

INTERNATIONAL COURT OF JUSTICE

**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 AUSTRALIA**

15 November 2022

1. On 30 September 2022, Australia filed a Declaration of Intervention (the “Declaration”) pursuant to Article 63 of the Statute of the Court. On the same day, the Registrar of the Court, acting in accordance with Article 83 of the Rules of Court, forwarded a certified copy of the Declaration to the Agent of Ukraine and informed him that the Court had fixed 15 November 2022 as the time-limit within which the Governments of Ukraine and the Russian Federation may furnish their written observations on the Declaration.

2. The Government of Ukraine provides its observations regarding Australia’s Declaration of Intervention below. In the view of the Government of Ukraine, the Declaration of Australia fulfills the requirements of Article 63 of the Statute and Article 82 of the Rules of the Court and is, accordingly, admissible.

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3. Article 63 confers a “right to intervene in the proceedings” to a State notified of a case involving the construction of a convention to which the State is a party. In assessing whether a declaration falls under Article 63, “the only point which it is necessary to ascertain is whether the object of the intervention . . . is in fact the interpretation of the [relevant] Convention in regard to the question” at issue in the dispute.¹ The declaration must also satisfy the conditions set forth in Article 82 of the Rules of the Court. As Article 63 of the Statute provides for intervention as of right,² where a State seeking to intervene has met the conditions provided under Article 63 of the Statute and Article 82 of the Rules, the declaration is deemed admissible.³

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

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

³ See *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, pp. 5–6, paras. 7–8.

4. The Declaration of Australia satisfies all the necessary requirements. The instant case puts in question the construction of the Genocide Convention. Australia is a party to the Genocide Convention and thus has a right to intervene under Article 63. Based on the text of the Declaration, which identifies Australia's interpretation of specific provisions of the Genocide Convention, namely Articles I, II and IX, the Declaration's object is the interpretation of the Genocide Convention.

5. Article 82(1) provides that declarations under Article 63 "shall be filed as soon as possible, and not later than the date fixed for the opening of the oral proceedings. In exceptional circumstances a declaration submitted at a later stage may however be admitted."

Article 82(2) provides further requirements:

2. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

(a) particulars of the basis on which the declarant State considers itself a party to the convention;

(b) identification of the particular provisions of the convention the construction of which it considers to be in question;

(c) a statement of the construction of those provisions for which it contends;

(d) a list of the documents in support, which documents shall be attached.

6. All of these requirements are met. Australia has filed its Declaration well before the opening of oral proceedings, which have not been set. Australia has also appointed an agent,⁴ and the Declaration notes the basis on which Australia considers itself a party to the

⁴ Letter from Mr. Jim Chalmers, Acting Minister for Foreign Affairs of Australia, dated 26 September 2022.

Genocide Convention,⁵ identifies “particular provisions” of the Genocide Convention it considers to be in question, and provides a statement regarding the “construction of those provisions.”⁶ Finally, the Declaration includes “a list of the documents in support and attaches those documents.”⁷ Accordingly, all of the requirements of Article 82 are met and the Declaration is admissible.

7. Russia’s filing of preliminary objections on 3 October 2022 does not have an effect on the admissibility of Australia’s intervention. As stated in its Declaration, Australia wishes to avail itself of its right to intervene with respect to the construction of several provisions of the Genocide Convention, including those relevant to the merits of this case (Articles I and II) and to the Court’s jurisdiction (Article IX).⁸ Russia’s preliminary objections place at issue the interpretation of several articles of the Convention. Russia takes the position that, in addition to Article IX, the Court should “carry out, at this stage, a proper interpretation of the provisions invoked by Ukraine (Articles I and IV of the Convention) to determine the obligations contained therein and the scope of the Court’s jurisdiction *ratione materiae*.”⁹ Without prejudice to Ukraine’s ultimate position as to whether the interpretation of these provisions should take place at the preliminary objections or merits phase of these proceedings, Australia has the right under Article 63 of the Statute to intervene with respect

⁵ Declaration of Intervention Under Article 63 of Australia, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*, 30 September 2022, paras. 19–20.

⁶ *Id.* paras. 21–55.

⁷ *Id.* para. 56.

⁸ *Id.* paras. 24–55.

⁹ Preliminary Objections of the Russian Federation, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russia)*, filed 3 October 2022, para. 163.

to the interpretation of any provision of the Convention that is at issue, including any provision that the Court is asked to interpret during the preliminary objections phase of the case.¹⁰

8. Moreover, as the Court did not decide under Article 79 of the Rules that questions concerning its jurisdiction or the admissibility of the application shall be determined separately, and Ukraine accordingly filed a Memorial addressing both the Court’s jurisdiction and the merits, it was appropriate for Australia to submit a Declaration of Intervention addressing its interpretation of provisions of the Genocide Convention relevant to both jurisdiction and the merits in this case.¹¹

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9. For the reasons set forth above, it is the view of the Government of Ukraine that the Declaration of Intervention filed by Australia under Article 63 of the Statute of the Court is admissible.

¹⁰ See Hugh Thirlway, *THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE, VOLUME I* (2013), p. 1031 (“If for example a case is brought on the basis of the compromissory clause in a multilateral convention, the interpretation of that clause may be of interest to all the other States parties (or at least those of them who have not made a reservation to the clause). It would therefore seem that there is no reason why intervention under Article 63 should not be possible to argue a question of jurisdiction or admissibility, if that question involves the interpretation of a multilateral treaty.” (internal citations omitted)); ROSENNE’S *LAW AND PRACTICE OF THE INTERNATIONAL COURT: 1920–2017, VOLUME III PROCEDURE* (Malcolm N. Shaw QC ed., 5th ed. 2016), p. 1533 (“If the dispute over jurisdiction relates to the interpretation of a multilateral treaty which contains a compromissory clause or any other provision including another instrument intrinsically linked to that treaty, it is not self-evident why any other party to that treaty cannot intervene under Article 63 in any phase of the proceedings: close examination of the legislative history of that provision in 1920 and of the initial Rules of Court of 1922 strongly indicates that this was precisely the intention behind that provision.” (internal citation omitted)).

¹¹ Cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America) (Declaration of Intervention of El Salvador)*, Order of 4 October 1984, *I.C.J. Reports 1984*, p. 216 (finding inadmissible El Salvador’s declaration, which addressed merits as well as jurisdictional issues, where the Court had ordered a separate jurisdictional phase of proceedings and Nicaragua had filed a Memorial limited to jurisdiction and admissibility).

15 November 2022

Mr. Anton Korynevych

Agent of Ukraine

Ms. Oksana Zolotaryova

Co-Agent of Ukraine