

INTERNATIONAL COURT OF JUSTICE

WRITTEN OBSERVATIONS
OF THE FEDERAL REPUBLIC OF GERMANY
ON THE ADMISSIBILITY OF ITS DECLARATION OF INTERVENTION

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)

I. Introduction

1. On 1 September 2022, the Federal Republic of Germany (“Germany”) submitted to the Court a Declaration of Intervention pursuant to Article 63 paragraph 2 of the Statute of the Court in the Case concerning *The Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

2. Germany submits the present observations on the admissibility of its Intervention pursuant to the letter of the Registrar dated 31 January 2023. The observations are submitted in reaction to the Russian Federation’s Written Observations on the admissibility of the Declaration of Intervention of Germany and others, filed on 17 October 2022 (hereafter: “Russian Written Observations”), and in light of the Written Observations of Ukraine on the Declaration of Intervention of Germany, of the same date.

3. In its Written Observations, the Russian Federation has challenged the admissibility of the Declarations of Intervention of a number of States, including Germany, on the following grounds:

(a) ... the interventions are not genuine: their real object is not the construction of the relevant provisions of the Genocide Convention, as required by Article 63 of the Statute, but rather pursuing a joint case alongside with Ukraine as de facto co-applicants rather than non-parties.

(b) ... the participation of the Declarants in these proceedings would result in a serious impairment of the principle of equality of the parties to the detriment of the Russian Federation and would be incompatible with the requirements of good administration of justice.

(c) ... the Court cannot, in any event, decide on the admissibility of the Declarations before it has made a decision on the Preliminary Objections, and that the Declarations address matters that presuppose that the Court has jurisdiction and/or that Ukraine’s Application is admissible.

(d) ... the Declarations should be equally declared inadmissible because the Declarants seek to address issues unrelated to the “construction” of the Genocide Convention, such as the interpretation and application of other rules of international law and several questions of fact, which is incompatible with the limited object of Article 63. Furthermore, allowing the Declarants

to intervene on such matters at this stage would prejudge the question of the Court's jurisdiction *ratione materiae*.¹

4. Germany considers that it has fully complied with the admissibility requirements under Article 63 of the Statute and 82 of the Rules of the Court. As indicated in para. 21 of its Declaration of Intervention, Germany became a party to the Genocide Convention. Moreover, it has announced to the Court in paras. 22 ff. of the Declaration of Intervention its intention to contribute to the interpretation of Article IX of the Genocide Convention. In doing so, Germany has refrained from making any statements that could be regarded as an attempt to go beyond mere interpretation of the Convention. Accordingly, Germany has neither the same interest in the dispute as Ukraine nor arrogated itself any other right that is reserved to a party to the dispute.

5. In the present observations Germany will confine itself to reacting to the Russian Written Observations, without repeating or elaborating upon the arguments put forward in its Declaration of Intervention.

II. Germany's intervention complies with the requirements of Article 63 of the Statute and is "genuine"

6. The Russian Federation's first objection is that Germany's intervention was not genuine, i.e. not related to the subject-matter of the pending dispute. The Russian Federation refers to the *Haya de la Torre* case,² arguing that for an intervention to be admissible, the Party should be recognised to have a "genuine intention" to address the construction of the Convention in question.³ Quoting several political statements in paragraphs 15-29 of its Written Observations, the Russian Federation takes issue with the fact that the intervention was allegedly part of a concerted political strategy to help Ukraine in the case. This, in the view of Russia, revealed an intention of Germany to become a de-facto co-complainant.

¹ *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, para 9 (hereafter: "Russian Written Observations").

² *Haya de la Torre Case*, Judgment of June 13th, 1951: I.C.J. Reports 1951, p. 71, pp. 76-77.

³ Russian Written Observations, para 14.

7. The Court has clearly stated that the intervention under Article 63 of the Statute is only subject to the conditions of the Statute and Rules of the Court, as verified by the Court itself.⁴ Such conditions are: (a) that the State willing to intervene is a Party to the convention in question; (b) that the Declaration of Intervention addresses the construction of the convention in question; and (c) that the Declaration complies with the formal requirements under Article 82 of the Rules of the Court.⁵

8. The Court's case law on Article 63 confirms that there are no further conditions pertaining to the admissibility of the intervention apart from those referred to above.

9. The Court has used the expression of "genuine intervention" in *Haya de la Torres*⁶ to describe how it operated the objective test of finding out whether the object of the intervention of Cuba was the interpretation of the Havana Convention (a "genuine" intervention) or an attempt to re-litigate another case (not a "genuine" intervention). However, contrary to the Russian observation in paragraph 14, the Court did not consider the text of the declaration and the context within it had been filed to establish the "genuine *intention*" of Cuba. This semantic shift from an objective test (was the intervention "genuine?") to a subjective test (was the government's intention "genuine?") does not have any basis in the case law of the Court. Accordingly, the decisive question is whether Germany has a genuine interest in the construction of the Genocide Convention in the present case. The political context in which Germany decided to submit its declaration of intervention is legally irrelevant. As a party to the Genocide Convention, Germany has a genuine interest in how the Genocide Convention and in particular, its Article IX, is being interpreted when it comes to allegations of genocide. It follows from the international community's common interest in the rights and duties enshrined in the Convention and their *erga omnes* character that all States parties have an interest of their own in the proper interpretation, application and fulfilment of those obligations. Besides, Germany has stressed in para. 14 of its declaration that, given its own past, it has a specific interest in supporting the Court in upholding the integrity of the Genocide Convention. Any government's political motivation for intervening in a case before

⁴ *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, para 8.

⁵ A Miron, C Chinkin, 'Article 63', in A Zimmermann *et al* (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn; OUP 2019) 1741, 1752 ff.

⁶ *Haya de la Torre Case*, Judgment of June 13th, 1951, I.C.J. Reports 1951, p. 71, at p. 77

the Court has nothing to do with the prerequisites for admissibility. It suffices that as a State party to a Convention it states the construction of the provisions of a Convention in question for which it contends. Germany has demonstrated a genuine interest in the Court exercising its jurisdiction regarding the interpretation of the Convention.

III. Germany's intervention does not impair the principle of equality of arms

10. In its second argument, the Russian Federation pleads admitting the intervention would be incompatible with the equality of the Parties and the requirements of good administration of justice.

11. In *Whaling in the Antarctic* Judge Owada gave some credence to the idea of an effects test to restrict the admissibility of an intervention, as quoted extensively in paragraphs 36-38 of the Russian submission. However, he remained isolated with his position in the bench. The Court itself dismissed the very idea that an intervention would affect the equality of parties if it stays within the limits drawn by Article 63 ICJ-Statute. When admitting New Zealand's intervention, it ruled⁷:

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

19. Whereas New Zealand has met the requirements set out in Article 82 of the Rules of Court; whereas its Declaration of Intervention falls within the provisions of Article 63 of the Statute ; whereas, moreover, the Parties raised no objection to the admissibility of the Declaration ; and whereas it follows that New Zealand's Declaration of Intervention is admissible".

12. In other words, the Court confirmed that a proper declaration of intervention under Article 63 of the Statute, which is limited to submitting

⁷ *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, p. 3, at p. 9, paras. 18-19.

observations on the construction of the convention in question, cannot affect the equality of the Parties *per se*.

13. While acknowledging the existence of this order (para. 37), Russia takes issue with the fact that the high number of interventions would nevertheless raise an issue of representativeness in the bench under Article 31(5) of the Statute (paras. 39-43) and become “unmanageable” for itself and the Court (para. 45). Admitting several interveners would also run “entirely against the Court’s previous practice of admitting only one intervener per case” (para. 49). However, contrary to the Russian assertions expressed in paragraphs 36-48, the Court’s order in *Whaling in the Antarctic* also presents good law when the Court faces a situation of several interveners.

14. First, the assertion that the Court admitted only one intervener per case is misleading. To the best knowledge of Germany the Court has never refused a declaration of intervention with the reasoning that it had already allowed the intervention of another State, and allowing a second one would therefore be inadmissible.

15. Second, such an approach would also be manifestly arbitrary. The Court has no power to declare an intervention inadmissible because another State had already done so before. Such a restriction would directly encroach of the “right of intervention” of every State party to a Convention whose construction is at issue. It may well be the case that States were cautious to exercise this right in the past, leading to very few interventions in the history of the Court so far. However, that is a pure matter of policy. According to the law, all State parties have the right to intervene under Article 63 of the Statute at the same time, if they wish to do so. Under the Genocide Convention, all State Parties can even invoke the responsibility of another party for a breach of its obligations *erga omnes* to institute proceedings against the other party⁸. In such a situation, when the treaty embodies matters of collective interest, the late Judge Cançado Trindade called upon all State Parties to contribute to the proper interpretation of the treaty as sort of a “collective guarantee of the observance of the obligations contracted by the State parties”⁹. In the present case, the fact that many other States felt the need to share their interpretation of the

⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 36, paras. 107-108.

⁹ Separate Opinion of Judge Cançado Trindade, attached to *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, I.C.J. Reports 2013, p. 33, para 53.

Genocide Convention with the Court cannot deprive Germany of its right to intervene under Article 63 of the Statute on this important matter.

16. Third, it is a direct and inevitable consequence of numerous interventions that several Judges on the bench may hold the same nationality as one of the intervening States. However, that does not infringe upon the equality of the parties in the case. As recalled by the Court in para. 18 of its order in the *Whaling* case, the interveners do not become party to the proceedings. Therefore, Articles 31 (5) of the Statute, and Articles 32 and 36 of the Rules, as quoted by the Russian Federation, do not apply. Moreover, all Judges at the Court are in any event bound to impartiality in accordance with Article 20 of the Statute, irrespective of whether there are interventions in a case or not.

17. Fourth, Germany reckons that the number of interveners in the present case is unprecedented and may indeed present new organisational challenges to the Court. In line with Article 30(1) of the Statute, the Court enjoys large discretion to organise the proceedings. Germany welcomes the decision of the Court to establish a written procedure for hearing the States seeking to intervene with an identical deadline for all in order to streamline the process. In order to help in the good administration of justice, it also reiterates its willingness to coordinate its further action before the Court with other interveners, in particular other EU Member States, to contribute to an effective management of time of the Court and both parties.

IV. Germany is entitled to intervene under Article 63 of the Statute at the jurisdictional stage

18. In its third argument, the Russian Federation maintains that the Court has never allowed interventions at the preliminary stage of the proceedings in which the jurisdiction of the Court or the admissibility of an application were challenged.

19. In paras. 50-52, it quotes six cases in support. In the first three instances (*Military and Paramilitary Activities*, *Nuclear Tests* and *Nuclear Tests (Request for Examination)*), the Court is said to have discarded interventions in the respective phases relating to jurisdiction or admissibility. In the second three instances (*Haya de la Torre*, *Whaling in the Antarctic* and *Wimbledon*), the Court accepted interventions within the main phase, because – according to Russia in para. 51 – the jurisdiction was not challenged in a separate stage.

20. It appears that Russia draws from this practice a duty of the Court to refrain from deciding on the admissibility of the interventions before considering Russia's preliminary objections filed on 3 October 2022 regarding the jurisdiction of the Court and the admissibility of Ukraine's Application.

21. However, the only precedent mentioned by the Russian Federation, which might be relevant to the present proceedings, is the *Military and Paramilitary Activities* case. Here, however, the Russian Written Observations contain a misleading reading of the decision of the Court on the admissibility of interventions.

22. In *Military and Paramilitary Activities*, the Court's jurisdiction depended on an understanding of Article 36(2) and (5) of the Statute, and the merits touched upon questions of the UN Charter and customary international law. El Salvador's Declaration of intervention of 15 August 1984 addressed mainly the latter and did not contain any statement on how it would construe Article 36(2) and (5) of the Statute. Against that background, the Court dismissed the application "in as much as it relates to the current phase of the proceedings"¹⁰. As Judge Singh¹¹, Judges Ruda, Mosler, Ago, Jennings and De Lacharrière¹², as well as Judge Oda¹³ explained, it had weighed in the Court that El Salvador's declaration was mainly directed to the merits of the case, but insufficient with respect to the jurisdictional question before the Court. This explanation is shared by the doctrine¹⁴.

23. Therefore, it appears that the Court rejected El Salvador's declaration as inadmissible during the jurisdictional phase *because and only insofar it did not contain any construction of Article 36(2) and (5) of the Statute as the jurisdictional base of the case*. The Court did not find that no intervention under Article 63 of the Statute could ever be admissible during a jurisdictional phase, as the Russian Federation seems to read into the Court's order of 4 October 1986.

¹⁰ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Order of 4 October 1984, I.C.J. Reports 1984, p. 215, at p. 216.

¹¹ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judge Singh, I.C.J. Reports 1984, p. 218.

¹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings, and De Lacharrière, I.C.J. Reports 1984, p. 219.

¹³ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judge Oda, I.C.J. Reports 1984, p. 220.

¹⁴ Juan José Quintana, *Litigation at the International Court of Justice*, Brill 2015, pp. 943-944.

24. The Russian Federation criticises that Germany's declaration of intervention in effect addressed matters, which presuppose that the Court has jurisdiction and/or that Ukraine's application is admissible. Russia complains, in particular, that the declaration contains a construction of Article IX of the Genocide Convention on the jurisdiction of the Court. For Russia, this makes the declaration inadmissible, as it is written in a way that presupposes that the Court has jurisdiction over the alleged dispute. Thereby, Russia effectively maintains that a State may not intervene on questions of jurisdiction, as taking a position on that point would "presuppose" that the Court has jurisdiction. In its fifth argument, it repeats this point with more clarity, contesting Germany's right to intervene on Article IX of the convention *per se*.

25. In Germany's view, this line of reasoning also runs contrary to Article 63 of the Statute and to the Court's practice.

26. According to Article 63 (1) of the Statute, a State party may intervene on the "construction of a convention". The plain wording refers to the entire Convention, including its compromissory clause, as the case may be. Accordingly, nothing in the text suggests that a State may not offer its construction of Article IX of the Genocide Convention to the Court.

27. That point is further strengthened when referring to the object and purpose of Article 63 of the Statute. The object and purpose of the right to intervene is to give States that are not directly concerned in a case, but are a party to a convention upon whose construction the case rests, an opportunity to advance their views on the construction of the relevant convention. The right to intervene guarantees that States can advance their views on the construction of a convention to which they are also a party. It is mirrored by the legal consequence that the construction then later given in the Court's judgment will be equally binding upon them. States do not only have a legitimate interest to share with the Court their interpretation of substantive obligations contained in a convention at stake before the Court. It is of equal importance for States to be heard on jurisdictional issues, as this may affect their own position before the Court in future cases which may be relating to themselves. Hence, an intervention under Article 63 of the Statute may cover both jurisdictional and substantive aspects¹⁵.

¹⁵ MN Shaw (ed), *Rosenne's Law and Practice of the International Court 1920-2015* (5th ed, Vol III, Brill Nijhoff 2016), p. 1533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* (Vol I, OUP 2013), p. 1031; A. Miron/C. Chinkin, "Article 63" in: Zimmermann/Tams/Oellers-

28. Subsequent practice before the Court points into the same direction. So far, the Court has never dismissed an intervention because it was (entirely or primarily) directed to interpreting a compromissory clause. Rather, in *Military and Paramilitary Activities* El Salvador's attempt to influence the jurisdictional question before the Court was unsuccessful because the declaration had not complied with the formal requirements under Rule 82(2)(b) and (c) in the view of the great majority in the Court. Had it done so, it would have been of interest to the Court, as expressly confirmed by Judge Oda¹⁶. Moreover, Judge Schwebel even found that the faults of El Salvador's initial declaration on jurisdiction had been healed by subsequent letters. Based on this reading, he was prepared to admit El Salvador's declaration on jurisdictional matters.

29. It follows that Germany in the current case correctly wishes to avail itself of its right to intervene under Article 63 of the Statute. The fact that the declaration of intervention limits itself to addressing the compromissory clause under Article IX of the Genocide does not render the intervention inadmissible.

V. Germany's arguments are relevant to the construction of the Genocide Convention

30. In its last argument, the Russian Federation refers to Germany's statements on the interpretation of Article IX as regards the notion of a 'dispute between the Contracting Parties' (paras. 29, 30) and the relation of the dispute to 'the interpretation, application and fulfilment of the [Genocide] Convention'. The Russian Federation alleges that these observations do not relate to the construction of the Genocide Convention and contain an impermissible incursion into the interpretation or application of other rules of international rules that are distinct from the treaty in question and derive from different sources.

31. The argument is based on a misperception of Germany's statements. Clearly, the German submission did not introduce "matters relating to the existence of a dispute between the Russian Federation and Ukraine"; "evidence that genocide

Frahm/Tomuschat (eds), *The Statute of the International Court of Justice: A Commentary* (3rd ed. OUP 2019), p. 1741, at p. 1763, note 46.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Intervention of El Salvador, Separate Opinion of Judge Oda, I.C.J. Reports 1984, p. 220, at p. 221.

has been committed or may be committed in Ukraine”; “issues relating to the doctrine of abuse of rights”; or “issues relating to the use of force” as a self-standing matter. Rather, all statements made were part of the German views of the construction of Article IX of the Convention.

32. Such technique is permissible under international law. According to Article 31(1) of the Vienna Convention on the Law of Treaties, which represents customary international law¹⁷, a treaty

“shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”

33. It follows that constructing the ordinary meaning of Article IX of the Convention, its context and the object and purpose of the Convention while interpreting the notion of a ‘dispute’ and its relation to the ‘interpretation, application and fulfilment of the Convention’ as Germany has done cannot be disqualified as “impermissible incursion”. Rather, it contributes to the required integral interpretation of international law as a legal order.

34. Such operation does not transcend the boundaries of Article 63 of the Statute, but stays within the requirement of constructing the Convention at issue in a case before the Court, in line with the accepted rules of treaty interpretation.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment of 22 July 2022, p. 31, para. 87: “The Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969”; see also *Application of the International Convention On the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Preliminary Objections, Judgment of 4 February 2021, p. 24, para. 75 with further references.

VI. Conclusion

35. For the reasons set out above Germany is convinced that its Declaration of Intervention fully complies with the requirements under Article 63 of the Statute and Article 82 of the Rules. Germany thus requests the Court to decide that the intervention is admissible, to allow Germany to exercise its right to intervene, as a party to the Genocide Convention, and to present its written observations on the construction of the Genocide Convention in good time.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read 'T. von Uslar-Gleichen'.

Tania von Uslar-Gleichen

Agent of the Government of the Federal Republic of Germany