

**OBSERVATIONS ON THE OBJECTIONS OF THE RUSSIAN FEDERATION TO
THE ADMISSIBILITY OF THE DECLARATION OF INTERVENTION OF THE
REPUBLIC OF LATVIA**

Riga, 13 February 2023.

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I. INTRODUCTION

1. On 21 July 2022, Latvia submitted a Declaration of Intervention (“the Declaration”) pursuant to the right to intervene set out in Article 63, paragraph 2, of the Statute of the International Court of Justice (“the Court”), in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (“the Proceedings”).¹ On 18 October 2022, the Registrar of the Court transmitted to Latvia copies of the Written Observations of Ukraine on the admissibility of the Declaration of Intervention filed by Latvia under Article 63 of the Statute of the Court² and the Written Observations of the Russian Federation (presented as a single document) on the admissibility of the Declarations of Intervention filed by multiple States, including Latvia, under the same provision.³ Russia objected to the admissibility of the Declaration; Ukraine did not.
2. On 31 January 2023, the Registrar of the Court wrote to Latvia, informing it that the Court, pursuant to Article 84, paragraph 2, of its Rules (“Rules”), had to hear the State seeking to intervene and the Parties before deciding on the question of admissibility. The Court decided to do so by means of a written procedure and fixed 13 February 2023 as the time-limit to submit observations in writing on the admissibility of the Declaration.
3. Russia’s objections to the admissibility of the Declaration seek to deprive Latvia of its important right under Article 63, paragraph 2, of the Statute to intervene in the Proceedings on the construction of the Convention on the Prevention and Punishment of the Crime of Genocide (“Genocide Convention”).⁴ Russia’s objections are expressed in general terms and mostly relate to States other than Latvia or issues not relevant to the current stage of

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Declaration of Intervention of the Republic of Latvia of 19 July 2022) <<https://www.icj-cij.org/public/files/case-related/182/182-20220719-WRI-01-00-EN.pdf>>.

² *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 Declaration of Intervention of Latvia of 17 October 2022).

³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (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 United Kingdom and the United States of 17 October 2022).

⁴ Convention on the Prevention and Punishment of the Crime of Genocide (adopted 9 December 1948, entered into force 12 January 1951) 78 UNTS 277.

the Proceedings. Accordingly, Latvia will focus its observations on the small sub-set of arguments that are directed at the admissibility of its Declaration and explain why the five Russian objections are unfounded (in law, in fact, or, mostly, both).⁵ Latvia will address the objections in the order and under the rubrics presented by Russia. These observations relate solely to Latvia's position regarding the admissibility of the Declaration, and constitute, together with the Declaration, the exclusive source for determination of that position in these Proceedings.

II. ARGUMENTS

4. Before addressing individual objections, Latvia will make a general point regarding the fatal weakness underpinning the entirety of Russia's position. Latvia exercises its right under Article 63 of the Statute to intervene on the construction of a convention to which it is a party. It is not a Party to the Proceedings between Ukraine and Russia, be that an applicant or a co-applicant. Nor does it want to be. Nor is Latvia what Russia calls a "de facto co-applicant",⁶ a concept unknown to the Statute and the Rules. Russia's attempts to infuse Article 63 with procedural and substantive considerations borrowed from qualitatively different procedures that reflect a very different balance of rights, obligations, and guarantees must fail. Latvia takes the Court and its judicial function very seriously, as is reflected among other things in its recent acceptance of the Court's jurisdiction as compulsory.⁷ It understands the difference between being a Party and an intervener under Article 63 of the Statute, has made a conscious choice to appear before the Court in the latter capacity in the Proceedings, and expects to be held against that benchmark and no other. In short, Latvia acts in its own name, speaks with its own voice, and presents its own arguments.

A. THE DECLARATION FALLS WITHIN THE PROVISIONS OF ARTICLE 63 OF THE STATUTE AND ARTICLE 82 OF THE RULES OF COURT

5. Russia's first objection is that declarations of intervention submitted in the Proceedings by several States, including Latvia, are not genuine, and that their real object is not the

⁵ The sixth objection is peculiar to the legal positions of the United States, see *ibid* Section II.F.

⁶ *Ibid* [19], [21], [23], [31], [44], [48].

⁷ <<https://www.icj-cij.org/en/declarations/lv>> (24 September 2019).

construction of the Genocide Convention but pursuing a joint case with Ukraine.⁸ This objection adopts an incorrect legal test, which finds no basis in Article 63 of the Statute or Article 82 of the Rules of Court. It is also factually unfounded.

6. The correct legal test for evaluating the admissibility of the Declaration was set out by the Court in the case concerning *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)*, viz. whether “the declaration concerned falls within the provisions of Article 63” of the Statute of the Court (“Statute”).⁹ Russia describes it as “well established”.¹⁰ Latvia agrees with this characterisation of *Whaling in the Antarctic*. There is no support in the Statute or the Rules, or indeed scholarship, for departing from this test to search instead for (what Russia advocates for and describes as) a “genuine intention” of the State concerned. Nor has Russia identified any such authority.¹¹
7. The proposed “genuine intention” test is incompatible with the well-established proposition, repeated in a recent judgment, that the Court cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose participation in proceedings before it.¹² Russia’s argument is also not helped by *Haya de la Torre (Colombia/Peru)*, from which it quotes extensively.¹³ In that case, Cuba’s intervention was found by the Court to relate almost entirely to questions already decided with the authority of *res judicata* in the earlier case concerning *Colombian-Peruvian Asylum (Colombia v. Peru)*, and thus incapable of being addressed anew under Article 63.¹⁴ The Court’s analysis in *Haya de la Torre* focused exclusively on the substance of the intervener’s position, revealed in the text of the declaration and submissions in the

⁸ Russian Federation’s Written Observations (n 3) Section II.A.

⁹ *Whaling in the Antarctic (Australia v. Japan)* (Declaration of Intervention of New Zealand, Order of 6 February 2013) [2013] ICJ Rep 3 [8], also [18].

¹⁰ Russian Federation’s Written Observations (n 3) [11].

¹¹ *Ibid* [13]-[14].

¹² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (Preliminary Objections) [2022] ICJ Rep <<https://www.icj-cij.org/public/files/case-related/178/178-20220722-JUD-01-00-EN.pdf>> [44]; also *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Iran v. United States)* (Preliminary Objections) [2021] ICJ Rep 9 [55]-[59].

¹³ Russian Federation’s Written Observations (n 3) [13].

¹⁴ *Colombian-Peruvian Asylum (Colombia v. Peru)* [1950] ICJ Rep 226.

oral proceedings, so as to determine whether the conditions of a genuine intervention under Article 63 of the Statute were satisfied. It engaged – rightly – in no inquiry of motivations or the broader political context.¹⁵ Properly understood, *Haya de la Torre* does not reflect or suggest the existence of a different test, but rather is an example of the application of the principle expressed in *Whaling in the Antarctic*.

8. Russia’s first objection is based on an incorrect legal test for determining admissibility of intervention, which means that even factually correct allegations (*vel non*) could not lead to inadmissibility of the Declaration. Latvia will briefly explain, nevertheless, why Russia’s factual allegations on which its objection rests are also irrelevant or unjustified.
9. Some of Russia’s allegations are not relevant for Latvia. First, Russia criticises individual statements by States regarding intervention in the Proceedings.¹⁶ No such statements by Latvia have been identified. Secondly, Russia alleges inconsistency between the position adopted by States in declarations of intervention in the Proceedings and *Legality of Use of Force* cases, to which Latvia was not a Party.¹⁷
10. Other Russia’s allegations are unjustified.

10.1. First, the Joint Statements quoted by Russia show nothing more than the very proper and public support by Latvia to the Court¹⁸ in pursuing the important function of judicial settlement of disputes likely to endanger the maintenance of international peace and security.¹⁹

10.2. Secondly, Russia refers to Latvia as one of the States that “have consistently expressed that they possess a legal interest in light of the *erga omnes* character of the obligations under the Convention” and describes as “telling ... the express references to a ‘a legal interest’ and *erga omnes* obligations”.²⁰ Latvia, in fact,

¹⁵ *Haya de la Torre Case (Colombia/Peru)* [1951] ICJ Rep 71, 77.

¹⁶ Russian Federation’s Written Observations (n 3) [17]-[18].

¹⁷ *Ibid* [25]-[30].

¹⁸ *Ibid* [15]-[16].

¹⁹ *Arbitral Award of 3 October 1989 (Guyana v. Venezuela)* (Jurisdiction of the Court) [2020] ICJ Rep 455 [82].

²⁰ Russian Federation’s Written Observations (n 3) [23].

agrees with the thrust of Russia’s observation that the *erga omnes* character of treaty obligations under construction is not relevant for determining the admissibility of an intervention under Article 63. That is why there is no express reference to “a legal interest” or *erga omnes* obligations in the Declaration, including in the paragraph specifically cited by Russia.²¹

10.3. Thirdly, Russia sees a sign of “a joint effort with Ukraine” in the alleged similarity of the interveners’ arguments with Ukraine’s, including in “its Memorial (which should have been unavailable to the Declarants until their Declarations have been admitted”).²² Latvia was the first State in the Proceedings to submit its declaration of intervention, and did not coordinate its substance with that of any other State. For the avoidance of doubt, Latvia confirms that it has at no point had access to any documents submitted to the Court in the Proceedings, other than those transmitted to it by the Registrar or available on the Court’s website.²³ More generally, it is hard to see what Latvia could respond to this objection at this stage, given that it does not have access to Ukraine’s memorial, which in any event apparently (as Russia itself states) “differs significantly from the Application”.²⁴

B. LATVIA’S INTERVENTION IS COMPATIBLE WITH THE PRINCIPLE OF EQUALITY OF THE PARTIES AND THE REQUIREMENTS OF GOOD ADMINISTRATION OF JUSTICE

11. Russia’s second objection is that if the Court were to admit multiple States, including Latvia, as interveners, it would seriously impair the principle of equality of the parties before the Court and be contrary to the good administration of justice.²⁵ Latvia agrees in general terms with what Russia says about the importance of the principle of equality of

²¹ Ibid fn 21 (citing Declaration (n 1) [46]). The cited paragraph, found in the section of the Declaration that addresses the construction of Article I of the Genocide Convention, quotes from an advisory opinion of the Court solely in relation to construction, and has no relevance for admissibility of a claim or an intervention, Declaration (n 1) Section F(ii) (quoting *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide* (Advisory Opinion) [1951] ICJ Rep 15, 23).

²² Russian Federation’s Written Observations (n 3) [24].

²³ <<https://www.icj-cij.org/en/case/182>>.

²⁴ Russian Federation’s Written Observations (n 3) [91].

²⁵ Ibid Section II.B.

the parties and good administration of justice.²⁶ It disagrees, however, that the Declaration is capable of affecting these guarantees in the Proceedings either in principle or in practice.

12. Russia's objection can again be dismissed as incompatible with the leading authority on the precise issue it raises, namely the unanimous decision of the Court in the *Whaling in the Antarctic* (serious engagement with which is absent from the objection). In that case, the Court held that "an intervention [under Article 63 of the Statute] cannot affect the equality of the Parties to the dispute".²⁷ Nor is Russia's concern about equality of rights and Judges of the Court who are nationals of the States that have announced their decision to intervene in the Proceedings relevant for Latvia, which does not have (and has never had) a Judge on the Court.²⁸

13. But more to the point, this objection begs a key question. Even if justified on its own terms (*vel non*), the objection could succeed only if the Court accepts that it is necessarily incapable of administering the Proceedings in line with these guarantees, as Russia evidently believes to be the case. Latvia disagrees. The Court has broad and flexible powers under the Statute to craft procedural solutions necessary to ensure a good administration of justice where more than two States participate in the proceedings. By way of example, in recent years the Court has ensured good administration of justice in a contentious case brought by joint applicants against a single respondent,²⁹ and in an advisory proceeding that raised the question of responsibility of a single State, where most States inclined in one direction.³⁰ More generally, there is nothing unusual in international dispute settlement

²⁶ Ibid [33].

²⁷ *Whaling in the Antarctic* (Order) (n 9) [18] ("Whereas the concerns expressed by Japan relate to certain procedural issues regarding the equality of the Parties to the dispute, rather than to the conditions for admissibility of the Declaration of Intervention, as set out in Article 63 of the Statute and Article 82 of the Rules of Court; whereas intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court; and whereas such an intervention cannot affect the equality of the Parties to the dispute.").

²⁸ Russian Federation's Written Observations (n 3) [48].

²⁹ *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)* [2020] ICJ Rep 81.

³⁰ *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95.

about multiple third-party interventions in inter-State proceedings.³¹ Latvia is confident in the Court's ability to ensure a sound administration of justice in the Proceedings that respects the rights and interests of Parties and interveners alike.³² Indeed, the Court is already doing so: its decision to hear the States seeking to intervene by means of a written procedure with a short deadline pursuant to Article 84, paragraph 2, of the Rules is an excellent example of how good administration of justice in relation to Article 63 of the Statute can and will work.

C. THE COURT CAN DECIDE ON THE ADMISSIBILITY OF THE DECLARATION BEFORE IT CONSIDERS RUSSIA'S PRELIMINARY OBJECTIONS

14. Russia's third and fourth objections to the admissibility of the Declaration are related. For the Court's convenience, Latvia will address them separately.

15. Russia's third objection is two-fold: first, it asserts that the long-standing practice of the Court militates against admitting declarations of intervention prior to the resolution of preliminary objections.³³ Upon closer examination, this supposed practice resolves itself as partly irrelevant for Russia's argument and partly incompatible with the same. Of the six cases Russia identifies as relating to interventions under Article 63 prior to the resolution of preliminary objections, in three (as Russia itself accepts),³⁴ the issue was not put to the Court at all: in one case the intervention was attempted not under Article 63 but Article 62³⁵ (thought at the time of the handing down of the order to raise particular issues

³¹ E.g. WTO, *European Communities-Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, Report of the Appellate Body, 9 September 1997 [106]-[128] (17 States intervened); WTO, *Canada-Patent Protection of Pharmaceutical Products*, WT/DS114/R, Report of the Panel, 17 March 2000 [5.1]-[5.36] (11 States intervened); WTO, *Russia-Measures Concerning Traffic in Transit*, WT/DS512/R, Report of the Panel, 5 April 2019 [1.6] (16 States and the European Union in); ECtHR Press Release, 'Multiple third-party intervention requests in inter-State proceedings *Ukraine v. Russia (X)*' (23 September 2022) (23 States intervened and 2 expressed an interest to intervene).

³² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* (Merits) [1986] ICJ Rep 14, para. 38.

³³ Russian Federation's Written Observations (n 3) [50]-[53].

³⁴ *Ibid* [50(b)], [51(a), (c)].

³⁵ *Nuclear Tests (Australia v. France)* (Order of 12 July 1973) [1973] ICJ 320, Declaration of Judge Onyeama 322; *ibid* Declaration of Judge Ignacio-Pinto 322; *Nuclear Tests (Australia v. France)* (Order of 20 December 1974) [1974] ICJ 530, Declaration of Judge Onyeama 531-2; *ibid* Joint Declaration of Judges Dillard and Waldock 532-3.

regarding jurisdiction);³⁶ and in two cases jurisdiction was not challenged.³⁷ The fourth case is too peculiar to permit serious insight to be gleaned from the brief half-paragraph on the issue.³⁸ The fifth case is *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. Latvia has explained in the Declaration why, properly understood, that case supports the admissibility of Article 63 interventions on issues of jurisdiction.³⁹ The sixth case, which is precisely on point, is *Whaling in the Antarctic*, where a unanimous Court was perfectly comfortable with admitting a declaration of intervention before objections to jurisdiction had been decided.⁴⁰ This approach is also in line with the practice of the Permanent Court of International Justice (“PCIJ”) (not mentioned by Russia).⁴¹

16. Secondly, Russia argues that the Court has not yet established the existence of the alleged dispute, its subject-matter, and the provisions of the Convention that may be in question.⁴²

³⁶ See the explanation of *Nuclear Tests* and Article 62 in *Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Application to Intervene)* [1981] ICJ Rep 3 [27].

³⁷ A point accepted in Russian Federation’s Written Observations (n 3) [51], see *S.S. “Wimbledon”* [1923] PCIJ Series A No 1; *Haya de la Torre* (n 15) 78.

³⁸ *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)* [1995] ICJ Rep 288 [67].

³⁹ Declaration (n 1) [20] (“Latvia’s interpretation of Article 63 of the Statute is in line with the Court’s practice, including in its decision to refuse El Salvador’s application to intervene under Article 63, paragraph 1, of the Statute in the jurisdictional phase of the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*. First, neither the Court nor Judges writing individually in that case suggested that Article 63 could not, in principle, apply to jurisdictional issues. The only explicit discussion of the issue is found in Judge Schwebel’s extended argument that ‘intervention in the jurisdictional phase of a proceeding is within the scope of the right with which States are endowed by the terms of Article 63.’ Similar views are held by leading scholars. Secondly, a key element that led to the rejection of El Salvador’s declaration of intervention in that case was that the Court and Judges perceived it as primarily or even exclusively directed at the merits of the case. Conversely, in the Proceedings, Latvia wishes to intervene on matters that concern the Court’s jurisdiction under Articles IX and I of the Genocide Convention. To the extent it is on foot with the Proceedings, therefore, the Court’s prior practice supports the admissibility of properly framed Article 63 interventions on issues of jurisdiction.”) (internal footnotes omitted).

⁴⁰ *Whaling in the Antarctic (Australia v. Japan; New Zealand intervening)* [2014] ICJ Rep 226 [5], [24] (Japan’s objection to jurisdiction on 9 March 2012); [12] (the order on admissibility of New Zealand’s intervention on 6 February 2013); Section I (dismissal of Japan’s objection to jurisdiction on 31 March 2014).

⁴¹ *Appeals from Certain Judgments of the Hungaro-Czechoslovak Mixed Arbitral Tribunal, Ninth Annual Report of the Permanent Court of International Justice (June 15th, 1932 – June 15th, 1933)* Series E no 9 176 (“In view of the fact that these objections concerned the interpretation of Art. X of Agreement No. II of Paris, they were communicated, pursuant to Art. 63 of the [Statute], to all States which had signed and ratified that agreement, but not to signatories of the Treaty of Trianon [to which the application was also related but no objections had been made]”).

⁴² Russian Federation’s Written Observations (n 3) [54]-[68].

This misstates the legal test. Article 63 of the Statute speaks about construction of a convention being “in question”, which is textually and functionally an importantly different benchmark from “dispute” in Article 36 of the Statute (and Russia’s attempt to conflate the two and rely upon practice in relation to the “dispute” must therefore fail). Russia’s further reliance on *Haya de la Torre* does not strengthen its argument:⁴³ the Court in that case did not mention “dispute” in relation to intervention,⁴⁴ even though the technical term and associated concepts were well-recognized in the case law of the PCIJ and the Court⁴⁵ (and indeed had been explicitly considered just a year before in relation to the *Asylum* case).⁴⁶ Russia’s objection is also out of line with the practice of application of Article 63 by the Registrar of the Court.⁴⁷ Latvia does, however, agree with Russia’s statement that Article 82 of the Rules is applicable to interventions under Article 63 of the Statute.⁴⁸ That is correct: indeed, the Declaration quotes the provision in its very first page and uses Article 82, paragraph 2, to structure the argument throughout (including in the detailed explanation for why Latvia “considers ... [the construction of] particular provisions of the convention ... to be in question”).⁴⁹ Importantly, Russia has not pointed to any particular aspect of the Declaration that would be incompatible with the Statute or the Rules, nor any “particular provisions of the [Genocide Convention] the construction of which” Latvia has identified in the Declaration that would not be “in question”.⁵⁰

17. On closer inspection, Russia’s concern seems more diffuse. It argues that, unless the Court has “confirmed that the Court has jurisdiction to hear the applicant’s claims and that such

⁴³ Ibid [57]-[60].

⁴⁴ *Haya de la Torre* (n 15) 76-77.

⁴⁵ *Alleged Violations* (n 12) [63].

⁴⁶ *Request for Interpretation of the Judgement of November 20th, 1950, in the Asylum case, Judgement of November 27th, 1950* [1950] ICJ Rep 395, 403.

⁴⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Letter from the Registrar of the Court to the Ambassador of Latvia to The Netherlands of 30 March 2022) (by reference to Ukraine’s application, “[i]t therefore appears that the construction of [the Genocide Convention] will be in question in this case”).

⁴⁸ Russian Federation’s Written Observations (n 3) [56], [63].

⁴⁹ Declaration (n 1) Section E.

⁵⁰ Russian Federation’s Written Observations (n 3) [56], [63].

claims are admissible, it cannot be certain” that the conditions of Article 82 of the Rules are fulfilled, and thus the Court should first decide upon the objections it has raised before admitting interventions with respect to the merits.⁵¹ This again begs the question by alluding to Latvia’s ignorance of the particular objections to Ukraine’s application Russia has raised. But the matter is otherwise: if Latvia is admitted as an intervener, then in accordance with Article 86, paragraph 1, of the Rules it will be furnished with copies of the pleadings and will be able to submit its fully informed written observations on the subject-matter of intervention at the relevant procedural stage.

18. Russia also appears to suggest that no interpretation of a treaty would be given if preliminary objections were successful.⁵² This is hard to reconcile with the Court’s practice of thorough engagement with questions of treaty interpretation in judgments upholding preliminary objections⁵³ (or indeed Russia’s invocation of a judgment upholding its own preliminary objections as an authority on interpretation).⁵⁴ But, ultimately, to dismiss this objection it again suffices to point to *Whaling in the Antarctic*, where the Court unanimously admitted New Zealand as an intervener before it had decided upon Japan’s earlier-made objection to the Court’s jurisdiction over Australia’s application.⁵⁵ That is precisely the approach that Latvia asks the Court to follow in this case.

D. THE DECLARATION DOES NOT INAPPROPRIATELY PRESUPPOSE THAT THE COURT HAS JURISDICTION AND/OR THAT UKRAINE’S APPLICATION IS ADMISSIBLE

19. Russia’s fourth objection follows on from its third. By this, it asserts that Latvia’s application to intervene on questions of the Court’s jurisdiction is to no avail because it presupposes that the Court has jurisdiction over the alleged dispute and that the Ukraine’s

⁵¹ Ibid [64]-[68].

⁵² Ibid [67].

⁵³ E.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)* (Preliminary Objections) [2021] ICJ Rep 71 [74]-[105].

⁵⁴ *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)* (Preliminary Objections) CR 2019/11, 6 June 2019 <<https://www.icj-cij.org/public/files/case-related/166/166-20190606-ORA-01-00-BI.pdf>> 42 [10] (Pellet on behalf of Russia, invoking *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)* (Preliminary Objections) [2011] ICJ Rep 70).

⁵⁵ See discussion in 40 of *Whaling in the Antarctic* (Judgment) (n 40).

application is admissible.⁵⁶ Russia first quotes from the Declaration (that “a key element that led to the rejection of El Salvador’s declaration of intervention in that case [*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*] was that the Court and Judges perceived it as primarily or even exclusively directed at the merits of the case”). It then, with an apparent emphasis on the word “primarily”, notes approvingly that “Latvia agrees that a declaration of intervention which is primarily directed at the merits of the case (as the vast majority of the Declarations, including Latvia’s own) should be dismissed”.⁵⁷

20. This objection fails to engage, however, with the Declaration’s explanation as to why an intervention under Article 63 of the Statute on issues relating to jurisdiction is, in principle, just as admissible as an intervention on issues relating to the merits. (In summary, Latvia relied upon the text of Article 63; the Court’s routine construction of treaty provisions when assessing its jurisdiction; the Court’s practice of notifying States party to a convention; the lack of uniformity on the important question of *prima facie* jurisdiction over the Proceedings; and the support for its position in the properly understood *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*).⁵⁸ But Latvia agrees with Russia that the correct legal question is indeed whether “a declaration of intervention is ... primarily or even exclusively directed at the merits of the case” (using “primarily” in the ordinary sense of “for the most part, mainly”).⁵⁹ Applying this test, the Declaration is plainly admissible: it identifies distinct provisions of the Convention in question regarding jurisdiction of the Court⁶⁰ and proposes a construction of those provisions so far as they concern the jurisdiction of the Court (and is, indeed, “primarily” directed at its jurisdiction in the Proceedings).⁶¹

⁵⁶ Russian Federation’s Written Observations (n 3) Section II.D.

⁵⁷ *Ibid* [77].

⁵⁸ Declaration (n 1) [15]-[20].

⁵⁹ ‘primarily, adv’, 1, *Oxford English Dictionary*.

⁶⁰ Declaration (n 1) [30]-[34].

⁶¹ *Ibid* [40]-[44], [46]-[49], [51]-[53].

21. The Declaration also identifies provisions of the Convention in question and their proposed construction regarding the merits of the claim. The reason for addressing jurisdiction and merits in one document is clear: the Declaration was submitted before Russia had filed its preliminary objections, when there were doubts regarding its participation in the Proceedings⁶² and the possible use by the Court of its power to decide questions of jurisdiction or admissibility separately from the merits. In line with the injunction of Article 82, paragraph 1, of the Rules, Latvia filed the Declaration “as soon as possible”. For the avoidance of doubt, Latvia confirms that, if its intervention were admitted under Article 63 of the Statute and if so directed by the Court, it would only submit its observations on the subject-matter of the intervention relevant to the particular procedural stage; i.e. only regarding jurisdiction at the preliminary objections stage.

22. With its position set out, Russia objects to the admissibility of the Declaration in the following terms:

“[T]he Declarations effectively presuppose that there is a dispute between the Parties under the Genocide Convention and that the Court has jurisdiction to entertain the dispute and/or that the Application of Ukraine is admissible: ... (d) Latvia points out that ‘the Court will have jurisdiction over any claim by the latter State seeking a declaration that the former State’s accusations are without legal and factual foundation’”.⁶³

This is simply wrong. The relevant section of the Declaration does not mention Ukraine or Russia at all, nor does it say anything about a dispute between them, the Court’s jurisdiction to adjudicate such a dispute, or the admissibility of Ukraine’s application.⁶⁴ The Declaration on this point is confined solely to the construction of Article IX of the Convention, as mandated by Article 63 of the Statute.

⁶² In another recent inter-State dispute, Russia did not participate in the proceedings where it had not appeared at the provisional measures stage, *The “Arctic Sunrise” Case (the Netherlands v. Russia)* (Provisional Measures) [2013] ITLOS Rep 230 [30]; *The “Arctic Sunrise” Case (the Netherlands v. Russia)* (Award on Jurisdiction) (2014) 32 RIAA 183 [5]; *ibid* (Award on the Merits) (2015) 32 RIAA 205 [5]-[7]; *ibid* (Award on Compensation) (2017) 32 RIAA 315 [8], [13].

⁶³ Russian Federation’s Written Observations (n 3) [81(d)].

⁶⁴ Declaration (n 1) [40]-[44].

E. THE DECLARATION DOES NOT SEEK TO ADDRESS ISSUES UNRELATED TO THE CONSTRUCTION OF THE CONVENTION AND ITS ADMISSION WOULD NOT PREJUDGE QUESTIONS RELATING TO THE COURT’S JURISDICTION *RATIONE MATERIAE*

23. Russia’s fifth objection is that the Declaration must be declared inadmissible because it is not confined to the construction of a convention in question.⁶⁵ Russia’s position is unfounded both in law and in fact.

24. First, Russia’s interpretation of Article 63 of the Statute is wrong in law. In particular, it is incompatible with the Court’s finding in *Haya de la Torre*, where the declaration of the intervener was “devoted almost entirely” to provisions of the convention the construction of which were not in question in the case. Nevertheless, in the oral proceedings a narrowly relevant aspect of construction was identified, and “[r]educing in this way, and operating within these limits, the intervention of the Government of Cuba conformed to the conditions of Article 63 of the Statute”.⁶⁶ Consequently, if a declaration of intervention falls partially within the provisions of Article 63 of the Statute, the Court’s reasoning in *Haya de la Torre* suggests that it should be admitted within these limits, rather than declared fully inadmissible.

25. Secondly, Russia’s position is not tenable as a matter of fact. The Declaration is confined to Latvia’s construction of the provisions of the Genocide Convention and relates specifically to the Court’s *ratione materiae* jurisdiction under Articles IX and I of the Convention. Russia objects against the Declaration in the following terms:

“Latvia alleges that it ‘will not address application’. Yet it then states that it intends to address issues relating to the existence of evidence that genocide has occurred or may occur in Ukraine; the doctrine of abuse of rights; and the legality of the use of force. In this respect, Latvia expressly admits that ‘the content of the rule prohibiting unlawful unilateral use of force ... is to be determined by taking into account other relevant rules of international law’ rather than legal provisions of the Convention.”⁶⁷

Again, this is simply wrong. Latvia is baffled about where its alleged intention to “address issues relating to existence of evidence that genocide has occurred or may occur in

⁶⁵ Russian Federation’s Written Observations (n 3) Section II.E.

⁶⁶ *Haya de la Torre* (n 15) 78.

⁶⁷ Russian Federation’s Written Observations (n 3) [85(d)] (internal footnotes omitted).

Ukraine”, provided without a paragraph reference, appears in the Declaration, when even the word “evidence” is used only once (in a quote from a 2007 Court’s judgment).⁶⁸ Nor is the language of “doctrine of abuse of rights” (or “doctrine” or “abuse of rights”, or indeed “abuse”) found in the Declaration, and the passages Russia refers to speak consistently about construction of Article I of the Convention as possibly prohibiting abusive allegations of genocide.⁶⁹ Russia’s quote relating to use of force omits the crucial explanation of its legal rationale as interpretation of the Genocide Convention “[c]onsistently with Article 31, paragraph 3, sub-paragraph (c), of the Vienna Convention [on the Law of Treaties]” (which is to say, again, an argument about construction of a convention to which Latvia is a party).⁷⁰ In short, all of the points identified by Russia relate to construction of the Convention and fall within the provisions of Article 63 of the Statute.

III. SUBMISSIONS

26. In view of the foregoing, Latvia respectfully requests the Court:

- (a) to reject all the objections raised by the Russian Federation to the admissibility of the Declaration;
- (b) to declare the Declaration admissible as to the jurisdictional phase of the proceedings;
- (c) to declare the Declaration admissible as to the merits phase of the proceedings.

Respectfully,

Kristīne LICE,

Agent of the Republic of Latvia.

⁶⁸ Declaration (n 1) [47] (quoting *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* [2007] ICJ Rep 43 [209]).

⁶⁹ Ibid Section F(ii).

⁷⁰ Ibid [54].