

INTERNATIONAL COURT OF JUSTICE
OBSERVATIONS ON THE ADMISSIBILITY OF THE DECLARATION OF
INTERVENTION UNDER ARTICLE 63
OF NORWAY

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)

OBSERVATIONS ON THE ADMISSIBILITY OF THE DECLARATION OF INTERVENTION UNDER ARTICLE 63 OF NORWAY

INTRODUCTION

1. On 24 November 2022, the Kingdom of Norway availed itself of its right to intervene in the proceedings in the Case of *Allegations of Genocide under the Convention on the Prevention and Punishment of the crime of Genocide between Ukraine and the Russian Federation* pursuant to Article 63 paragraph 2 of the Statute of the Court.

2. In its “*Written Observations on Admissibility of the Declarations of Intervention submitted by Belgium, Bulgaria, Cyprus, Liechtenstein, Malta, Canada and the Netherlands, Norway, Slovakia and Slovenia*”, The Russian Federation has requested the Court to dismiss Norway’s Declaration of Intervention, as a whole or as it relates to the jurisdictional phase of the proceedings, or to defer the consideration of admissibility until after the Court has made a decision on the Russian Federation’s Preliminary Objections. The basis of this claim is that 1) Norway’s intervention “is not genuine”, 2) Norway’s intervention would be incompatible with the principle of equality of the Parties and the requirements of good administration of justice, 3) the Court cannot decide on the admissibility of the Declaration before it has considered the Russian Federation’s Preliminary Objections, 4) the Declaration addresses matters which presuppose that the Court has jurisdiction and/or that Ukraine’s Application is admissible, and that 5) the Declaration seeks to address issues unrelated to the Construction of the Convention and that admission of the Declaration would therefore prejudge questions relating to the Court’s jurisdiction *ratione materiae*.

3. Norway maintains that the question of whether Norway’s Declaration of Intervention is admissible depends on an assessment of whether the Declaration falls within the ambit of Article 63 of the Statute of the Court and adheres to the formal requirements of Article 82 of the Rules of the Court. As follows from the Declaration itself and as summarized below in para 2, this is clearly the case.

4. The means of treaty interpretation follow from customary international law as reflected in the Vienna Convention on the Law of Treaties Articles 31 and 32 and this must form the basis of an assessment of Article 63. In Norway’s view, none of the objections advanced by the Russian Federation stand up to closer scrutiny. The objections of the Russian Federation are addressed below in para 3 to 8.

NORWAY’S DECLARATION OF INTERVENTION IS CONSISTENT WITH THE SCOPE OF ARTICLE 63 OF THE STATUTE OF THE COURT AND MEETS THE FORMAL REQUIREMENTS OF ARTICLE 82 OF THE RULES OF COURT

5. Article 63 of the Statute of the Court confers a “right” to intervene in ongoing proceedings to every state notified of a case where the construction of a convention to which it is a party is

in question. As follows from the wording, Article 63 provides for interventions *as of right*.¹ It is for the state itself to decide whether it “desires” to use this right in a specific case or not.²

6. The context confirms this understanding. The Statute of the Court provides two alternative forms of intervention. In addition to the right given to parties to intervene in a case related to a convention whose construction is in question, Article 62 specifies that a state “may submit a request to the Court to be permitted to intervene” where it considers it has “an interest of a legal nature in a case”. As opposed to the situation in Article 63, it is then “for the Court to decide upon this request” and whether such an intervention is “permitted”. This is indeed also reflected in the Rules of Court Article 84 (1) where it is stated that the Court shall decide “whether an application for permission to intervene under Article 62 of the Statute shall be granted, and whether an intervention under Article 63 of the Statute is admissible”.³

7. Accordingly, when faced with a Declaration of Intervention under Article 63, the Court is simply invited to verify that the intervention “is admissible”, in other words that the Declaration is consistent with the scope of Article 63, and that the formal requirements of Article 82 of the Rules of the Court are met.⁴

8. As evidenced in the Declaration of Intervention itself, Norway’s Declaration is within the scope of interventions as defined by Article 63: As noted by the Registrar in the formal notification pursuant to Article 63 (1), “the Genocide Convention is invoked as a basis of the Court’s jurisdiction and as a substantive basis of the Applicant’s claims on the merits”.⁵ Hence, the case concerns the construction of the Genocide Convention. Norway is a party to this convention.⁶ Norway’s Declaration in turn puts forth Norway’s views on the construction of the Convention. In doing so, the text of the Declaration is confined to Norway’s interpretation of the Convention articles IX, I, II, III and VIII. The object of the Declaration is thus the construction of the Convention and it “does not extend to general intervention in the case”.⁷ Norway’s Declaration is therefore consistent with the scope of Article 63.

9. Norway’s Declaration also meets the formal requirements of Article 82 of the Rules of the Court. The Declaration, signed in the manner provided for in Article 38 paragraph 3 of the Rules, was filed “as soon as possible” and well before any opening of oral proceedings, the dates of which have not yet been set.⁸ The Declaration appoints an agent and specifies the case and the convention to which it relates.⁹ It also contains the basis on which Norway is a party to the Convention, identifies the “particular provisions” of the convention the construction of which Norway “considers to be in question”, and includes a statement of the

¹ Statute of the International Court of Justice Article 63 (2) “Every state so notified has the rights to intervene (...)”. Rules of Court Article 82 (1) also speaks of “the right of intervention conferred upon it”.

² As reflected in Rules of Court Article 82 (1) “A state which desires to avail itself the right of intervention conferred upon it by Article 63 of the Statute (...)”.

³ Rules of Court Article 84 (1).

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

⁵ Annex A to Norway’s Declaration of Intervention under Article 63: Letter from the Registrar of the International Court of Justice to the Ambassador of Norway to the Kingdom of the Netherlands dated 30 March 2022.

⁶ Annex B to Norway’s Declaration of Intervention under Article 63: Letter from the United Nations regarding the Ratification by the Government of Norway of the Convention on the Prevention and Punishment of the Crime of Genocide.

⁷ Haya de la Torre (Colombia v. Peru), Judgment of 13 June 1951, I.C.J. Reports 1951 pp. 74, 76-78.

⁸ In accordance with Rules of Court Article 82 (1).

⁹ Rules of Court Article 82 (2)

construction of these provisions as well as a list of the documents in support, which are attached to the Declaration.¹⁰

10. For these reasons, Norway asserts that its Declaration of Intervention “is admissible” and therefore “shall be granted” by the Court. In Norway’s view, none of the objections raised by the Russian Federation in its Written Observations change this outcome. For the sake of good order, Norway will briefly outline its reasons for this conclusion below.

THE “GENUINNESS” OF A DECLARATION OF INTERVENTION IS NOT RELEVANT UNDER ARTICLE 63

11. In its Written Observations, the Russian Federation argues that the interventions received by the Court “are not genuine” as their “real objective” is not the construction of the convention, but “to pursue a joint case with Ukraine”.¹¹ The Russian Federation seems to suggest that the Court should attempt to look beyond the text of a submitted declaration to identify the “real objectives” of a state that has availed itself of the right to provide the Court with its views on the interpretation of a convention in question in a case. Apparently, this test of the “genuineness”, i.e., the “sincerity” of a declaration should be assessed based on “the context of the declaration”, and the Russian Federation proceeds to provide the Court with a variety of political statements and press releases as the basis for this evaluation.

12. Norway notes that none of these “sources” provided in Part II A of the Russian Federation’s Written Observations concern Norway or the Norwegian Declaration of Intervention specifically. Still, Norway will briefly outline why this argument lacks legal basis.

13. First, Article 63 invites the Court to ascertain whether a declaration of intervention meets the described requirements. This precludes any consideration of the “genuineness” of a declaration or the “real objectives” of the state submitting it. There is nothing in Article 63, interpreted in good faith and otherwise in line with the acknowledged rules of interpretation reflected in the Vienna Convention on the Law of Treaties Articles 31 and 32, that supports the Russian interpretation of Article 63 in this regard.

14. Second, the Norwegian Declaration is an independent statement by the Kingdom of Norway as a party to the Genocide Convention submitting Norway’s views on its construction. Whether Norway’s views align with one of the parties to the case, or with other states who also desire to avail themselves of their right of intervention, is irrelevant to the assessment of the conditions under Article 63.

15. Third, the Russian Federation bases its argument on an erroneous reading of the Court’s practice in the *Haya de la Torre* case. In this case, the Court simply assessed if Cuba’s intervention in the case was made regarding the construction of the Havana Convention in connection with the subject matter of the case, namely the question of whether Colombia was obligated to surrender Haya de la Torre to the Peruvian authorities and not made as an *attempt to appeal against a former Judgment by the Court*. It is in this context that the concept of a “genuine intervention” appears. The Court found that to a large extent, the Cuban intervention was in fact devoted to questions already decided by the Court in its former Judgment.

¹⁰ Rules of Court Article 82 (2) litra a-d.

¹¹ Written Observations of the Russian Federation part A.

Importantly however, the Court accepted the intervention in as far as it pertained to the interpretation of aspects that had not been considered in the former Judgment.¹²

16. Fourth, the Russian Federation seems to indicate that Norway, as well as the other Declarants, has ulterior motives for intervening other than opining on the construction of the Genocide Convention. However, the Russian Federation can rest assured that Norway is perfectly capable of exercising its right under the ICJ Statute as a party to the Genocide Convention *while also* condemning the Russian Federation's war of aggression against Ukraine in the strongest possible terms as a blatant violation of international law. The two are not mutually exclusive. The difference is that where the first gives Norway the right to intervene under Article 63 in the case currently before the Court, the latter does not provide the Russian Federation with any grounds for its dismissal.

17. As shown above, the "genuineness" of a Declaration of Intervention is not relevant under Article 63. Norway thus rejects this claim by the Russian Federation.

ADMITTING NORWAY'S DECLARATION OF INTERVENTION IS CONSISTENT
WITH THE PRINCIPLE OF EQUALITY OF THE PARTIES AND THE REQUIREMENTS
OF GOOD ADMINISTRATION OF JUSTICE

18. In part II B of its Written Observations, the Russian Federation attempts to show that Norway's Declaration of Intervention would be incompatible with the principle of equality of the parties and the requirements of good administration of justice.

19. This too does not pass muster. The Court is not undermined because other parties to a convention whose construction is in question before the Court, use their right of intervention. On the contrary, Article 63 explicitly provides for this. Article 63 is itself an essential part of the set of rules which shall ensure good administration of justice. As such, the object and purpose of Article 63 is to ensure that *other states* than the parties to a case, can present their views to the Court on the construction of conventions to which they too are parties. It is of inherent value for the Court not only to hear the views of the parties at bar, but also other states' interpretations of the questions of law before the Court. This is even more important, as in this case, when the legal issues raised involve *jus cogens* norms and obligations *erga omnes* as enshrined in the Genocide Convention.

20. In addition, it must be assumed that the principles of equality of the parties and good administration of justice are achieved precisely through the Court performing its role based on the Statute of the Court and according to the Rules of Court, which are conducive to cases being addressed on the basis of fairness, impartiality and timeliness. Reciprocity for the parties to the case is in turn provided for through the opportunity for the parties to respond to a Declaration of Intervention, as the Russian Federation has also done.

21. Among other claims, the Russian Federation alleges that the Court in its evaluation of Article 63 must have the "circumstances of each specific case" in mind. Norway respectfully submits that this is incorrect as the purpose of Article 63 is to ensure that other parties to a convention whose construction is in question in a case can provide the Court with its interpretation, *irrespective* of the circumstances of a specific case.

¹² Haya de la Torre (Colombia v. Peru) Judgment of 13 June 1951, I.C.J. Reports 1951 pp. 77.

22. The Russian Federation also refers to procedural rules of the Court pertaining to cases where there are several parties involved. It is correct that the Rules of Court have specific procedural rules governing a case with several *parties*. However, Norway *is not a party* to the case between Ukraine and the Russian Federation. *Neither has Norway requested permission* from the Court to intervene as a party under Article 62. Importantly, Norway *is not a “de-facto-applicant”* but has declared that it desires to use its right to intervene under Article 63. Consequently, the procedural rules regarding several parties are not relevant.

23. As shown above, admitting Norway’s Declaration of Intervention is consistent with the principle of equality of the parties and the requirements of good administration of justice.

THE COURT SHALL ASSESS THE ADMISSIBILITY OF NORWAY’S INTERVENTION BEFORE CONSIDERING THE RUSSIAN FEDERATION’S PRELIMINARY OBJECTIONS. THE DECLARATION DOES NOT PRESUPPOSE THAT THE COURT HAS JURISDICTION AND/OR THAT UKRAINE’S APPLICATION IS ADMISSIBLE

24. The Russian Federation claims in part II C of its Written Observations that the Court must decide on its Preliminary Objections before it can assess Norway’s Declaration of Intervention. At the same time, however, the Russian Federation argues in its Preliminary Objections that the Court must interpret several provisions of the Convention to establish the Court’s jurisdiction *ratione materiae*.¹³

25. Norway has a right to intervene under Article 63 on the construction of a convention “whenever” it is in question. It follows that Norway can intervene on the construction of *any* provision of the Convention whenever any such provision is in question. This includes the jurisdictional stage. Whether the Court decides to address questions of jurisdiction separately from other issues does not alter this.

26. This understanding is indeed confirmed by Article 63 read in conjunction with the Rules of Court which state that an intervening state shall file a declaration “as soon as possible” and at the same time identify “the particular provisions of the convention the construction of which it considers to be in question”.¹⁴ The choice of plural form – provisions – confirms that a state can provide its views on the construction of several provisions.

27. Further, the wording attests that *it is for the intervening state* to identify which provisions “it considers to be in question”. Thus, the intervening state must, based on the information available to it at the time of the declaration – which must be as soon as possible – evaluate and identify which of the provisions of a convention before the Court it seeks to exercise its right to intervene. Norway has done precisely this. Coincidentally, this point is illustrated by the fact that the intervening states in this case have focused on different provisions in their respective declarations.

28. Norway submits that if the right to intervene under Article 63 is to fulfill its purpose, it must be possible to intervene *before the Court decides* on the matter. This understanding is supported by the wording in Article 84 of the Rules of Court obliging the Court to decide

¹³ 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.

¹⁴ Rules of Court Article 82 (2) litra b).

whether an intervention under Article 63 is admissible “as a matter of priority”.¹⁵ If the Court does not assess the admissibility of Norway’s Declaration before considering the Russian Federation’s Preliminary Objections, Norway’s views on the Articles relevant for this assessment will not be heard by the Court. Consequently, Article 63 is devoid of its purpose.

29. For the same reasons stated above, it must be clear that the Norwegian Declaration does not “presuppose” that the Court has jurisdiction or that Ukraine’s Application is admissible to the Court, as argued by the Russian Federation in part II D of its Written Observations. Rather, it adheres completely to the scope and intention of Article 63, as well as the formal requirements established in the Rules of Court.

30. Norway rejects the Russian Federation’s claim that the Court must decide on its Preliminary Objections before it can assess the admissibility of Norway’s Declaration of Intervention, as well as the claim that the Declaration is inadmissible since it relates to the jurisdictional phase of the proceedings.

NORWAY HAS THE RIGHT TO INTERVENE ON THE GENOCIDE CONVENTION ARTICLE IX

31. In part II E of its Written Observations, the Russian Federation argues that Norway is prevented from intervening on the construction on the Genocide Convention Article IX, apparently because it is a compromissory clause and therefore cannot form the “subject-matter” of the proceedings.

32. From the documents available, it is clear that Ukraine contends that the Court has jurisdiction to hear its case under Article IX. The Russian Federation has disputed this. Accordingly, Norway has identified that the construction of Article IX of the Genocide Convention is in question in the case, and Norway has a right to provide its view on its construction.

33. Norway recalls that the right to intervene under Article 63 arises “whenever the construction of a convention to which States other than those concerned in the case are parties is in question”. There is no distinction between jurisdictional and substantive issues in this regard.

34. Further, and as highlighted above, it is for the intervening state to identify which particular provisions of a convention it considers to be in question. Consequently, states may offer their assistance to the Court on any occasion of interpretation of a convention to which they are party, including on a compromissory clause as the basis for the Court’s jurisdiction.

35. The Russian Federation has not provided any sound legal basis for its claim to the contrary. There is nothing in the *travaux préparatoires* – as a supplementary means of interpretation – to contradict Norway’s interpretation of Article 63 outlined above. On the contrary, the report made by the representative of France, to which the Russian Federation refers, confirms the object and purpose of Article 63 as allowing states “not involved in the dispute” “the right of intervening in the case in the interest of the harmonious development of

¹⁵ Rules of Court Article 84 (1).

the law”.¹⁶ Depending on the circumstances of the case, this naturally applies also in relation to questions of jurisdiction.

36. Nor does the Court’s reasoning in the *Haya de la Torre* case support the Russian Federation’s view.¹⁷ The “subject-matter” of the current proceedings between Ukraine and the Russian Federation is the allegations of genocide made by the Russian Federation. Norway’s Declaration of intervention is made on the construction of the Genocide Convention in this context.

37. The remaining sources cited by the Russian Federation in part II E of its Written Observation deal with whether compromissory clauses give substantive rights. Norway has not claimed that Article IX gives substantial rights. Norway has simply, in line with its right under Article 63 and in line with the Rules of Court, identified that Article IX is one of the provisions Norway “considers to be in question” in the case and has provided its opinion on its construction accordingly.

38. Thus, Norway submits that it has the right to intervene with respect to Article IX.

NORWAY’S DECLARATION CONCERNS THE CONSTRUCTION OF THE GENOCIDE
CONVENTION, AND NORWAY’S INTERPRETATION IS BASED ON THE
RECOGNIZED RULES OF TREATY INTERPRETATION AS WELL AS THE RELEVANT
SOURCES OF INTERNATIONAL LAW

39. In part II F of its Written Observations the Russian Federation claims that the Declaration is inadmissible because Norway refers to “issues that are unrelated to the construction of the provisions of the Convention”, with the following specific examples pertaining to Norway:

(g) Norway touches upon the issues such as the existence of dispute between the Parties, good faith in the application of the Convention, the use of force and abuse of rights, while also referring to the UN Charter and other rules of international law.

40. When it comes to the alleged references to “the existence of a dispute between the parties”, Norway submits that for a state to effectively identify which “particular provisions” it “considers to be in question”, it is necessary to assess – prima facie – based on the information and documents available, whether the parties seem to disagree on the interpretation of a specific provision, and in turn whether it wishes to intervene on the construction of it. This is precisely what Norway has done, completely in line with Article 63 and the Rules of Court.¹⁸

41. Moreover, Norway’s interpretation of the relevant provisions of the Convention is based on the recognized rules of treaty interpretation as they follow from customary international law and as reflected in The Vienna Convention on the Law of Treaties Articles 31 and 32, including the principle of good faith, as reflected in Article 31 (1), and other “relevant rules of

¹⁶ League of Nations, Permanent Court of International Justice, *Documents concerning the action taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court of International Justice* (1921), p. 50.

¹⁷ As outlined in paragraph 2 above, the Court’s reference to an intervention relating to “the subject-matter of the pending proceedings” meant that Cuba’s intervention had to be on the construction of the Havana Convention in connection with the question of whether Colombia was obligated to surrender Haya de la Torre to the Peruvian authorities, cf. *Haya de la Torre (Colombia v. Peru)* Judgment of 13 June 1951, I.C.J. Reports 1951.

¹⁸ E.g. cf. Norway’s Declaration on Intervention, paragraph 13.

international law applicable in the relations between the parties”, as reflected in Article 31 (3) litra c). When it comes to the references to the UN Charter, Norway recalls that the Statute of the International Court of Justice is considered an integral part of the Charter.¹⁹

42. Norway furthermore submits that the Russian Federation’s claim that the Declaration is inadmissible because Norway refers to “issues that are unrelated to the construction of the provisions of the Convention” are irrelevant to the assessment of whether the Declaration meets the conditions under Article 63. Norway thus rejects the claim that the Declaration is inadmissible for the reasons referred to in part II F of the written observations of the Russian Federation.

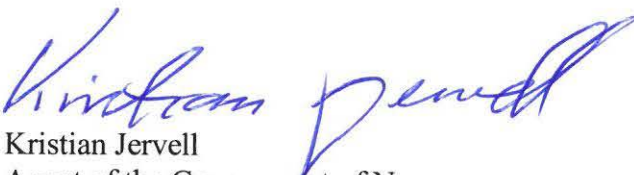
CONCLUSION

43. In Norway’s view, none of the objections advanced by the Russian Federation in its Written Observations can render the Norwegian Declaration inadmissible.

44. The Norwegian Declaration of Intervention is admissible pursuant to Article 63 and meets the formal requirements of Article 82 of the Rules of Court and shall therefore be granted by the Court.

45. Based on the above, Norway respectfully requests the Court to admit Norway’s Declaration of Intervention.

Respectfully,


Kristian Jervell
Agent of the Government of Norway

¹⁹ Cf. the Charter of the United Nations Article 92.