Before the
INTERNATIONAL COURT OF JUSTICE

WRITTEN OBSERVATIONS OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND ON THE ADMISSIBILITY OF ITS DECLARATION OF INTERVENTION SUBMITTED PURSUANT TO ARTICLE 63 OF THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE

13 February 2023

In the case of

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

(UKRAINE *v.* RUSSIAN FEDERATION)

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INTRODUCTION

1. On 1 August 2022, the United Kingdom of Great Britain and Northern Ireland ("the United Kingdom") exercised its right under Article 63 of the Statute of the International Court of Justice ("the Statute") to intervene in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation).*

2. On 17 October 2022, Ukraine filed Written Observations on the Declaration of intervention filed by the United Kingdom ("the Declaration"), contending that the Declaration is admissible.[1] The United Kingdom agrees with Ukraine's position.

3. On the same date, the Russian Federation filed 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 ("the Written Observations"). The Russian Federation's position is that the Declaration is inadmissible.[2]

4. By letter dated 31 January 2023, the Registry of the Court notified the United Kingdom that the Court had fixed 13 February 2023 as the time-limit for the United Kingdom to submit observations in writing on the admissibility of the Declaration, in accordance with Article 84(2) of the Rules of the Court ("the Rules"). The present observations respond to the Russian Federation's Written Observations insofar as they pertain to the United Kingdom's Declaration.

5. The United Kingdom addressed in its Declaration that this case raises questions concerning the construction of the Convention on the Prevention and Punishment of Genocide ("the Genocide Convention") and further that, as required for an intervention pursuant to Article 63 of the Statute, the United Kingdom is a party to the Genocide

[1] *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 the United Kingdom, 17 October 2022, paras. 2, 9.
[2] *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, 17 October 2022 ("Written Observations"), paras. 8, 132(a).

Convention.[3] The Russian Federation rightly does not contest either of these facts. It follows that the United Kingdom is entitled to intervene as of right in these proceedings pursuant to Article 63(2) of the Statute, provided that its Declaration meets the requirements of Article 82 of the Rules.

6. As to the requirements set out in Article 82, the Russian Federation does not contest any of the following matters:

   (a) That the Declaration in this case was filed within the time limit set out in Article 82(1) of the Rules;

   (b) That the Declaration complies with the relevant formalities in Article 82(1)–(2), including having been appropriately signed, stating the name of an agent, identifying the basis on which the United Kingdom considers itself a party to the Genocide Convention, identifying the particular provisions of the Genocide Convention the construction of which the United Kingdom considers to be in question, stating the construction of those provisions for which the United Kingdom contends, and listing and attaching the documents in support.

7. As is reflected in the text of Article 84(1) of the Rules, in relation to an intervention under Article 63 of the Statute, the Court's role is merely to determine whether a declaration is "admissible", rather than (as is the case with interventions under Article 62 of the Statute) to determine whether the putative intervening State "should be granted" permission to intervene. The Court's jurisprudence has repeatedly emphasised that intervention under Article 63 of the Statute is allowed as of right where the formal requirements for an intervention under that provision and Article 82 of the Rules have been satisfied. For example:

   (a) In *Whaling in the Antarctic*, in the order accepting New Zealand's Declaration of intervention the Court acknowledged its own limited role in reviewing the declaration's compliance with the formal requirements of an intervention under Article 63 of the Statute. It stated:

[3] *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declaration of Intervention under Article 63 of the United Kingdom of Great Britain and Northern Ireland ("the Declaration"), paras. 13–15.

> "Whereas intervention based on Article 63 of the Statute is an incidental proceeding that constitutes the exercise of a right; … Whereas … the fact that intervention under Article 63 of the Statute is of right is not sufficient for the submission of a 'declaration' to that end to confer *ipso facto* on the declarant State the status of intervener; whereas such right to intervene exists only when the declaration concerned falls within the provisions of Article 63; and whereas, therefore, the Court must ensure that such is the case before accepting a declaration of intervention as admissible; … whereas it also has to verify that the conditions set forth in Article 82 of the Rules of Court are met."[4]

In the same case, Judge Cançado Trindade emphasised the distinction between "discretionary intervention" under Article 62 of the Statute and "intervention *as of right*" under Article 63.[5]

(b) This is consistent with the Court's statement in *Territorial and Maritime Dispute (Nicaragua v. Colombia)* that the text of Article 62 was "markedly different from Article 63, paragraph 2, [which] clearly gives certain States 'the right to intervene in the proceedings' in respect of the interpretation of a convention to which they are parties".[6]

(c) In *Military and Paramilitary Activities*, numerous members of the Court emphasised that the Court lacks any discretion in determining whether to admit an intervention under Article 63, beyond determining that it satisfies the basic admissibility requirements. Judges Ruda, Mosler, Ago, Jennings and de Lacharrière stated in their Separate Opinion:

> "Article 63 of the Statute of the Court provides for a right of intervention in proceedings before it, 'Whenever the construction of a convention to which States other than those concerned in the case are parties is in question'. Where those conditions are fulfilled, a State wishing to intervene has a right to do so, and it is not for the Court to grant or withhold permission."[7]

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[4] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at pp. 5–6, paras. 7–8.
[5] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at pp. 5–6, Separate Opinion of Judge Cançado Trindade, at p. 28, para, 38 (emphasis in original).
[6] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment, ICJ Reports 2011, p. 420, at p. 434, para. 36.
[7] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, at p. 219, para. 1.

Judge Schwebel made the same point in the following terms:

> "While under Article 63 of the Statute, a State has 'the right' to intervene whenever the construction of a convention to which it is a party is in question in proceedings before the Court, it always has been accepted that the Court must pass upon whether the State seeking to intervene is such a party, and whether the construction of the convention cited is in question in the proceedings. If the Court so finds, the Court does not need to grant permission to intervene; it simply … 'records' that the declarant State intends to avail itself of the right to intervene conferred upon it by Article 63 of the Statute and 'accepts' its intervention."[8]

(d) In *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, in his Separate Opinion on the admissibility of Italy's application for permission to intervene under Article 62 of the Statute, Judge Jiménez de Aréchega stated:

> "[T]he two Articles 62 and 63, although dealing with similar subjects, operate under different legal régimes and attribute functions of a diverse nature to the Court. One function is intervention as of right; the other is permissive intervention. Whereas Article 63 confers an unqualified right on the State party to the convention, and the Court merely performs the function of verifying formal admissibility, under Article 62 the Court must reach a judicial decision, by means of a judgment, as to whether permission 'should be granted' in accordance with Rule 84."[9]

According to Judge Schwebel in the same case, "Article 63 unconditionally authorizes intervention where the State seeking it is party to a treaty" and "Article 63 speaks of a 'right to intervene' because all that need be ascertained is that a State which seeks to exercise that right is party to the convention whose construction is at issue".[10]

8. Notwithstanding this clear and settled position, the Russian Federation disputes the admissibility of the Declaration on five misconceived grounds. Several of these relate

[8] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Dissenting Opinion of Judge Schwebel, at p. 233.
[9] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, ICJ Reports 1984, Separate Opinion of Judge Jiménez de Aréchega, p. 3, at p. 58, para. 9.
[10] *Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Application to Intervene, Judgment, ICJ Reports 1984, Dissenting Opinion of Judge Schwebel, p. 3, at p. 144, paras. 31–32. See also, in the same case, the Dissenting Opinion of Sir Robert Jennings, at p. 156, para. 25 ("Article 63 … gives a right of intervention, without the need of any permission from the Court, to any States parties to a convention the construction of which 'is in question' in a case").

to alleged conditions on the right to intervene pursuant to Article 63 which it invites the Court to imply into the Statute, but which have no basis in any of the Statute, the Rules, or the practice and jurisprudence of the Court. Nor do they have any principled rationale. Others rely on mischaracterisations of the Declaration. The present observations address each of the objections in turn.

9. The Russian Federation is correct to characterise the circumstances of this case as "exceptional"[11] in the sense that the case has elicited an unprecedented number of interventions under Article 63 of the Statute. However, contrary to the Russian Federation's submissions, this fact has no bearing on the admissibility of the Declaration of the United Kingdom (or any other State). The entitlement to intervene under Article 63 is not in any way conditioned on the extent to which other States exercise their own right to intervene on the same basis.[12] It is entirely logical that a case involving the construction of an important multilateral convention to which nearly all States are parties could attract interventions by a large number of States. That many States have exercised their right to intervene does not affect the existence of that same right for any other State. In 1981, Judge Oda addressed the possibility of a proliferation of interventions under Article 62 of the Statute:

> "It may be objected that the States which may be affected by the interpretation of such principles and rules by the Court will be without number, and that, if an interpretation of the principles and rules of international law can open the door of the Court to all States as interveners, this will invite many future instances of intervention. This problem should be considered from the viewpoint of future judicial policy, and more particularly from the viewpoint of the economy of international justice. *Yet this cannot be the reason why a request for intervention which is actually pending should be refused when the requesting State claims that its legal interest may be affected by the Court's rulings on the principles and rules of international law*. The possibility of an increasing number of cases invoking Article 63 may likewise not be avoided. The fact that in the past Article 63 has been rarely invoked does not guarantee that the situation will remain unchanged in the future. Thus the problem is related not only to Article 62, but also to Article 63."[13]

10. The remainder of the present observations is structured as follows:

[11] Written Observations, para. 8.
[12] See further paras. 18–19 below.
[13] *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application to Intervene, Judgment, ICJ Reports 1981, p. 3, Separate Opinion of Judge Oda, p. 31, para. 17 (emphasis added).

(a) The Russian Federation's first objection to the admissibility of the Declaration — namely, that it is not a "genuine" intervention and has an impermissible "object"[14] — is addressed in **Section I**. There is no requirement of "genuine intention" in the Statute, the Rules or the Court's case law. The object of the Declaration is the construction of the provisions of the Genocide Convention, as required under Article 63 of the Statute. The political elements of a dispute do not render the legal questions inadmissible.

(b) The Russian Federation's second objection — namely, that allowing the intervention would be incompatible with the equality of the parties to the case and the good administration of justice[15] — is addressed in **Section II**. This objection misconstrues the nature of an intervention under Article 63, which does not involve the intervening State becoming a "party" or having the "same interest" as a party. Interventions by multiple States are compatible with the equality of the parties and the good administration of justice.

(c) **Section III** addresses the Russian Federation's third objection, which is that the Declaration is automatically inadmissible by virtue of it having been filed before Russia's preliminary objections to Ukraine's claims have been resolved.[16] There is nothing in the Statute or the Rules that limits the right to intervene pursuant to Article 63 in a preliminary objections phase. To the contrary, the Court's jurisprudence and practice are consistent with declarations of intervention being admissible at a preliminary objections phase insofar as they address the issues in question at this stage of the proceedings.

(d) The Russian Federation's fourth objection is based on the false premise that the Declaration presupposes that the Court has jurisdiction and that Ukraine's claim is admissible.[17] It is addressed in **Section IV**. This objection simply misrepresents the Declaration and, in particular, ignores the United Kingdom's

[14] Written Observations, Section II(A).
[15] Written Observations, Section II(B).
[16] Written Observations, Section II(C).
[17] Written Observations, Section II(D).

clear delineation between issues concerning jurisdiction and issues concerning the merits.

(e) **Section V** answers the Russian Federation's fifth objection, which contends that the Declaration addresses issues unrelated to the construction of the Genocide Convention.[18] Again, this objection is based on mischaracterising the Declaration, which is limited to raising matters of construction of the Genocide Convention.

(f) Finally, **Section VI** sets out the United Kingdom's Submissions.

11. The United Kingdom notes that it is aware that 33 States have filed declarations of intervention in the present case, whereas the Written Observations to which it is responding relate to the declarations of only 11 States. The United Kingdom is not aware of whether the Russian Federation has raised or will raise objections to other States' declarations additional or different to those asserted in the Written Observations to which the United Kingdom has been asked to respond. Naturally, only the objections raised in those Written Observations and in relation to the United Kingdom's Declaration are applicable to the United Kingdom, and it is only those objections which are addressed in the present observations.

I. THE RUSSIAN FEDERATION'S FIRST OBJECTION: THE "REAL OBJECT" OF THE INTERVENTION

12. The Russian Federation asserts that the United Kingdom's Declaration is inadmissible because it is not "genuine". It makes three points in this regard. First, it contends that the Court needs to establish the "genuine intention" of a State before it can "confer[] the status of intervener on [that] State" under Article 63 of the Statute.[19] Secondly, the Russian Federation argues that the object of the United Kingdom's intervention is not to submit observations "on the construction or interpretation of the multilateral treaty in question" but to become a "*de facto* co-applicant[] and pursue a joint case with Ukraine".[20] Thirdly, the Russian Federation alleges that the United Kingdom's

[18] Written Observations, Section II(E).
[19] Written Observations, paras. 11, 14.
[20] Written Observations, paras. 14, 19.

statements in its Declaration "manifestly contradict" what it stated in the *Legality of the Use of Force* cases.[21] Each of these points, addressed in turn below, is flawed and cannot render the Declaration inadmissible.

13. First, it is not a condition of the exercise of the right of intervention under Article 63 that the State hold a "genuine intention". Article 63(2) provides that, whenever the construction of a convention is in question in a case, a State that is a party to the convention "has the right to intervene in the proceedings". Article 82(1) of the Rules simply requires a State that wishes to "avail itself of the right of intervention conferred on it by Article 63 of the Statute" to "file a declaration to that effect". As set out in the Introduction to the present observations, the Court has observed that Article 63 "clearly gives certain States 'the right to intervene in the proceedings' in respect of the interpretation of a convention to which they are parties".[22]

14. The Russian Federation relies on the Court's judgment in *Haya de la Torre* to justify the "genuine intention" condition, but the judgment did not create such a condition. Peru objected to Cuba's Declaration of intervention under Article 63 because it was "not an intervention in the true meaning of the term, but an attempt by a third State to appeal against the Judgment delivered by the Court on November 20th, 1950".[23] The Court stated:

> "In regard to that question, the Court observes that every intervention is incidental to the proceedings in a case; *it follows that a declaration filed as an intervention only acquires that character, in law, if it actually relates to the subject-matter of the pending proceedings*. The subject-matter of the present case differs from that of the case which was terminated by the Judgment of November 20th 1950: it concerns a question — the surrender of Haya de la Torre to the Peruvian authorities — which in the previous case was completely outside the Submissions of the Parties, and which was in consequence in no way decided by the above-mentioned Judgment.
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> In these circumstances, *the only point which is necessary to ascertain is whether the object of the intervention of the Government of Cuba is in fact the interpretation of the Havana Convention* in regard to the question of whether Columbia is under an obligation to surrender the refugee to the Peruvian authorities.

[21] Written Observations, paras. 25, 26, 28(c).
[22] *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Application for Permission to Intervene, Judgment, ICJ Reports 2011, p. 420, at p. 434, para. 36. See further para. 7 above.
[23] *Haya de la Torre Case (Colombia/Peru)*, Judgment of June 13th, 1951, ICJ Reports 1951, p. 71, at p. 76.

> On that point, the Court observes that the Memorandum attached to the Declaration of Cuba is devoted almost entirely to a discussion of the questions which the Judgment of November 20th, 1950, had already decided with the authority of *res judicata,* and that, *to that extent, it does not satisfy the conditions of a genuine intervention*. However, at the public hearing on May 15th, 1951, the Agent of the Government of *Cuba stated that the intervention was based on the fact that the Court was required to interpret a new aspect of the Havana Convention,* an aspect which the Court had not been called on to consider in its Judgment of November 20th, 1950.
>
> Reduced 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, and the Court, having deliberated on the matter, decided on May 16th to admit the intervention in pursuance of paragraph 2 of Article 66 of the Rules of Court."[24]

15. The Russian Federation focuses on the phrase "the conditions of a genuine intervention" to assert that the Court needs to "establish the 'genuine intention' of the State concerned, thus establishing whether the conditions of a genuine intervention are satisfied".[25] However, as is clear from the passage above, the Court did not refer to a requirement of the intervening State having a "genuine intention"; indeed, the phrase "genuine intention" does not even appear. Rather, the Court was concerned with whether the declaration of intervention "actually relate[d] to the subject-matter of the pending proceedings", namely the interpretation of the Havana Convention and the question of an obligation to surrender.

16. The *Haya de la Torre* judgment, along with the Court's judgment in *Whaling in the Antarctic*,[26] emphasise that an intervention under Article 63 has a "limited object", but this is not the same as seeking to establish any intention of a State in intervening or assessing whether an intention should be characterised as genuine. As set out in *Whaling in the Antarctic*, the Court will assess the admissibility of the intervention by examining whether the declaration "falls within the provisions of Article 63" and meets the conditions in Article 82 of the Rules as regards the timing of the declaration, the naming of the Agent, the case and the convention to which the declaration relates, the basis on which the State is a party to the convention, the identification of the particular

[24] *Haya de la Torre Case (Colombia/Peru)*, Judgment of June 13th, 1951, ICJ Reports 1951, p. 71, at pp. 76–77 (emphasis added).
[25] Written Observations, para. 14.
[26] Cited in Written Observations, paras. 11–12.

provisions of the convention the construction of which are in question, the statement of the construction of the provisions, and the enclosure of supporting documents.[27]

17. The issue before the Court is an objective one as to whether the United Kingdom's Declaration fulfils the conditions of Article 63 of the Statute and Article 82 of the Rules. It is not one of seeking to determine a State's subjective intention and whether any intention held or presented by a State should be characterised as genuine. As already addressed in the Written Observations of Ukraine[28] and the Introduction of the present observations,[29] the applicable conditions are objective and the United Kingdom's Declaration satisfies them.

18. There is also no support for the Russian Federation's second allegation, which is that the United Kingdom's object is to become a "*de facto* co-applicant[] and pursue a joint case with Ukraine".[30] The Russian Federation points to the 20 May 2022 and 13 July 2022 Joint Statements on Ukraine's Application as evidence of States, including the United Kingdom, pursuing a "joint case".[31] However, those statements simply confirm the interest of all States Parties that the Genocide Convention "not be misused or abused" and express their trust in the Court to play a vital role in the peaceful settlement of disputes.[32] In the *Whaling in the Antarctic* case, Japan had contended that the Joint Media Release of New Zealand and Australia in which New Zealand stated it was "a strong partner of Australia in the bid to end 'scientific' whaling and improve whale conservation worldwide" was a "serious anomal[y]".[33] However, the Court did not consider the media release to relate to the conditions for admissibility and proceeded to conclude that New Zealand had met the objective requirements of Article 63 of the Statute and Article 82 of the Rules.[34]

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[27] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at pp. 5–6, paras. 8–11.
[28] Declaration, paras. 5–6.
[29] See paras. 5–6 above.
[30] Written Observations, paras. 14, 19.
[31] Written Observations, paras. 15–16.
[32] Written Observations, Annexes 1, 2.
[33] *Whaling in the Antarctic (Australia v. Japan)*, Written Observations of Japan on the Declaration of Intervention of New Zealand, 21 December 2012, paras. 2–4.
[34] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 9, paras. 18–19.

19. The Russian Federation seeks to characterise the interventions of the United Kingdom and other States as a "collective political strategy" rather than interventions aimed at the correct legal construction of the Genocide Convention.[35] The Court has long recognised 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 long-standing political dispute between the States concerned".[36] At the same time, the Court has repeatedly confirmed that the political elements of a dispute do not render the legal questions before the Court inadmissible. The fact that a disagreement over the interpretation or application of a convention "has arisen in a broader context" does not deprive a body of its jurisdiction.[37] The Court is capable of drawing a distinction between a broader "goal" of a State and the "related but distinct dispute presented by the Application".[38] Similarly, there is a distinction between the goal of supporting Ukraine in the face of the Russian Federation's aggression and legal questions concerning the correct interpretation of the Genocide Convention, which has been invoked by the Russian Federation to seek to justify its use of force. Indeed, in a past case before the Court, the Russian Federation accepted that "[o]ne situation may contain disputes which relate to more than one body of law and which are subject to different dispute settlement procedures", including disputes involving the status of territories, outbreaks of armed conflict and alleged breaches of international humanitarian law and of human rights.[39] The fact that a dispute of which the Court is properly seized is part of a multi-faceted dispute does not deprive the Court of jurisdiction.

[35] Written Observations, para. 19.
[36] *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, ICJ Reports 1980, p. 3, at p. 20, para. 37. See also *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, ICJ Reports 2019, p. 7, at p. 23, para. 36.
[37] *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)*, Judgment, ICJ Reports 2020, p. 81, at pp. 100–101, para. 48.
[38] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, ICJ Reports 2015, p. 592, at p. 604, para. 32.
[39] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Preliminary Objections, Judgment, ICJ Reports 2011, p. 70, at pp. 85–86, para. 32. See also *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 69, at pp. 91–92, para. 54.

20. In short, the Court has never shied away from a case brought before it merely because it had political implications, including as regards the use of force.[40]

21. Thirdly, the Russian Federation's allegation that the United Kingdom has made contradictory statements in its Declaration and in the *Legality of the Use of Force* cases is irrelevant to the question of the admissibility of its intervention. At the very most, such matters could be relevant only to the soundness of the United Kingdom's contentions as to the construction of the relevant provisions of the Genocide Convention. These would be matters to be addressed following the Court's resolution of the issue of the admissibility of the Declaration. Given their irrelevance in the present context, the United Kingdom does not address these allegations here, but records that it rejects those allegations and reserves its right to respond to them at an appropriate stage.

II. THE RUSSIAN FEDERATION'S SECOND OBJECTION: THE PRINCIPLE OF EQUALITY OF THE PARTIES AND THE REQUIREMENTS OF THE GOOD ADMINISTRATION OF JUSTICE

22. The Russian Federation contends that "conferring on the Declarants the status of interveners would seriously impair the principle of equality of the parties before the Court and be contrary to the requirements of the good administration of justice".[41] This argument misconstrues the nature of an intervention under Article 63 and the requirements of the principle of equality and the good administration of justice in international law.

23. Interventions under Article 63 of the Statute have a confined scope. An intervening state is "limited to submitting observations on the construction of the convention in question".[42] It does not become a party to the proceedings and the intervention is not permitted "to deal with any other aspect of the case before the Court".[43] In accordance with Article 86 of the Rules, the intervening State is restricted to making written and oral observations which address only the subject-matter of the intervention. As the

[40] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1984, p. 392, at p. 435, para. 96.
[41] Written Observations, para. 32.
[42] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 9, para. 18.
[43] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 9, para. 18.

Court observed in the *Whaling in the Antarctic* judgment, "such an intervention cannot affect the equality of the Parties to the dispute".[44]

24. Article 63 interventions are intended to inform the Court of the views of States Parties on the construction of a convention. The right to intervene arises only when "the construction of a convention … is in question" (Article 63(1)). Once the right arises, the Registrar has to notify "all" States Parties to the convention, other than the applicant and the respondent (Article 63(1)). It is only "the construction given by the judgment" that will be binding on any intervening State (Article 63(2)).

25. Article 63 acknowledges that all parties to a convention have an interest in the Court's construction of the convention. The numerical limit on participation is set by the number of parties to the convention, not by some extrinsic measure of what might give rise to perceived "undue and unnecessary pressure on the Judges and the Court as a whole".[45]

26. A useful contrast may be drawn with interventions under Article 62 which are based on whether a state "has an interest of a legal nature which may be affected by the decision in the case". A State with a legal interest may make submissions about the application of law to facts, but, accordingly, whether it should be granted permission to do so is for the Court to determine in its discretion, pursuant to Article 84(1) of the Rules.

27. An even starker contrast is with Article 31(5) of the Statute, on which the Russian Federation relies. That provision concerns the identification of "several *parties* in the *same interest*" (emphasis added) for the purposes of determining the proper composition of the Court in a given case. However, intervention under Article 63 cannot confer the status of "party to the proceedings".[46] Intervention under Article 63 is not concerned with any "interest" of the State in the dispute. It is, as explained above, concerned with the construction of the convention to which the intervening State is a party. The Russian Federation's invocation of Article 31(5) of the Statute and related cases is therefore irrelevant. The references to Judge Owada's Declaration in the

[44] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 9, para. 18.
[45] Written Observations, para. 51.
[46] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 6, para. 9.

Whaling in the Antarctic case and Judge Xue's Dissenting Opinion in the *Gambia v. Myanmar* case are also irrelevant.[47] As the Russian Federation acknowledges, Japan did not object to the admissibility of New Zealand's declaration and Judge Owada's views were not adopted by the majority. Judge Xue was referring to a different and specific scenario where an applicant State (not an intervening State) was said to be acting on behalf of an international organisation. Similarly, the Russian Federation's observation that "7 out of the 16 Judges of the Court (including the President of the Court) are nationals of the States that have announced their intention to intervene"[48] is not relevant to the admissibility of an Article 63 intervention. Intervening States do not have a right to appoint a judge *ad hoc*. And, as the Court noted in *Whaling in the Antarctic*, an Article 63 intervention also has no impact on the right of an applicant or a respondent to appoint a judge *ad hoc*.[49]

28. The Russian Federation also raises a number of complaints that reflect a misunderstanding of the principle of equality and the good administration of justice in international law. The Russian Federation complains that it "would be forced to respond to numerous lengthy written pleadings by the interveners supporting Ukraine … as well as to many statements at any oral phase".[50] It suggests that "multiple interventions and public statements" by intervening States "undoubtedly put undue and unnecessary pressure on the Judges and the Court as a whole".[51]

29. The principle of equality is concerned with a fair balance between the parties so that neither is placed at a substantial disadvantage. The principle affords each party a reasonable opportunity to present its case and to contest the case of the other side. The Court has considered the principle in cases arising between international organisations and their officials. According to the Court, "[t]he judicial character of the Court requires that both sides directly affected by these proceedings should be in a position to submit their views and their arguments to the Court".[52] While in that case there was no obstacle to the international organisation submitting its views in writing or orally, it was

[47] Written Observations, paras. 34–38.
[48] Written Observations, para. 48.
[49] Written Observations, para. 68.
[50] Written Observations, para. 47.
[51] Written Observations, para. 48.
[52] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of October 23rd, 1956, ICJ Reports 1956, p. 77, at p. 86.

challenging to receive the observations of individual officials on equal terms under Article 66 of the Statute. The Court therefore adjusted its procedure in order to receive the written statement of officials through an intermediary; it also decided not to hold oral hearings.[53] In a later case, the Court confirmed that "[g]eneral principles of law and the judicial character of the Court do require that, even in advisory proceedings, the interested parties should each have an opportunity, and on a basis of equality, to submit all the elements relevant to the questions which have been referred to the review tribunal", a condition which it considered was "fulfilled by the submission of written statements".[54] This solution was adopted in other cases and the Court noted that when parties have "adequate and in large measure equal opportunities to present their case and to answer that made by the other … in essence, the principle of equality in the proceedings before the Court, required by its inherent judicial character and by the good administration of justice, has been met".[55] Consequently, even in proceedings where the parties have had demonstrably unequal access to the Court, the Court has been able to ensure equality and good administration of justice.

30. In these proceedings, the Russian Federation and Ukraine are the parties to a contentious dispute and have equal access to and standing before the Court. They have, and will continue to have, equal opportunities to present their cases and answer the case of the other. The intervention of multiple States on the question of the construction of the Genocide Convention will neither undermine this equality nor impair the good administration of justice. The interventions are limited in scope, and both Ukraine and the Russian Federation have had and will have equal opportunity to comment on them. The Court will, as it has shown in the past, be able to ensure equality and fairness are respected through decisions on procedure, if required.

[53] *Judgments of the Administrative Tribunal of the I.L.O. upon complaints made against the U.N.E.S.C.O.*, Advisory Opinion of October 23rd, 1956, ICJ Reports 1956, p. 77, at p. 86.
[54] *Application for Review of Judgment No. 158 of the United Nations Administrative Tribunal*, Advisory Opinion, ICJ Reports 1973, p. 166, at p. 181, para. 36.
[55] *Judgment No. 2867 of the Administrative Tribunal of the International Labour Organization upon a Complaint Filed against the International Fund for Agricultural Development*, Advisory Opinion, ICJ Reports 2012, p. 10, at p. 30, para. 47.

III. THE RUSSIAN FEDERATION'S THIRD OBJECTION: ADMISSIBILITY OF THE DECLARATION PRIOR TO THE RESOLUTION OF PRELIMINARY OBJECTIONS

31. In its third objection, the Russian Federation contends that the Court cannot decide on the admissibility of the Declaration prior to ruling on its preliminary objections raised with respect to Ukraine's claim.[56] The United Kingdom notes that, as it has not yet been admitted as an intervener, it has not seen the preliminary objections filed by the Russian Federation. That is, however, immaterial in the present context, because the Russian Federation's objection to the admissibility of the Declaration is based on it being impermissible in principle to allow interventions before preliminary objections have been resolved, rather than anything specific to the preliminary objections it has raised in this case.

32. The Russian Federation advances two arguments in relation to this objection. First, it argues that the Court's practice militates against admitting interventions at the preliminary objections phase of proceedings.[57] This argument is addressed in **sub-section A** below. Secondly, it contends that the Declaration cannot be admitted before the Court has ascertained the existence and subject matter of the dispute between Ukraine and the Russian Federation and has established the provisions of the Genocide Convention which may be in question.[58] This argument is addressed in **sub-section B** below.

A. The Court's practice as regards the admissibility of interventions under Article 63 prior to the resolution of preliminary objections

33. The Russian Federation asserts that "the Court's practice is consistent in not allowing interventions at the jurisdictional phase of the proceedings".[59] It does so by reference both to cases in which the Court did not allow an Article 63 intervention to proceed,[60] and to additional cases in which the Court allowed an Article 63 intervention in circumstances where the respondent State did not raise any preliminary objections.[61]

[56] Written Observations, Section II(C).
[57] Written Observations, Section II(C)(i).
[58] Written Observations, Section II(C)(ii).
[59] Written Observations, para. 52.
[60] Written Observations, para. 50.
[61] Written Observations, para. 51.

34. It is conspicuous from the outset that the Russian Federation, beyond referring to such "practice" (which is addressed below), has not identified any provision of the Statute or the Rules which could support a restriction on the right to intervene under Article 63 to the effect that it can only be exercised following the resolution of preliminary objections raised by a respondent State. This is because there is no support in the Statute or Rules for such a restriction — and, to the contrary, they both support the conclusion that interventions can in principle be admissible at the preliminary objections phase. In particular:

(a) Article 63 of the Statute sets out the circumstances in which a State has the right to intervene — namely, in the words of Article 63(1), "[w]henever" the construction of a convention to which it is a party is in question in a case before the Court. According to Article 63(2), in those circumstances,[62] the State has "the right to intervene". The term "[w]henever" is notably broad and does not distinguish between preliminary objections and merits phases of a case.

(b) Article 63(1) of the Statute also refers to "the construction of a convention" being the permissible subject matter of an intervention, and this is reflected in Article 82(2)(b)–(c) of the Rules, which sets out the matters that a declaration of intervention must address. There is no reason why the plain terms of Article 63(1) and/or Article 82(2) should be read as referring only to the construction of a convention in relation to a substantive question that falls to be determined at the merits phase of the case. Throughout the Court's history, there are many examples of the Court being required to construe conventions in relation to jurisdictional and/or admissibility questions, and the present case is one such example (as addressed further below).

[62] The Russian Federation seeks to attach some significance to the fact that the word "[w]henever" appears in Article 63(1), but the right to intervene is set out in Article 63(2): Written Observations, para. 78(d). This is misconceived. The right to intervene and the circumstances in which it may be exercised are contained in Article 63 as a whole. See the formulation in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, at p. 219, para. 1 ("Article 63 … provides for a right of intervention in proceedings before it, 'Whenever the construction of a convention to which States other than those concerned in the case are parties is in question'").

(c) Article 63(2) provides for a "right to intervene *in the proceedings*" (emphasis added), again without distinction between any preliminary objections phase and the merits phase of the proceedings.[63]

(d) Article 63(1) refers to States parties to a convention being notified "forthwith", while Article 82(1) of the Rules requires a State to file a declaration of intervention "as soon as possible". Further, Article 84 requires that the Court determine the admissibility of an intervention under Article 63 "as a matter of priority". The requirement for expedition having been repeatedly referred to as a feature of the procedure is inconsistent with the argument that it is not permissible for declarations to be filed until after the resolution of any preliminary objections.

(e) Article 82(1) states that a declaration must usually be filed "not later than the date fixed for the opening of the oral proceedings". There is no indication that this is limited to the oral proceedings at the merits phase and it would apply equally to oral proceedings at which preliminary objections are to be heard.

35. In *Military and Paramilitary Activities*, Judge Schwebel referred to such textual indicators in support of his view that Article 63 interventions could in principle be permissible at the jurisdictional phase of proceedings, and also noted that there was nothing in the *travaux préparatoires* of the Statute which supported any contrary view.[64]

36. In addition, there is no reason of principle as to why an intervention should not be permitted at the preliminary objections phase of a case. To the contrary, it is right that a State which is a party to a convention which falls to be construed in proceedings to which it is not a party should be entitled to convey its views as to the construction of a compromissory clause within that convention, as eminent commentators have noted.[65]

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[63] See Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015*, 5th Ed., (Brill, 2016), p. 1533; Alina Miron and Christine Chinkin, "Article 62" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (Eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1695.

[64] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Dissenting Opinion of Judge Schwebel, at pp. 234–235.

[65] See, e.g., Malcolm N. Shaw, *Rosenne's Law and Practice of the International Court: 1920–2015*, 5th Ed., (Brill, 2016), p. 1533; Alina Miron and Christine Chinkin, "Article 63" in Andreas Zimmermann, Christian J.

As the Court stated in the *Jurisdiction of the ICAO Council* case, a decision concerning matters of jurisdiction and admissibility is capable of being "of scarcely less importance than a decision on the merits" and can "involve questions of law" as "important and complicated [as those] that arise on the merits".[66] Indeed, the Court observed that decisions on jurisdiction under multilateral conventions "may … create precedents affecting the position and interests of a large number of States, in a way which no ordinary procedural, interlocutory or other preliminary issue could do", especially given "the drastic effects which … they are capable of having".[67]

37. Judge Schwebel recognised in *Military and Paramilitary Activities* the reality that States could therefore have a compelling interest in intervening on matters of the construction of a convention concerning jurisdiction, stating:

> "Thus the terms of Article 63 and the Rules which the Court has adopted in implementation of those terms both indicate that intervention under Article 63 in the jurisdictional phase of a case is permitted. The sense of Article 63 implies no less. Why should intervention at the jurisdictional phase of a case not be admitted? There are multilateral conventions that, in whole or in part, relate to jurisdictional questions. Their construction by the Court in a case between two States can affect the legal position of a third State under such conventions no less than it can affect their position under other conventions, or parts of other conventions, whose clauses are substantive rather than jurisdictional. Take, for example, the controversies that have come before the Court more than once over the force and effect of the General Act of 26 September 1928 for the Pacific Settlement of International Disputes. If one State maintains that that Act remains in force and is a basis of the Court's jurisdiction, and another contests those contentions, why should not a third State party to the Act be able to intervene under Article 63 at the jurisdictional stage of the proceedings to submit a statement of the construction of the relevant provisions of that Act for which it contends?"[68]

38. Judge Lauterpacht made a similar observation in *Norwegian Loans*. In this case, the Court made various findings as to the effect of an "automatic reservation" to a State's

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Tams, Karin Oellers-Frahm and Christian Tomuschat (Eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1763; Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume I, (OUP, 2013), p. 1031.

[66] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, p. 46, at pp. 56–57, paras. 18(a), 18(d).

[67] *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan)*, Judgment, ICJ Reports 1972, p. 46, at p. 57.

[68] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Dissenting Opinion of Judge Schwebel, at p. 235.

declaration under Article 36(2) of the Statute accepting the compulsory jurisdiction of the Court. Judge Lauterpacht recognised that the Court's ruling "has a bearing upon Declarations, similarly formulated, of a number of other States", whose amenability to the Court's jurisdiction could therefore be significantly affected in future cases. He stated that "[i]t would have been preferable if, in accordance with Article 63 of the Statute, the Governments which have made a Declaration in these terms had been given an opportunity to intervene".[69] This shows both that: (i) both the parties to a case and third States can have a strong interest in findings of the Court on jurisdictional matters; and (ii) Judge Lauterpacht, like Judge Schwebel, expressly contemplated the possibility of States intervening pursuant to Article 63 of the Statute on questions of construction pertaining to the Court's jurisdiction.

39. Further, contrary to the Russian Federation's suggestion, the practice of the Court clearly favours the conclusion that interventions filed prior to the resolution of preliminary objections by the respondent State are not for that reason inadmissible. The Russian Federation emphasises that the Court has not, to date, admitted an intervention under Article 63 at a preliminary objections phase of a case.[70] This must be seen in the context of the very small number of cases in which States have sought to exercise the right of intervention under Article 63 and the specific circumstances of each of those cases, rather than any principled position against the admissibility of interventions at such a stage. Each of the cases to which it refers are addressed in turn below.[71]

40. The Russian Federation refers[72] to the fact that El Salvador's intervention was deemed inadmissible during the jurisdictional phase of *Military and Paramilitary Activities* "inasmuch as it relates to the current phase of proceedings".[73] However, the Court's

[69] *Case of Certain Norwegian Loans (France v. Norway)*, Judgment of July 6th, 1957, ICJ Reports 1957, p. 9, Separate Opinion of Sir Hersch Lauterpacht, at pp. 63–64. Judge Lauterpacht reiterated this view at *Interhandel Case (interim measures of protection)*, Order of October 24th, 1957, ICJ Reports 1957, p. 105, Separate Opinion of Sir Hersch Lauterpacht, at p. 120.
[70] Written Observations, para. 50.
[71] The Russian Federation refers (at Written Observations, paras. 51(a) and 51(c)) to two cases in which Article 63 interventions were admitted in circumstances where the respondent State had not raised (and did not subsequently raise) preliminary objections: *Haya de la Torre Case (Colombia/Peru)*, Judgment of June 13th, 1951, ICJ Reports 1951, p. 71; *Case of the S.S. "Wimbledon"*, PCIJ, Series A, No. 1, 1923, p. 11. Given that no preliminary objections were raised in those cases, they do not assist in ascertaining whether interventions are admissible when preliminary objections are pending and are not addressed further here.
[72] Written Observations, para. 50(a).
[73] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, at p. 216, dispositif, para. (ii).

Order made clear that this finding was based on the specific circumstances and characteristics of El Salvador's intended intervention, rather than any broader conclusion that interventions under Article 63 were inherently inadmissible pending the resolution of preliminary objections.[74] The Court noted that El Salvador's declaration "addresse[d] itself also to matters, including the construction of conventions, which presuppose that the Court has jurisdiction to entertain the dispute between Nicaragua and the United States of America and that Nicaragua's Application … in respect of that dispute is admissible".[75] This indicates only that the Court did not consider it permissible to admit an intervention that was predicated on a finding that the dispute was within the Court's jurisdiction and admissible. Neither the order itself nor any of the separate or dissenting opinions which accompanied it (reflecting the views of a total of 9 members of the Court) suggested that interventions were necessarily inadmissible at the preliminary objections phase.[76] Specifically:

(a) Judge Nagendra Singh observed that El Salvador's Declaration "*in effect* appears directed to the merits of the case", which is what "weighed with the Court".[77] He was concerned that, if El Salvador were heard "at the present first phase", then "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".[78] The Court's order, he stated, was "directed towards placing things in the order and sequence in which they rightly belong".[79]

[74] Supporting this view, see Hugh Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Volume I, (OUP, 2013), p. 1031.
[75] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, at p. 216, para. 2.
[76] The Separate Opinion of Judge Bedjaoui addressed only the possibility of a hearing being held to determine the admissibility of El Salvador's intervention: *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Bedjaoui, at p. 222.
[77] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Nagendra Singh, at p. 218 (emphasis in original).
[78] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Nagendra Singh, at p. 218.
[79] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Nagendra Singh, at p. 218.

(b) Judges Ruda, Mosler, Ago, Jennings and de Lacharrière stated that they considered El Salvador's intervention to be inadmissible:

> "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".[80]

Thus, for these Judges, the defect in the declaration which rendered it inadmissible was that it did not identify either provisions of the convention which fell to be determined at the jurisdictional phase, or the construction of those provisions which El Salvador wished to advance.

(c) Judge Oda explained that El Salvador's intervention "appeared mainly directed to the merits of the case, was vague and did not appear to satisfy the requirements of Article 82, paragraph 2 (b) and (c), of the Rules of Court for an intervention at the present stage".[81] He proceeded to state that, "[h]ad El Salvador's initial Declaration been properly formulated, … El Salvador's Declaration might well have been the first case of intervention under Article 63 of the Statute to be considered by the Court at a jurisdictional phase of a case".[82] Thus, far from ruling out the possibility of interventions under Article 63 being admitted at the preliminary objections phase of a case, Judge Oda expressly acknowledged such a possibility, provided that a declaration complies with the relevant formalities and admissibility requirements.

[80] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, at p. 219, para. 3.
[81] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Oda, at p. 220, para. 2.
[82] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Oda, at p. 221, para. 5.

(d) As set out above, Judge Schwebel expressed the view that there was no reason that interventions could not be admitted at the preliminary objections phase of a case.[83]

41. Thus, the Court's decision not to allow El Salvador's intervention was based on the circumstances of the case before it and not any view that interventions under Article 63 could never be admitted at the preliminary objections phase. Further, none of the grounds for dismissing El Salvador's intervention apply to the United Kingdom's Declaration:

(a) As addressed further in **Section IV** below, the United Kingdom's Declaration expressly differentiates matters of construction pertaining to the Court's jurisdiction (which it seeks to address at the preliminary objections phase)[84] from matters of construction pertaining to the merits of the case.[85] Given that it has now been determined that there will be a preliminary objections phase to these proceedings (which was not the case when the United Kingdom filed the Declaration on 1 August 2022), the United Kingdom has already undertaken not to address any matters in the latter category unless and until the Court finds that the claims are within its jurisdiction and admissible.[86]

(b) Unlike El Salvador, the United Kingdom's Declaration complies with all the formal requirements of an Article 63 intervention, including by identifying the convention the construction of which is in question (namely, the Genocide Convention),[87] setting out the basis on which the United Kingdom is a party to the Genocide Convention,[88] identifying the provisions of the Genocide Convention the construction of which it considers to be in question,[89] stating

[83] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Dissenting Opinion of Judge Schwebel, at pp. 234–236.
[84] Declaration, paras. 17–20, 31–47.
[85] Declaration, paras. 21–27, 48–65.
[86] Declaration, para. 16.
[87] Declaration, para. 13.
[88] Declaration, para. 15.
[89] Declaration, paras. 17–27.

the construction of those terms for which it contends,[90] and enclosing documents in support.[91]

42. The Russian Federation quotes several passages from three separate opinions at the merits phase of *Military and Paramilitary Activities*, but none of them supports its contention that Article 63 interventions are necessarily inadmissible at the preliminary objections phase of a case.

(a) Judge Lachs merely paraphrased the Court's earlier finding that there had been "no adequate reason" to allow El Salvador's intervention during the jurisdictional phase (the reasons for that earlier finding being set out above in the present observations), while expressing some regret at the fact that El Salvador had not been granted a hearing to defend the admissibility of its application[92] (a regret which he was not alone in expressing[93]).

(b) Similarly, Judge Sette-Camara referred to, without elaborating on, the Court's previous finding that El Salvador's intervention had been "untimely".[94] As stated above, the basis for this finding was that El Salvador's intervention focused on matters pertaining to the merits and did not either identify relevant treaty provisions relevant to jurisdictional issues or proffer particular constructions of any such provisions.

(c) The same is true of Judge Ni's reference to the Court having previously determined that El Salvador's intervention was "premature".[95] Again, this was simply a reference to El Salvador's specific intervention being inappropriate for determination at the jurisdictional phase (for the reasons set out above), rather

[90] Declaration, paras. 28–65.
[91] Declaration, para. 66 and Annexes A–B.
[92] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, Dissenting Opinion of Judge Oda, at p. 244, para. 66, Dissenting Opinion of Judge Schwebel, p. 313, paras. 108–110.
[93] See also *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, Separate Opinion of Judge Lachs, at p. 171.
[94] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, Separate Opinion of Judge Sette-Camara, at p. 195.
[95] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, ICJ Reports 1986, p. 14, Separate Opinion of Judge Ni, at p. 204.

than any broader suggestion that any intervention filed before preliminary objections are resolved is necessarily premature.

43. The Russian Federation also refers to the dismissal of Fiji's attempted intervention under Article 62 in the *Nuclear Tests* cases between New Zealand and Australia (as applicants) and France (as respondent).[96] In each of those cases, consideration of Fiji's intervention was initially deferred to the merits phase of the case following resolution of France's preliminary objections, given that the intervention did not involve questions of jurisdiction and therefore "by its very nature presuppose[d] that the Court ha[d] jurisdiction" over the dispute and that the dispute was admissible.[97] Ultimately, the applications to intervene in each case were never resolved because, France's preliminary objections having been upheld and the cases accordingly dismissed, the interventions equally fell away as there was no longer "any proceedings before the Court to which the Application for permission to intervene could relate".[98] As Professors Miron and Chinkin have written, this case is authority for the proposition "that an intervention based on a legal interest relating to the merits shall be considered as premature at the jurisdictional stage", but "should not be interpreted as rejecting at large the possibility of intervention on jurisdictional issues at the jurisdictional stage".[99]

44. The approach of deferring Fiji's intervention to the merits phase was appropriate in circumstances where Fiji did not seek to intervene on any issues of construction relevant to jurisdictional issues. To that extent, Fiji's intervention is distinguishable from the Declaration of the United Kingdom in the present proceedings, which does in part address matters of construction relevant to the Court's jurisdiction.[100] As the United Kingdom acknowledged in its Declaration, to the extent that the Declaration addresses matters of construction relevant to the merits of the case, those will be addressed by the United Kingdom only during any merits phase, following resolution

[96] Written Observations, para. 50(b).
[97] *Nuclear Tests (Australia v. France)*, Application to Intervene, Order of 12 July 1973, ICJ Reports 1973, p. 320, at p. 321, para. 1; *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 12 July 1973, ICJ Reports 1973, p. 324, at p. 325, para. 1.
[98] *Nuclear Tests (Australia v. France)*, Application to Intervene, Order of 20 December 1974, ICJ Reports 1974, p. 530, at p. 530, para. 2; *Nuclear Tests (New Zealand v. France)*, Application to Intervene, Order of 20 December 1974, ICJ Reports 1974, p. 535, at p. 535, para. 2.
[99] Alina Miron and Christine Chinkin, "Article 62" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (Eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1695.
[100] Declaration, paras. 17–20, 31–47.

of the Russian Federation's preliminary objections.[101] Thus, admitting the Declaration, at this stage exclusively in relation to the jurisdictional matters it addresses, does not presuppose that the Court has jurisdiction over the claim or that the claim will be found to be admissible.

45. The Russian Federation refers also to the declarations of intervention filed pursuant to Article 63 by Samoa, the Solomon Islands, the Marshall Islands and the Federated States of Micronesia in *Nuclear Tests (Request for Examination)*.[102] Like Fiji's interventions in the *Nuclear Tests* cases, none of these interventions dealt with jurisdictional issues, and all of them were dismissed after the Court determined that it lacked jurisdiction over the main dispute. Specifically:

(a) New Zealand had invoked, as the basis for the Court's jurisdiction, paragraph 63 of the Court's previous judgment in *Nuclear Tests*.[103]

(b) Each of the States seeking to intervene under Article 63 did so on the basis that they were States parties to the Convention for the Protection of Natural Resources and Environment of the South Pacific Ocean.[104] None of the declarations of intervention advanced any argument relevant to the question of jurisdiction, which New Zealand had not contended arose under this Convention.

(c) France raised a preliminary objection as to the Court's jurisdiction based on its previous judgment.[105]

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[101] Declaration, para. 16.
[102] Written Observations, para. 50(c). Australia also sought to make an intervention under Article 62 of the Statute, and was denied on the same grounds as the States seeking to intervene under Article 63.
[103] *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*, ICJ Reports 1995, p. 288, at p. 289, para. 3.
[104] See, e.g., *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*, Application for Permission to Intervene under Article 62 of the Statute – Declaration of Intervention under Article 63 of the Statute submitted by the Government of the Solomon Islands, 24 August 1995, paras. 1(2), 41(b). The declarations of intervention under Article 63 by each of the Marshall Islands, the Federated States of Micronesia and Samoa were materially identical.
[105] *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*, ICJ Reports 1995, p. 288, at p. 292, para. 13.

(d) Following a hearing on France's preliminary objection, the Court determined that it lacked jurisdiction to hear New Zealand's request and thus dismissed the claim.[106]

(e) As a result, the Court dismissed the interventions which had previously been filed.[107] This was, as in *Nuclear Tests*, the inevitable consequence of the Court's finding that the case would not proceed to a merits phase, given that the interventions in question solely concerned merits issues.

46. The present case is distinguishable from that situation for the same reasons as are set out in paragraph 44 above.

47. The fourth case invoked by the Russian Federation,[108] *Whaling in the Antarctic*, further undermines its position. In that case, Japan objected to the Court's jurisdiction, but did so in its Counter-Memorial rather than in a separate pleading, with the consequence that the Court's jurisdiction was considered alongside the merits in a single phase of proceedings.[109] After Japan had filed its Counter-Memorial, New Zealand filed a declaration of intervention.[110] Despite the fact that Japan's objection to the Court's jurisdiction had not been resolved, New Zealand's declaration was admitted unconditionally.[111] This demonstrates that it is entirely possible for interventions pursuant to Article 63 to be admitted prior to the resolution of jurisdictional objections.

48. This conclusion is reinforced by the Court's practice in relation to notifying States, in accordance with Article 63(1) of the Statute, that the construction of a convention to which they are parties is in question in a case. Its practice in this regard makes clear

[106] *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*, ICJ Reports 1995, p. 288, at pp. 306–307, paras. 65, 68(1)–(2).
[107] *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*, ICJ Reports 1995, p. 288, at pp. 306–307, paras. 67–68(3).
[108] Written Observations, para. 51(b).
[109] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226, at pp. 235, 239, paras. 5, 25.
[110] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment, ICJ Reports 2014, p. 226, at pp. 235, para. 7.
[111] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, ICJ Reports 2013, p. 3, at p. 10, para. 23(1).

that the Court does not consider it contrary to the Statute or the Rules for States to intervene under Article 63 at the preliminary objections phase of a case.

49. In several cases, the Registrar (acting on directions of the Court under Article 43(1) of the Rules) has issued such notifications to States where the convention to which they are parties is relevant to the case in question *only* in relation to jurisdictional issues. This has repeatedly occurred in relation to, for example, cases where an applicant State asserts jurisdiction based on the American Treaty on Pacific Settlement ("the Pact of Bogotá"). The sole focus of this convention is to set out procedures which the States parties agree to use for the peaceful resolution of their disputes. Article XXXI confers jurisdiction on the Court in respect of disputes submitted by a State party. In numerous cases, the Registry has provided notifications to States parties of the Pact of Bogotá pursuant to Article 63(1) of the Statute.[112] The only conceivable basis for an intervention relating to the Pact of Bogotá would be one relating to the Court's jurisdiction under that convention.

50. In *Obligation to Negotiate Access to the Pacific Ocean*, the Registry notified not only States parties but also, in accordance with Article 34(3) of the Statute and Article 69(3) of the Rules, notified the Organization of American States that the construction of the Pact of Bogotá was in question in the case and asked whether it intended to furnish observations within the meaning of Article 69(3). According to the Court's judgment on preliminary objections, the Registry's communication stated that, "in view of the fact that the current phase of the proceedings related to the question of jurisdiction, any written observations should be limited to the construction of the provisions of the Pact of Bogotá concerning that question".[113] As has been observed, "If, under Article 43 of

[112] See, e.g., *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, ICJ Reports 1988, p. 69, at p. 71, para. 5; *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua v. Honduras)*, Judgment, ICJ Reports 2007, p. 659, at p. 664, para. 3; *Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, ICJ Reports 2009, p. 213, at p. 219, para. 3; *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2007, p. 832, at pp. 835–837, para. 3; *Maritime Dispute (Peru v. Chile)*, Judgment, ICJ Reports 2014, p. 3, at p. 10, para. 3; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 3, at p. 9, para. 6; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, ICJ Reports 2016, p. 100, at p. 107, para. 6; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Judgment, ICJ Reports 2018, p. 507, at p. 515, para. 7.

[113] *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, ICJ Reports 2015, p. 592, at p. 597, para. 7.

the Rules, an international organization is authorized to file written observations on jurisdictional issues, there is little reason not to allow the States parties to the convention in question to do the same."[114]

51. The Pact of Bogotá is not the only convention which has given rise to this practice. In the *Nuclear Tests* case between Australia and France, the Registry sent a notification to States parties to the General Act for the Pacific Settlement of International Disputes, which was relevant to Australia's claim only as the alleged basis for the Court's jurisdiction.[115]

52. In the context of notifications pursuant to Article 63(1), the Court has also expressly drawn States' attention to the fact that the construction of a convention to which they are parties is in question in relation to both jurisdictional and merits matters. By way of example, in the present case, the Registry's notification in accordance with Article 63(1) to States parties to the Genocide Convention stated as follows:

> "In the above-mentioned Application, the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the 'Genocide Convention') is invoked both as a basis of the Court's jurisdiction and as a substantive basis of the Applicant's claims on the merits. In particular, the Applicant seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of this instrument will be in question in the case."[116]

53. This notification encompasses both issues of construction relevant to the Court's jurisdiction and those relevant to the substantive claim, with the clear implication that all these issues of construction are amenable to intervention at the election of a State party to the Genocide Convention. This is not isolated practice on the part of the Court. Similarly, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, in its notification pursuant to Article 63(1) of the Statute, the Registry similarly referred to the fact that The Gambia sought

[114] Alina Miron and Christine Chinkin, "Article 63" in Andreas Zimmermann, Christian J. Tams, Karin Oellers-Frahm and Christian Tomuschat (Eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd Ed., (OUP, 2019), p. 1765.
[115] *Nuclear Tests (Australia v. France)*, Judgment, ICJ Reports 1974, p. 253, at p. 255, para. 8.
[116] Letter from the Registrar of the International Court of Justice to the Ambassador of the United Kingdom to the Netherlands, 30 March 2022: see Declaration, Annex A.

to found the Court's jurisdiction on the compromissory clause of the Genocide Convention, and this supported its conclusion that "[i]t therefore appears that the construction of this instrument will be in question in the case".[117] The Registry's notifications in cases brought pursuant to the compromissory clause in the Convention on the Elimination of All Forms of Racial Discrimination are equivalent.[118] This practice is also of very long standing. As long ago as 1936, the Registry, acting pursuant to the predecessor of what is now Article 63 of the Statute, notified Australia, as a State party to the "Agreement II signed at Paris on April 28th, 1930"[119] and the "Agreement III signed at Paris on the same date",[120] of the fact that Yugoslavia had filed a preliminary objection which "concern[ed] the interpretation of Agreements II and III of Paris". The Registrar wrote that, given this fact, it was "his duty, under Article 63 of the Statute … to bring it to Your Excellency's Notice".[121] Again, the only conceivable reason that such a notification would have been made is that the Registry considered that an intervention would be admissible if it related to the interpretation of those conventions in relation to Yugoslavia's preliminary objection. It is especially striking that this notification was made after the Registry had already provided a notification to Australia under Article 63 when Hungary had filed its Application. The Registry considered it necessary to provide an additional notification relating specifically to the fact that the conventions would fall to be construed during the jurisdictional phase.

54. It is clear from the foregoing that no support can be found in the text of the Statute or the Rules, in the practice of the Court, or as a matter of principle, for the Russian Federation's claim that the Declaration is necessarily inadmissible because the Russian Federation has made preliminary objections that have not been resolved.

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[117] Letter from the Registrar of the International Court of Justice to the Ambassador of the United Kingdom to the Netherlands, 24 January 2020.
[118] E.g., Letter from the Registrar of the International Court of Justice to the Ambassador of the United Kingdom to the Netherlands, 13 December 2021 (relating to *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* and recording that "[t]his Convention is also invoked as a basis of jurisdiction").
[119] This convention's full title was Agreement No. II on the Settlement of Questions Relating to the Agrarian Reforms and Mixed Arbitral Tribunals.
[120] This convention's full title was Agreement No. III Concerning the Organisation and Working of an Agrarian Fund Entitled "Fund A": Creation and Working of the Agrarian Fund.
[121] *The Pajzs, Csáky, Esterházy case*, Correspondence, PCIJ Series C, No. 80, p. 1368, at p. 1382. See also *Appeals from certain judgments of the Hungaro-Czechoslovak mixed arbitral tribunal*, PCIJ Series C, No. 68, Correspondence, p. 240, at pp. 264–265.

B. The existence of the dispute, its subject matter, and the provisions of the Genocide Convention that it concerns

55. The second aspect of the Russian Federation's third objection to the Declaration is that, given that the case is only at the preliminary objections phase, the Court has not yet ascertained whether a dispute exists, and, if it does, the scope of the dispute or the terms of the Genocide Convention which will fall to be construed at the merits phase. In the Russian Federation's contention, the consequence of this fact is that any declaration of intervention must be deemed inadmissible at the present stage.[122]

56. This argument, however, proceeds on the false premise that an intervention is permissible only if it relates to a matter of construction that is in dispute between the parties in the merits phase of the case. That is incorrect. In fact, all that Article 63 of the Statute requires is that the construction of the convention is "in question" in the case. As set out above,[123] the right to intervene arises "[w]henever" this is the case, not only at the merits phase of proceedings.

57. The Russian Federation emphasises that "a State can intervene in a case only if it seeks to interpret a provision of the convention over which the Parties express diverging views as to their interpretation in that case".[124] That proposition, taken alone, may be uncontroversial. Article 82(2)(b) makes clear that a State seeking to intervene under Article 63 of the Statute must identify "the particular provisions of the convention the construction of which it considers to be in question". A State may not intervene on a point of construction that is extraneous to the case before the Court and is not "in question" between the parties. This is the same proposition that the Court confirmed in a passage of *Haya de la Torre* cited by the Russian Federation[125] — namely, that an intervention must "actually relate to the subject-matter of the pending proceedings".[126] It was this finding which led to the inclusion of Article 82(2) in the 1978 version of the Rules (which has not since been amended), the purpose of which was "to ensure that

[122] Written Observations, Section II(C)(ii).
[123] See para. 34(a) above.
[124] Written Observations, para. 55.
[125] Written Observations, paras. 57–58.
[126] *Haya de la Torre Case (Colombia/Peru)*, Judgment of June 13th, 1951, ICJ Reports 1951, p. 71, at p. 76.

[an intervention] would remain within the bounds of Article 63 of the Statute and concern only the interpretation of the convention in question".[127]

58. It does not follow, however, that a point of construction will be considered to be "in question" in a case for the purposes of Article 63 of the Statute and Article 82(2)(b) of the Rules only if it is a matter of construction going to the merits of the case. Rather, points of treaty interpretation may equally arise in relation to jurisdictional issues. Provided that the point of construction is "in question" in the sense that it is the subject of disagreement between the parties to the case, then States parties to the relevant convention have a right of intervention to contend for their construction of the relevant provision(s). Consistently with this approach, when the Court referred in *Haya de la Torre* to the "subject-matter of the pending proceedings", this was not a reference exclusively to the substance of the dispute which would be resolved at the merits phase. The relevant "subject-matter" equally encompassed points of disagreement at the jurisdictional phase, as reflected in the language subsequently adopted in Article 82(2)(b).

59. It is on this point that the Russian Federation falls into error. It states that, "unless the Court has examined the submissions of the Parties and confirmed that the Court has jurisdiction to hear the applicant's claims and that such claims are admissible, it cannot be certain if there is 'a dispute' or 'a question' regarding the construction of a convention', or what provisions of the Convention are 'the subject-matter' of a dispute or are 'in question', and whether 'the question' relates to the interpretation of that provision of a convention".[128] It is correct that the Court's ruling on preliminary objections will determine the existence and subject matter of a dispute that will fall to be resolved at the subsequent merits phase. That does not, however, preclude the possibility that there will *also* be points of construction that fall to be resolved within the preliminary objections phase. Any such points of construction also constitute the

[127] Shabtai Rosenne, *Intervention in the International Court of Justice* (Martinus Nijhoff, 1993), p. 75.
[128] Written Observations, para. 64. See also para. 65 ("if the respondent State files preliminary objections … the Court will first have to examine the submissions of the original parties and establish (*i*) whether there is a dispute between such original parties, (*ii*) what the real natural of such dispute, if any, is; and (*iii*) what provisions of the relevant convention, if any, are in question").

subject matter of the case in the relevant sense and are matters "in question" for the purposes of Article 63 of the Statute and Article 82(2) of the Rules.

60. As noted above, the United Kingdom has not yet had access to the preliminary objections filed by the Russian Federation. However, Ukraine's observations on the admissibility of the Declaration indicates that Russia's preliminary objections invite (and require) the Court to interpret Articles I, IV and IX of the Genocide Convention.[129] Thus, based on its own preliminary objections, it is unsustainable for the Russian Federation now to contend that, unless and until the case proceeds to a merits phase, the Court "cannot give a binding interpretation of any provision of the Convention in line with Article 63 of the Statute, either for the original Parties or for the intervening States".[130] Based on Ukraine's description of the Russian Federation's objections, the Court is already being invited by the Russian Federation to give binding rulings on (at least) Articles I, IV and IX of the Genocide Convention, and the construction of these provisions will be "in question" for the purposes of Article 63 during the jurisdictional phase.

61. The Russian Federation refers to Article 40(1) of the Statute and Article 38 of the Rules, as well as judgments which explain how the Court will ascertain the subject of a dispute before it by reference to the parties' pleadings.[131] The relevance of these references is not clear. The provisions and judgments cited all relate to the question of whether a given substantive issue falls within the scope of the dispute of which the Court has been properly seized. This has no bearing on the scope of Article 63, which requires only that an issue of construction be "in question" in the case, without distinction as to whether the issue relates to jurisdiction or the merits.

62. Accordingly, there is no basis for finding the Declaration to be inadmissible on the grounds that the Court has not yet determined the existence or scope of any dispute which may fall to be determined at a future merits phase of this case. Even at the jurisdictional phase, on the Russian Federation's own case, matters of construction of the Genocide Convention will be resolved by the Court. As those matters will be "in

[129] *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 the United Kingdom, 17 October 2022, para. 7.
[130] Written Observations, para. 67.
[131] Written Observations, paras. 61–62.

question" in the case, States parties to the Genocide Convention such as the United Kingdom have a right to intervene in respect of them.

IV. THE RUSSIAN FEDERATION'S FOURTH OBJECTION: ALLEGED PRE-JUDGMENT AS TO THE COURT'S JURISDICTION AND THE ADMISSIBILITY OF UKRAINE'S CLAIM

63. The Russian Federation's fourth objection is that admission of the Application at this stage "would essentially prejudge the preliminary objections that the Russian Federation raised within a separate phase of the proceedings, and the outcome of such phase overall".[132] Like its third objection, this objection has two aspects. The first is that, because the Declaration contains submissions relevant to points of construction that will arise at the merits stage (if there is one), it is inadmissible in its entirety.[133] This argument is addressed in **sub-section A** below. The second is that the Declaration "effectively presuppose[s] 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".[134] This argument is addressed in **sub-section B** below.

A. The Declaration's inclusion of points of construction relating to the merits of the case

64. The Russian Federation takes the position that, if a declaration of intervention includes any matters pertaining to the merits of a case, it is automatically inadmissible in its entirety. It states:

> "[E]ven if a declaration contains arguments ostensibly related to jurisdiction, the presence of arguments related to the merits or presupposing that the Court has jurisdiction makes it inadmissible at the jurisdictional phase of proceedings."[135]

65. When the United Kingdom filed its Declaration on 1 August 2022, the Russian Federation had not yet filed preliminary objections.[136] On that basis, the United Kingdom included in its Declaration matters of construction relevant, respectively, to

[132] Written Observations, para. 82.
[133] Written Observations, paras. 69–80.
[134] Written Observations, para. 81.
[135] Written Observations, para. 76.
[136] The Court has indicated that the Russian Federation filed preliminary objections on 3 October 2022: *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 7 October 2022, at p. 2.

the Court's jurisdiction and to the merits of Ukraine's claims. It made explicit that, if there were to be a discrete preliminary objections phase in the proceeding, it would not raise any arguments regarding the merits at that stage. Specifically, it stated in Section 4 of its Declaration (which identified the provisions of the Genocide Convention which the United Kingdom considers to be in question) the following:

> "This part of the Declaration of intervention is therefore divided into two sections: **section A** on provisions of the Convention the construction of which is relevant to jurisdictional issues; and **section B** on provisions of the Convention the construction of which is relevant to the merits. If the Court proceeds to examine questions of jurisdiction together with questions of the merits, the United Kingdom will accordingly make observations in relation to the matters addressed in sections A and B together. If there were to be a separate phase of the proceedings dedicated to the Court's jurisdiction, the United Kingdom would in that phase make observations only in relation to those matters addressed in section A. In a subsequent phase concerning the merits, the United Kingdom would make observations in relation to those matters addressed in section B."[137]

66. The Declaration similarly distinguished jurisdictional from merits issues in Section 5 (which set out the construction of the relevant provisions for which the United Kingdom contends) and specified that, in any distinct jurisdictional phase, arguments relating to the merits would not be raised.[138]

67. In structuring its Declaration in this way, the United Kingdom expressly did not presuppose the Court's jurisdiction or the admissibility of Ukraine's Application. It clearly identified matters of construction pertaining to jurisdiction and separated them from matters going to the merits. The Declaration made clear that the United Kingdom will not address arguments pertaining to the merits unless and until the Court determines that it has jurisdiction over the claim and that the claim is admissible.

68. In the face of this clear delineation and articulation of issues, the Russian Federation seeks to liken the United Kingdom's Declaration to that of El Salvador in *Military and Paramilitary Activities*, which it describes as a "hybrid declaration of intervention (concerning both jurisdiction and merits)" which was automatically inadmissible at the jurisdictional phase because of its inclusion of merits issues.[139] However, for reasons

[137] Declaration, para. 16.
[138] Declaration, para. 30.
[139] Written Observations, para. 76.

already explained in relation to the Russian Federation's third objection,[140] the comparison is inapposite. The reason that El Salvador's intervention was deemed inadmissible during the jurisdictional phase was that the intervention was addressed to the merits of the case.[141] Although El Salvador had purported also to address issues relevant to jurisdiction, the reality was that it had not identified specific treaty provisions the construction of which it considered to be in issue, and nor had it advanced any contentions as to the correct construction of any such provisions.[142] The United Kingdom's Declaration, in contrast, fulfils both these requirements. Further, it was considered "inevitabl[e]" that, if the intervention were permitted, El Salvador would present merits issues at the jurisdictional phase.[143] Again, the United Kingdom's position is distinguishable because it has undertaken not to make submissions on any questions of construction pertaining to the merits at the preliminary objections phase.

69. Thus, the Court's treatment of El Salvador's declaration of intervention does not support the generalised proposition advanced by the Russian Federation[144] that any declaration of intervention which encompasses merits issues is automatically inadmissible in its entirety if there is a preliminary objections phase. In the specific circumstances of the United Kingdom's Declaration, it is entirely possible, and indeed foreseen in the Declaration, for it to be declared admissible on the basis that the matters of construction pertaining to the Court's jurisdiction that it specifically identifies as such would be addressed during the preliminary objections phase, whereas the remaining matters would be addressed only if, when and to the extent that the Court finds that it has jurisdiction and that Ukraine's claims are admissible.

70. The Russian Federation also repeats its reference to Fiji's attempted intervention in the *Nuclear Tests* cases.[145] However, it acknowledges that, unlike the United Kingdom, Fiji

[140] See paras. 40–42 above.
[141] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, at p. 216, para. 2.
[142] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and de Lacharrière, at p. 219, para. 3, Separate Opinion of Judge Oda, at p. 220, para. 2.
[143] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, ICJ Reports 1984, p. 215, Separate Opinion of Judge Nagendra Singh, at p. 218.
[144] Written Observations, paras. 76–77.
[145] Written Observations, paras. 75–76.

filed a declaration "devoted exclusively to the merits of the case".[146] As set out above,[147] the grounds for deferring consideration of Fiji's intervention simply do not arise in this case, where the United Kingdom has identified provisions of the Genocide Convention the construction of which it considers will be in issue at the jurisdictional phase and has set out the construction of each such provision for which it contends.[148]

71. Accordingly, the United Kingdom's inclusion of separable sections of its Declaration which focused on points of construction relevant to the merits of the case does not render the entirety of its intervention inadmissible.

B. The alleged presupposition of a dispute, the Court's jurisdiction, and the admissibility of Ukraine's Application

72. The closely related second aspect of the Russian Federation's fourth preliminary objection is that, if the Court were to admit the Declaration, this would "essentially prejudge the preliminary objections" raised by the Russian Federation.[149]

73. Paragraphs 64–69 above provide a complete answer to this argument. They make clear that, at the preliminary objections phase, the United Kingdom will not advance any argument regarding the merits of the case. Admitting the Declaration on this basis creates no risk of prejudgment of the merits.

74. The Russian Federation seeks to bolster its argument with reference to the United Kingdom's contention that "Article IX of the Genocide Convention does grant the Court jurisdiction to make a declaration of an applicant State's compliance with its obligations under the [Genocide] Convention, provided that this is a matter in dispute between the parties to the case".[150] This is the only part of the Declaration said by the Russian Federation to impermissibly prejudge the preliminary objections raised in this case. The Russian Federation claims that this passage "effectively presuppose[s] that there is a dispute between the Parties under the Genocide Convention and that the Court

[146] Written Observations, para. 75.
[147] See paras. 43–44 above.
[148] Declaration, paras. 17–20, 31–47.
[149] Written Observations, para. 82.
[150] Written Observations, para. 81(e), citing Declaration, para. 32.

has jurisdiction to entertain the dispute and/or that the Application of Ukraine is admissible".[151] That is not an available reading of the passage in question:

(a) This passage does not refer to the parties to this case, Ukraine and the Russian Federation, at all. It is strictly framed as a matter of construction without reference to the facts of the present case.

(b) It also, on its plain terms, does not presuppose the existence of a dispute, whether between these parties or any other States. To the contrary, it is expressly premised on the Court reaching a separate determination as to the existence of a dispute ("provided that this is a matter in dispute between the parties to the case"). The United Kingdom's contention is that in a case in which the Court determines that a dispute exists as to whether one State has complied with its obligations under the Genocide Convention, then as a matter of construction Article IX confers on the Court jurisdiction over a claim commenced by a State seeking a declaration that it has complied with the Genocide Convention. Whether or not there is in fact such a dispute is not a matter on which the United Kingdom could or does as an intervener express a view.

(c) Further, the quoted passage does not "presuppose … that the Court has jurisdiction".[152] All that it contends is that, if the Court were to find that there is a dispute concerning one State's compliance with the Genocide Convention, it would not (as a matter of construction of Article IX) be precluded from exercising jurisdiction over that dispute only on the basis that the State accused of breaching its obligations is the applicant State.[153]

(d) There is no conceivable basis for alleging that this passage presupposes that Ukraine's Application is admissible, and the Russian Federation has not identified any.

[151] Written Observations, para. 81.
[152] Contrary to Written Observations, para. 81.
[153] Declaration, paras. 32–34.

75. Accordingly, with its fourth objection, Russia has again failed to establish that the Declaration is inadmissible.

V. THE RUSSIAN FEDERATION'S FIFTH OBJECTION: ISSUES ALLEGEDLY UNRELATED TO THE CONSTRUCTION OF THE GENOCIDE CONVENTION

76. The Russian Federation's final objection is that the Declaration refers to "issues that are unrelated to the construction of the provisions of the [Genocide] Convention" and thus must be declared inadmissible.[154]

77. As a matter of principle, the United Kingdom agrees with the Russian Federation that an intervention under Article 63 will be admissible only to the extent that it deals with matters of construction of the relevant convention (in this case, the Genocide Convention), and will be inadmissible to the extent that it trespasses beyond issues of construction. However, it is simply incorrect that the Declaration deals with anything other than issues of construction of the Genocide Convention — let alone that it "almost exclusively" deals with issues other than construction.[155]

78. The Russian Federation asserts that the Declaration deals with four issues that are not matters of construction of the Genocide Convention. Every one of them is a mischaracterisation.

79. First, it contends that the Declaration addresses "the existence or otherwise of a dispute between the Russian Federation and Ukraine concerning the [Genocide] Convention".[156] However, the relevant paragraphs of the Declaration do not even refer to Ukraine or the Russian Federation. Instead, they set out how the term "dispute" in Article IX of the Genocide Convention should be construed, which the United Kingdom contends should be in accordance with "the wide meaning given to that term generally in international law" and "objectively", rather than based on one State's unilateral denial that a dispute exists.[157] Contrary to the Russian Federation's suggestion, the United Kingdom has confined itself to this point of construction and has not trespassed

[154] Written Observations, paras. 85, 93.
[155] As contended at Written Observations, para. 85(j).
[156] Written Observations, para. 85(j), citing Declaration, paras. 44–47.
[157] Declaration, paras. 46–47.

into any "evidentiary question … which is relevant only for the parties between which a dispute may (or may not) exist".[158]

80. Secondly, the Russian Federation wrongly suggests that the Declaration concerns "whether there is evidence that genocide has occurred or may occur in Ukraine".[159] It goes so far as to suggest that the Declaration intrudes into a "fact-intensive assessment" of this question.[160] Again, this suggestion is simply incorrect. The relevant paragraphs of the Declaration cited by Russia do not refer to the situation in Ukraine or the Russian Federation or any conduct by either State. Instead, they set out contentions as to matters of construction of Articles I and II of the Genocide Convention.

81. Thirdly, the Russian Federation complains that the Declaration addresses "the doctrine of abuse of rights",[161] which it claims could only constitute a general principle of law under Article 38(1)(c) of the Statute and thus "does not concern the construction of the [Genocide] Convention".[162] However, the Declaration does not address any doctrine of "abuse of rights". Instead, it makes the observation that "[i]t is inconsistent with the principle of good faith for a Contracting Party to carry out an assessment of the occurrence or risk of genocide abusively" and proceeds to give examples of conduct that would qualify as abusive under the Genocide Convention.[163] These submissions concern matters of construction of the Genocide Convention, relevant to the obligation to perform the Convention in good faith.[164]

82. Fourth, the Russian Federation claims that the Declaration concerns "the legality of the use of force, war crimes, [and] crimes against humanity",[165] which it claims amounts to an "impermissible incursion[] into the interpretation or application of other rules of international law that are distinct from the treaty in question and derive from other sources".[166] However, the paragraphs of the Declaration to which it refers are devoted exclusively to the construction of the "undertak[ing] to prevent" genocide under Article

[158] Written Observations, para. 86.
[159] Written Observations, para. 85(j), citing Declaration, paras. 48–58.
[160] Written Observations, para. 87.
[161] Written Observations, para. 85(j), citing Declaration, paras. 53–58.
[162] Written Observations, para. 88.
[163] Declaration, para. 54.
[164] 1969 Vienna Convention on the Law of Treaties, Article 26, cited in Declaration, para. 54.
[165] Written Observations, para. 85(j), citing Declaration, paras. 59–62.
[166] Written Observations, para. 89.

I of the Genocide Convention, and specifically the contention that this provision "cannot be construed as being capable of countenancing aggression, violations of international humanitarian law or crimes against humanity" in light of a substantial list of textual and contextual indicators within the Convention.[167] Again, it is a mischaracterisation to suggest that the Declaration ventures beyond matters of construction of the Genocide Convention.

83. There is also no substance to the Russian Federation's contention that admitting the Declaration "would effectively be prejudging the central question of the scope of [the Court's] jurisdiction *ratione materiae* in this case by accepting that those other rules are somehow relevant to the 'construction' of the Convention for purposes of Article 63 of the Statute".[168] To the extent that the United Kingdom addresses issues of construction of the Genocide Convention to which aggression, violations of international humanitarian law and crimes against humanity may be relevant, it is only in the part of its Declaration explicitly dedicated to "merits" issues,[169] which the United Kingdom has specified will be addressed only (if at all) after the conclusion of the preliminary objections phase.[170]

84. Accordingly, the Russian Federation's claim that the Declaration is inadmissible as it extends to matters beyond the construction of the Genocide Convention should be rejected. Equally, its alternative contention that the Declaration should be declared inadmissible at the jurisdictional phase, or its consideration postponed until the Court has resolved the scope of its jurisdiction *ratione materiae*, should be dismissed. As set out above, the United Kingdom has clearly identified the parts of its Declaration which relate to matters of construction going, respectively, to jurisdictional issues and to the merits of the case, and will address only the former at the preliminary objections phase.

VI. SUBMISSIONS

85. In light of the foregoing and for the reasons given in its Declaration of intervention, the United Kingdom respectfully requests that the Court recognise the admissibility of the United Kingdom's Declaration of intervention and that the United Kingdom is availing

[167] Declaration, para. 60.
[168] Written Observations, para. 92.
[169] Declaration, paras. 59–62.
[170] Declaration, paras. 16, 30.

itself of its right under Article 63, paragraph 2, of the Statute of the Court to intervene in these proceedings, on the basis that during the preliminary objections phase of the case the United Kingdom shall address only those matters identified at paragraphs 17–20 and 31–47 of its Declaration, being those matters of construction of the Genocide Convention concerning the jurisdiction of the Court.

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