

**Before the
International Court of Justice**

**Written Observations
Of the Governments of Canada and the Kingdom of the Netherlands
On the Admissibility of their Joint Declaration of Intervention**

**Filed in the Registry of the Court
In the case of**

**Allegations of Genocide under the Convention on the Prevention and Punishment of the
Crime of Genocide (Ukraine v. Russian Federation)**

WRITTEN OBSERVATIONS
OF THE GOVERNMENTS OF CANADA AND THE KINGDOM OF THE NETHERLANDS
ON THE ADMISSIBILITY OF THEIR JOINT DECLARATION OF INTERVENTION

1. On December 7, 2022, Canada and the Netherlands, invoking their right under Article 63 of the Statute of the International Court of Justice, submitted a joint declaration of intervention (Joint Declaration) 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 January 30, 2023, Ukraine and the Russian Federation (Russia) filed written submissions on the admissibility of the Declarations of Intervention submitted by Belgium, Bulgaria, Cyprus, Liechtenstein, Malta, Canada and the Netherlands, Norway, Slovakia and Slovenia. The Registrar provided these written observations to Canada and the Netherlands on the same date.

3. While Ukraine contends that the Joint Declaration meets the requirements of the Statute and the Rules of Court and is admissible, Russia objects to the admissibility of the Joint Declaration and requests the Court to decide that it is inadmissible.

4. On January 31, 2023, Canada and the Netherlands were notified of the Court's decision to fix 13 February 2023 as the deadline for the filing of written observations on the admissibility of their Joint Declaration.

5. These Written Observations present to the Court the views of Canada and the Netherlands on the admissibility of their Joint Declaration. For the reasons outlined below, Canada and the Netherlands respectfully submit that their Joint Declaration is admissible and that Russia's objections to the admissibility of their Joint Declaration must therefore be rejected.

6. These Written Observations are divided in four parts. First, Canada and the Netherlands argue that their Joint Declaration meets the criteria set out in the Statute and Rules of Court and that it is therefore admissible (Section A). They then submit that the Joint Declaration does not affect the equality of the parties in the proceedings and that it is not incompatible with the sound administration of justice (Section B). Third, Canada and the Netherlands argue that the right to intervene extends to the issue of jurisdiction of the Court (Section C). Finally, they submit that States can exercise their right to intervene jointly (Section D).

A. The Joint Declaration meets the criteria set out in the Statute and Rules of the International Court of Justice and is therefore admissible

7. A declaration of intervention is deemed admissible when a State seeking to intervene has met the requirements set out in Article 63 of the Statute of the Court (hereinafter: the Statute) and Article

82 of the Rules of Court (hereinafter: the Rules).¹ In this regard, the Court has recognized that Article 63 confers a right of intervention² where the State seeking to intervene confines its intervention to “the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case”.³

8. Specifically, Article 63 of the Statute provides that:

1. Whenever the construction of a convention to which states other than those concerned in the case are parties is in question, the Registrar shall notify all such states forthwith.

2. Every state so notified has the right to intervene in the proceedings; but if it uses this right, the construction given by the judgment will be equally binding upon it.

9. The Court has held that “in accordance with the terms of Article 63 of the Statute, the limited object of the intervention is to allow a third State not party to the proceedings, but party to a convention whose construction is in question in those proceedings, to present to the Court its observations on the construction of that convention.”⁴

10. The admissibility test is therefore simple. When assessing whether a declaration of intervention falls under Article 63 of the Statute, “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.⁵

11. Here, the Joint Declaration filed by the Governments of Canada and the Kingdom of the Netherlands (hereinafter: the Declarants) falls within the limited scope of Article 63 of the Statute, as the Declarants seek to present their observations on the interpretation of the provisions of the *Convention on the Prevention and Punishment of the Crime of Genocide*⁶ (hereinafter: Genocide Convention), the construction of which is in question in the proceedings.

12. The Declarants do not offer any views on the facts of the case, on the application of the Genocide Convention to these facts, or on the question of whether the conduct of the parties is in breach of their obligations under the Genocide Convention.

13. The fact that some of the arguments presented in the Joint Declaration may be similar to those presented in other declarations of intervention or in the application is irrelevant to its admissibility, as

¹ *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 7-8.

² *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 13, para 21; *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 7.

³ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, Application for Permission to Intervene, Judgment, I.C.J. Reports 1981, p. 15, para. 26.

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 7.

⁵ *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 77.

⁶ Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948, United Nations, *Treaty Series*, [vol. 78](#), p. 277. Entry into force on 12 January 1951.

long as the Joint Declaration falls within the scope of Article 63 of the Statute. By arguing that interventions must present different arguments, Russia adds to the requirements of the Statute and the Rules.

14. Finally, the Joint Declaration filed by the Declarants satisfies the requirements of Article 82 of the Rules, which reads as follows:

1. A State which desires to avail itself of the right of intervention conferred upon it by Article 63 of the Statute shall file a declaration to that effect, signed in the manner provided for in Article 38, paragraph 3, of these Rules. Such a declaration 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.

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.

3. Such a declaration may be filed by a State that considers itself a party to the convention the construction of which is in question but has not received the notification referred to in Article 63 of the Statute.

15. The Joint Declaration was filed well before the oral proceedings, which have not been set, and within the deadline set by the Registrar. Furthermore, as required by Article 82 of the Rules, the Joint Declaration states the names of the agents; it specifies the case and the convention to which it relates; and it contains (a) the particulars of the basis on which the declarant States consider themselves a party to the Genocide Convention; (b) identification of the particular provisions of the Genocide Convention the construction of which they consider to be in question; (c) a statement of the construction of those provisions for which they contend; and (d) a list of the documents in support, which are attached to the declaration of intervention.

16. For the reasons set out above, the Declarants have met the conditions required to intervene under Article 63 of the Statute and Article 82 of the Rules, and the Joint Declaration should be admitted by the Court.

B. The Joint Declaration does not affect the equality of the parties in the proceedings nor is it incompatible with the sound administration of justice

17. It is well established that the nature and scope of an intervention under Article 63 of the Statute is limited insofar as it allows only for the submission of observations relating to the construction of a

convention in question in the case. As such, intervening States under Article 63 do not become party to the proceedings, nor do they have the same interest as a party to the proceedings.⁷

18. Contrary to Russia's submissions, intervening States do not become "de facto co-applicants" to the proceedings. The Declarants do not seek to become parties to the proceedings by means of their Joint Declaration, and do not claim to exercise any right attributed to the parties to the dispute.

19. Furthermore, the fact that the interpretation put forward by an intervening State aligns with one of the parties is irrelevant to the question of whether its intervention is admissible. There is no requirement in Article 63 of the Statute that an intervening State either agree or disagree with the construction of the convention supported by one of the parties to the dispute. States may thus exercise their right to intervene under Article 63 also when there is a convergence of their views on the construction of the convention with the views of one of the parties, or with the views of the other intervening States.

20. In addition, the political motivation behind the decision to intervene is irrelevant when considering whether a declaration of intervention is admissible. While the political position of intervening States may inform their decision to intervene, it does not affect the admissibility of their declaration of intervention, which is based on the Statute and the Rules. Indeed, as outlined above, a declaration of intervention is admissible as long as it meets the requirements of Article 63 of the Statute of the Court and Article 82 of the Rules.

21. Similarly, desiring a certain outcome of a case to which intervening States are not party cannot deprive them of their right to intervene. The admissibility of a declaration of intervention should be judged solely upon the contents of the declaration.

22. More broadly, the existence of political considerations of sovereign States is not a bar to the exercise by the Court of its functions, including the admission of declarations of intervention. As the Court has held:

... 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 longstanding political dispute between the States concerned. Yet never has the view been put forward before that, because a legal dispute submitted to the Court is only one aspect of a political dispute, the Court should decline to resolve for the parties the legal questions at issue between them. Nor can any basis for such a view of the Court's functions or jurisdiction be found in the Charter or the Statute of the Court ; if the Court were, contrary to its settled jurisprudence, to adopt such a view, it would impose a far-reaching and unwarranted restriction upon the role of the Court in the peaceful solution of international disputes.⁸

23. When the Court was recently invited to consider the political motivations of an applicant to determine whether that State was truly bringing an application on its own behalf, the Court declined to do so, observing that "the question of what may have motivated a State...to commence proceedings is

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, para 18 and 21.

⁸ *United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 20, para. 37.

not relevant for establishing the jurisdiction of the Court”.⁹ This position of the Court should apply *mutatis mutandis* to its consideration of any potential motivations of a State indicating its intention to intervene in a contentious case before the Court.

24. Finally, there is no limitation in Article 63 of the Statute on the number of States parties to a convention that may intervene in a single proceeding. Article 63 confers a right on all States parties to intervene whenever the construction of a convention to which they are party is in question. Here, the fact that several States filed declarations of intervention does not deprive the Declarants of their right to intervene under Article 63. The Court is well accustomed to hearing from multiple States when giving advisory opinions, and can organise the proceedings in such a way as to ensure the good administration of justice.

25. In light of the above, the Declarants respectfully submit that their Joint Declaration does not affect the equality of the parties nor prevent the Court from safeguarding the administration of justice.

C. The right to intervene extends to the issue of jurisdiction of the Court

26. States Parties have the right to intervene under Article 63 of the Statute with respect to the interpretation of any provision of a convention whose construction is in question in the proceedings, including provisions raised in the preliminary objections phase of the proceedings.

27. Indeed, Article 63(1) of the Statute allows a State party to intervene “[w]hensoever the construction of a convention... is in question” (emphasis added). Article 63(2) confirms that any State party to such a convention has “the right to intervene in the proceedings” without limiting such a right to the merits phase of the proceedings, or excluding the right where the provision that is in question is a compromissory clause.

28. Contrary to Russia’s submissions, there is no limitation in the Statute or the Rules that would prevent intervening States from exercising their right to intervene on the construction of provisions of a convention raised in the preliminary objections phase of the proceedings, including provisions pertaining to issues of jurisdiction. Intervening States may do so as long as the construction of the provision is in question, in accordance with Article 63 of the Statute.

29. The construction of the compromissory clause of the Genocide Convention (Article IX) is in question in the present case. On March 30, 2022, pursuant to Article 63(1) of the Statute, the Registrar notified Canada and the Kingdom of the Netherlands, as Contracting Parties to the Genocide Convention, that by Ukraine’s application the Genocide Convention “is invoked both as a basis for the Court’s jurisdiction and as a substantive basis of [Ukraine’s] claims on the merits”.¹⁰ Specifically, the Registrar noted that Ukraine “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 Article 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”.¹¹ (emphasis added).

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgement of 22 July 2022, p.20, para 44.

¹⁰ Letters of 30 March 2022 from the Registrar of the Court to the Ambassador of Canada to the Netherlands and to the Minister of Foreign Affairs of the Kingdom of the Netherlands respectively.

¹¹ *Ibid.*

30. The Court's interpretation of the scope and content of Article IX of the Genocide Convention will have direct legal significance for any State party bound by the convention. As such, Contracting Parties to the Genocide Convention have as much of an interest in the construction of this compromissory clause as they do in the interpretation of any other provisions of the convention.

31. Furthermore, contrary to Russia's submissions, there is no "long-standing" practice of the Court against admitting declarations of intervention prior to the resolution of preliminary objections. The Court has only dealt with declarations of intervention under Article 63 of the Statute of the Court in three cases.¹² In two of them, there were no preliminary proceedings.¹³ In the third case, *Nicaragua v. United States of America*¹⁴, the declaration was declared inadmissible, but not because declarations of intervention cannot, as a matter of principle, address issues of a preliminary nature. In fact, in a separate opinion, Judge Oda expressly recognized that an intervention under Article 63 of the Statute is possible at the jurisdictional phase:

"Had El Salvador's initial Declaration been properly formulated, had Nicaragua's observations been properly interpreted, and had the procedures of the Court been properly pursued, 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."¹⁵

32. In addition, Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharrière explained in a joint separate opinion that El Salvador's declaration was inadmissible not because a State cannot intervene at the preliminary phase, but "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 between Nicaragua and the United States; nor of the construction of such provision or provisions for which it contends", as required by Article 82 of the Rules.¹⁶

33. In the current proceedings, the Court specifically invited States that intended to intervene to do so by December 15, 2022¹⁷, in other words during the preliminary phase of the proceedings, presumably given that the interpretation of the compromissory clause was at issue. Thus, the Court cannot be said to consider declarations of intervention under Article 63 inadmissible or premature at the preliminary phase of the proceedings. In particular, the Registrar's letter of October 31, 2022, to Contracting Parties to the Genocide Convention stated that "the Court considers that the interest of the sound administration of justice and procedural efficiency would be advanced if any State that intends to avail

¹² *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C. J. Reports 1984, p. 215; *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.

¹³ *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 76; *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.

¹⁴ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C. J. Reports 1984, p. 215.

¹⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C. J. Reports 1984, p. 215, Separate Opinion of Judge Oda, para 5.

¹⁶ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Declaration of Intervention, Order of 4 October 1984, I.C. J. Reports 1984, p. 215, Joint Separate Opinion of Judges Ruda, Mosler, Ago, Sir Robert Jennings and De Lacharrière para 3.

¹⁷ Letter of October 31, 2022 from the Registrar.

itself of the right of intervention conferred on it by Article 63 would file its declaration not later than Thursday 15 December 2022”.¹⁸

34. Desiring to promote the sound administration of justice and avoid undue delay the proceedings, the Declarants complied with the Court’s request and filed their Joint Declaration on December 7, 2022. A declaration filed within the deadline set by the Court is not premature.

35. In light of the above, Russia’s objection to the admissibility of the Joint Declaration on the ground that the Declarants cannot intervene on Article IX of the Genocide Convention, or at the current phase of the proceedings, should be rejected.

D. States can exercise their right to intervene jointly

36. There is nothing in the Statute or the Rules that prevents intervening States from filing a joint declaration of intervention.

37. In fact, a parallel may be drawn with Article 47 of the Rules, which allows the Court to direct that the proceedings in two or more cases be joined. In this regard, the Court has stated that: “Where the Court, or its predecessor, has exercised its power to join proceedings, it has done so in circumstances where joinder was consonant not only with the principle of the sound administration of justice but also with the need for judicial economy”.¹⁹

38. Filing a joint declaration of intervention serves the same sound administration of justice and avoids unnecessary delays, especially when intervening States have the same view on the construction of a convention that they wish to provide to the Court. For precedence on joint submissions, reference may be had to the case concerning the *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation*²⁰, which was brought jointly by Bahrain, Egypt, Saudi Arabia and the United Arab Emirates.

E. Conclusion

39. On the basis of these Written Observations, Canada and the Netherlands respectfully request that the Court:

- a. dismiss the objections raised by Russia against the admissibility of their Joint Declaration; and
- b. declare admissible the Joint Declaration submitted by Canada and the Netherlands.

¹⁸ Letter of October 31, 2022 from the Registrar.

¹⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Joinder of Proceedings, Order of 17 April 2013, I.C.J. Reports 2013, p. 166, para 18.

²⁰ *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, I.C.J. Reports 2020, p. 81.

Respectfully,



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