, it would have amounted to two hearings on merits, which could not be acceptable to any tribunal because of the confusion it would cause all round. In fact this would be both undesirable and untenable." (*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*, separate opinion of Judge Singh, p. 218.)

10. Judge Singh's views were sound and convincing. His concern of possibly two hearings for the intervenors to argue on the merits of the case is worth considering in the present case. Much to my regret, this important element is too easily dismissed by the Court.

11. As illustrated below, the Declarations of intervention submitted to the Court in the present case, even where identifying Article IX for construction, all concern the merits of the case. Pursuant to Article 79*bis*, paragraph 3, of the Rules of Court, the moment the respondent raises objections to the jurisdiction of the Court and the admissibility of the application, the proceedings on the merits shall be suspended. Moreover, pleadings of the parties shall be confined to those matters that are relevant to the preliminary questions. Insomuch as the Court is concerned, its judgment on the questions of jurisdiction and admissibility shall not in any way prejudge the merits. For the same reason, an intervenor should not be allowed to address the merits of the case at the preliminary objections phase. This judicial policy bears on the good administration of justice by the Court, reflecting the nature of international adjudication based on the principle of consent.

12. In practice, the jurisdiction of the Court may be founded on the basis of a multilateral treaty on dispute settlement, for instance, the American Treaty on Pacific Settlement of 1948 (officially called the Pact of Bogotá) and the European Convention for the Peaceful Settlement of Disputes of 1957. These treaties set forth the procedures for the peaceful settlement of disputes between the States parties and the terms and conditions under which those procedures may be used. Usually, when such a treaty is invoked by the applicant or the parties to a case, the Court will, pursuant to Article 43, paragraph 1, of the Statute, notify the States parties to the treaty, which are entitled to exercise their right to give the construction of the treaty, even at the preliminary phase when an objection to jurisdiction is raised. Clearly this type of treaty is different from a compromissory clause, such as the one in the present case, because the provisions on the dispute settlement procedures and conditions are the very subject-matter of the treaty in question. Such provisions do not concern specific substantive rights and obligations in question. The States parties may intervene to give their construction of the provisions of the relevant treaty without necessarily touching the merits of the case before the Court. That is not the situation with Article IX of the Genocide Convention.

II. The Question of Jurisdiction in the Present Case

13. The reason for restricting Article 63 intervention to the merits phase has much to do with the nature of jurisdiction of the Court. First of all, the issue of jurisdiction is not merely one of procedure. As has been pointed out,

> "the question whether and to what extent the Court has jurisdiction is frequently of political importance no less than the decision on the merits, if not more. When a respondent raises a matter of jurisdiction . . . it frequently indicates the absence of political agreement that the Court should entertain the case. These are not mere technical issues." (Shabtai

> Rosenne, *The Law and Practice of the International Court, 1920-2005* (Brill, 2006), Vol. II, Jurisdiction, p. 803.)

Unless and until the Court finds that it indeed has jurisdiction, there is no legal basis to discuss the merits of the case in the proceedings.

14. Moreover, in determining whether it has jurisdiction *ratione materiae* to entertain the case, the Court does not consider the question of jurisdiction in abstract terms. As it observed in the *Nottebohm* case, "[t]he Court is not concerned with defining the meaning of the word 'jurisdiction' in general. In the present case, it must determine the scope and meaning" of the relevant title of jurisdiction (*Nottebohm (Liechtenstein* v. *Guatemala), Preliminary Objection, Judgment, I.C.J. Reports 1953*, pp. 121-122). In other words, the Court must ascertain the extent of its jurisdiction in the concrete context of each specific case. Article IX of the Genocide Convention is a clause that establishes the jurisdiction of the Court. It defines the scope of the Court's competence for the settlement of "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". Frequently the parties may hold divergent views on the question of jurisdiction of the Court or the admissibility of the application. As a preliminary matter, the Court shall, either at the request of any party or *proprio motu*, first adjudicate whether there exists a dispute that falls with the jurisdiction *ratione materiae* of the Court. That is to say, the matter forms part of the judicial process. This explains why a compromissory clause normally does not give rise to a declaration of intervention under Article 63. With regard to the question of the Court's jurisdiction in the present case, interpretation of Article IX cannot be isolated from other provisions, totally detached from the interpretation of substantive articles and the facts of the case. This point is also admitted by some declarant States. For example, Cyprus states in its Declaration of intervention that

> "[i]t is not possible for the construction of that compromissory clause to take place in a vacuum, without reference to (and thus construction of) the substantive provisions of the Convention. . . .
>
> The proper construction of Articles I, II, III, VIII, and IX are thus potentially in question in the case, even at the jurisdictional stage of the proceedings." (Declaration of intervention of Cyprus, paras. 16 and 17.)

Cyprus's statement actually raises the very issue now under consideration, namely whether it is judicially appropriate to allow an intervening State to give its view on the question whether the acts complained of by the Applicant fall within the jurisdiction of the Court at the present phase before the Court takes its decision on the question of jurisdiction.

15. Lastly, by its nature, an Article 63 intervention should be neutral and objective, as the intervenor is not a party to the proceedings. In giving its

construction of the provisions of the convention, the intervenor should not take sides with either of the Parties to the dispute. At the preliminary objections phase, I doubt very much that interventions on the questions of jurisdiction and admissibility could maintain that objectivity.

16. Among its objections to the jurisdiction of the Court, the Respondent argues that there is no dispute between the Parties under the Genocide Convention. As an initial matter, the Court has to ascertain whether there exists a dispute between the Parties that is capable of falling within the provisions of the Genocide Convention and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX (*Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 372, para. 25; *Legality of Use of Force (Yugoslavia* v. *United Kingdom), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (II)*, p. 838, para. 33). Apparently, the existence of a dispute as a precondition for the establishment of jurisdiction is a judicial matter that is not for the parties but for the Court itself (*Fisheries Jurisdiction (Spain* v. *Canada), Jurisdiction of the Court, Judgment, I.C.J. Reports 1998*, p. 450, para. 37). In *Bosnia and Herzegovina* v. *Yugoslavia*, the Court stated that,

> "[i]n order to determine whether it has jurisdiction to entertain the case on the basis of Article IX of the Genocide Convention, it remains *for the Court to verify* whether there is a dispute between the Parties that falls within the scope of that provision" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 614, para. 27, emphasis added).

Therefore, the question of the existence of a dispute does not fall within the scope of intervention for the construction of the provision of Article IX.

17. In their Declarations of intervention many States address the issue of the existence of a dispute between the Parties. They argue that there exists a dispute between Ukraine and the Russian Federation which falls within the scope of Article IX of the Genocide Convention. For example, Liechtenstein claims that "in the case at hand, there is a dispute between Ukraine and the Russian Federation not only *prima facie* but also *ratione materiae*" (Declaration of intervention of Liechtenstein, para. 18). Likewise, Portugal states that "[i]t is . . . the view of the Portuguese Republic that a dispute exists between the [P]arties to the case regarding the application, interpretation, and fulfillment of the Genocide Convention, and that the Court has jurisdiction under Article IX of the Convention" (Declaration of intervention of Portugal, para. 31). Germany considers that "[t]he Parties . . . disagree over the lawfulness of the conduct of the applicant State, which is encompassed the term 'dispute'" and that

> "where, like in the case at hand, the subject-matter of an application concerns the question whether certain acts, such as allegations of genocide and military operations undertaken with the stated purpose of preventing and punishing genocide, are in conformity with the Genocide Convention, such dispute falls squarely within the scope of Article IX of the Convention" (Declaration of intervention of Germany, paras. 30 and 36; for additional examples see Declaration of intervention of Bulgaria, para. 21; Declaration of intervention of the Czech Republic, para. 26; Declaration of intervention of Lithuania, para. 16).

18. Moreover, some of the Declarations explicitly disregard the distinction between jurisdiction and merits, addressing both "preliminary and substantive elements", even after the Court suspended the proceedings on the merits (Joint Declaration of intervention of Canada and the Netherlands, para. 9; see also Declaration of intervention of Luxembourg, paras. 19-46; Declaration of intervention of Norway, paras. 13-33). Indeed, the submissions of some declarant States apparently extend far beyond the construction of the Genocide Convention, directly making arguments on the merits of the case.

19. For instance, some declarant States assert that the Russian Federation has violated Article I of the Genocide Convention or the Court's Order of 16 March 2022 on provisional measures. Illustratively, Ireland posits that "the Russian Federation has failed to comply with the [provisional measures] Order of the Court" (Declaration of intervention of Ireland, para. 8). Spain argues that "Russia has failed to comply with the Order, has intensified and expanded its military operations on the territory of Ukraine and has thus aggravated the dispute pending before the Court" (Declaration of intervention of Spain, para. 8; for further examples, see also Declaration of intervention of Latvia, para. 9; Declaration of intervention of Malta, para. 8; Declaration of intervention of Poland, para. 8; Declaration of intervention of Slovakia, para. 10; Declaration of intervention of Slovenia, para. 8; Declaration of intervention of Sweden, para. 10).

20. Some declarant States discuss the *jus cogens* nature of the obligations under the Convention or the principle of non-use of force in international law (see e.g. Declaration of intervention of Belgium, para. 9; Declaration of intervention of Estonia, para. 13; Declaration of intervention of Greece, para. 14; Declaration of intervention of Norway, para. 30; Declaration of intervention of Romania, para. 43). Some declarant States simply make political statements with regard to the Russian Federation's "war of aggression against Ukraine" (Observations on the Admissibility of the Declaration of intervention under Article 63 of Norway, para. 16; for additional examples, see Declaration of intervention of Lithuania, paras. 16 and 20; Declaration of intervention of New Zealand, para. 11; Declaration of intervention of Poland, para. 36).

21. Some declarant States refer to the obligation to perform international obligations in good faith, alleging the Respondent's "serious misuses of the

Genocide Convention" and abuse of the law (e.g. Declaration of intervention of France, para. 21; Declaration of intervention of Romania, para. 18; Declaration of intervention of the United Kingdom, para. 54; Declaration of intervention of Germany, para. 40).

22. These statements are apparently not about the construction of the Convention in accordance with Article 63; the declarant States act as parties to the dispute.

23. I must point out that, for the reasons stated above, I fully appreciate and endorse the Court's statement that it will not consider any arguments presented by the intervening States on the existence of a dispute between the Parties, the evidence, the facts, the application of the Convention in the present case, or rules and principles of international law unrelated to the construction of the Genocide Convention (Order, para. 84). This position shows that the Court is also aware of the problems that I have addressed with regard to these Declarations. This precaution, in my view, is nevertheless not sufficient to prevent the intervenors from dealing with other aspects of the case, for it actually still opens an opportunity for the intervening States to make arguments on the merits of the case, irrespective of whether or not they will be considered by the Court.

24. The declarant States do not hide the purposes of their interventions. Virtually all of them make clear their pursuit of two findings by the Court. The first concerns a "negative declaration" by the Court, namely, that the Court has jurisdiction to declare the absence of genocide on the part of Ukraine, with a view to finding that the Russian Federation's allegation of genocide is unfounded. The second is that the Genocide Convention does not authorize or require — or indeed that the Convention prohibits — uses of force to prevent and punish genocidal acts, with a view to finding that the Russian Federation has acted contrary to its obligations under the Genocide Convention.

25. The "relief" sought by the declarant States, in the first place, is not the proper object of intervention. Secondly, some of those issues are matters that can only be raised by the Parties or, to be more specific, by the Applicant in its pleadings. They are matters of substance that have to be examined and ascertained by the Court in accordance with the provisions of the Convention on the basis of facts and evidence; they are neither part of the construction of the Convention, nor for judicial settlement at the present phase.

III. The Principle of Equality of the Parties

26. I agree with the majority's position that the Respondent's objections to the admissibility of the Declarations of intervention on the grounds of political motivation and abuse of process are unfounded (Written Observations of the Russian Federation on the Admissibility of the

Declarations of intervention, 24 March 2023, paras. 15-45, 64-74). The Court should nevertheless pay more attention to the application of the principle of equality of the parties in the present case.

27. In the *Whaling* case, although there was only one State seeking to intervene, the close relationship between one party and the intervenor already raised some concern. Judge Owada observed that

> "[i]t is regrettable that a State party to a case before the Court and a State seeking to intervene in that case pursuant to Article 63 of the Statute should engage in what could be perceived as active collaboration in litigation strategy to use the Court's Statute and the Rules of Court for the purpose of promoting their common interest, as is candidly admitted in their Joint Media Release of 15 December 2010" (*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).

28. Although the Court seldom addresses the motivation of a State for coming to the Court, either as a party to a dispute or as a third State invoking an incidental proceeding, the overwhelming number of the declarant States in the present case that all stand on one side of the Parties and argue for the same cause and the same purpose should not be taken lightly and treated as a normal situation of intervention under Article 63. Virtually all of these declarant States are among the States that, together with the European Union, collectively issued the "Joint Statements" on 20 May 2022 and 13 July 2022. In the said statements, it is explicitly stated that these States would mobilize political support to Ukraine against the Russian Federation by intervening in these proceedings and explore "all options to support Ukraine in its proceedings before the ICJ" (Joint Statement by 41 States and the European Union on Ukraine's Application against Russia at the International Court of Justice, 20 May 2022; Joint Statement by 43 States and the European Union on Ukraine's Application against Russia at the International Court of Justice, 13 July 2022). Although their right to intervene under Article 63 remains intact notwithstanding the joint statements, the declarant States are in fact, to borrow Judge Owada's words, engaging in "an active collaboration of litigation strategy". These legal actions would certainly lend strong political support to the Applicant and at the same time exert political pressure on the Court to entertain the case.

29. Good administration of justice and equality of the parties are two fundamental principles that must guide the judicial process. Under the circumstances of the present case, the Court, in considering the admissibility of the Declarations of intervention, should not lose sight of the imbalance between the Parties and the impact of the interventions on the judicial proceedings. As discussed before, confining Article 63 intervention to substantive provisions at the merits phase would ensure that the intervening States will not deal with the merits of the case before the Court has

established its jurisdiction and decided that the Application is admissible. It would avoid the situation where the intervenors may be afforded two hearings to present their views on the merits. This is a fair approach for both Parties. In essence, this position would not in any way prejudice the right of the States parties to intervene under Article 63 of the Statute. I regret that the present decision does not duly take those aspects into account. As is often said, it is not enough that justice is done. Justice must also appear to be done.

(Signed) XUE Hanqin.