

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 THE REPUBLIC OF POLAND ON THE  
ADMISSIBILITY OF ITS DECLARATION OF INTERVENTION

13 FEBRUARY 2023



The Hague, 13 February 2023

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Embassy  
of the Republic of Poland  
in The Hague

AMB.HAGA.670.1.2023/1

*Excellency,*

With reference to the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), I have the honour to submit to the International Court of Justice the written observations of the Republic of Poland on the admissibility of its Declaration of Intervention pursuant to Article 63, paragraph 2, of the Statute of the Court.

I also attach 30 paper copies of the written observations and the USB pen drive containing both a PDF and a Microsoft Word version of the written observations, as requested.

*Yours sincerely,*

Margareta Kassangana  
Ambassador

H.E. Mr Philippe Gautier  
Registrar  
International Court of Justice

## Written observations of the Republic of Poland

### Admissibility of its declaration of intervention

To the Registrar, International Court of Justice, the undersigned being duly authorized by the Government of the Republic of Poland:

1. The present observations are submitted in accordance with the Registrar's letter dated 31 January 2023 concerning the time-limit for the Government of the Republic of Poland to submit observations in writing on the admissibility of the Polish declaration.
2. On 15 September 2022, the Republic of Poland ("Poland") filed a Declaration of Intervention ("Declaration") pursuant to Article 63 of the Statute of the International Court of Justice ("the Court").
3. On 17 October 2022, the Russian Federation ("Russia") filed written observations on the admissibility of declarations of intervention submitted by France, Germany, Italy, Latvia, Lithuania, New Zealand, Poland, Romania, Sweden, the United Kingdom and the United States. In its written observation, Russia "respectfully requests the Court:
  - (a) to dismiss each of the Declarations on the ground of inadmissibility; if not
  - (b) to dismiss each of the Declarations as inadmissible inasmuch as they relate to the jurisdictional phase of the proceedings;
  - (c) to defer consideration of admissibility of the Declarations until after the Court has made a decision on the Russian Federation's Preliminary Objections".
4. Poland's written observations here refer only to those elements of the position presented by Russia which are not directly related to states other than Poland covered by Russia's written observations.
5. Russia's written observations contain the following four general grounds:

- 5.1 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 Ukraine as de facto co-applicants rather than non-parties.
- 5.2 The Declarants' participation in these proceedings would result in a serious impairment of the principle of equality of parties to the detriment of the Russian Federation and would be incompatible with the requirements of good administration of justice.
- 5.3 The Court cannot, in any event, decide on the admissibility of the Declarations before it has made a decision on the Preliminary Objections; also, the Declarations address matters presupposing that the Court has jurisdiction and/or that Ukraine's Application is admissible.
- 5.4 The Declarations should likewise be 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 prejudice the question of the Court's jurisdiction *ratione materiae*<sup>1</sup>.

These observations will be commented upon in turn.

#### **Russia's first ground: Poland's Declaration is not genuine**

6. 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 that 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<sup>2</sup>. The declaration

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<sup>1</sup> 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.

<sup>2</sup> 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, para 8.

must also satisfy the conditions set forth in Article 82 of the Rules of the Court<sup>3</sup>. When a State seeking to intervene has met conditions set under Article 63 of the Statute and Article 82 of the Rules, the declaration should be considered admissible. Furthermore, the aforementioned provisions are the only legal requirements the Court must evaluate. How the fact of intervention is presented outside the framework of the proceedings before the Court has no significance for the admissibility evaluation when the prerequisites of Article 63 of the Statute and Article 82 of the Rules are fulfilled<sup>4</sup>.

7. Russia's presentation of the law is erroneous. The Court has used the expression of "genuine intervention" in the *Haya de la Torres* case to describe how it employed the objective test to discover whether the object of Cuba's intervention was 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 Cuba's "genuine intention". This semantic shift from an objective test (was the intervention "genuine"?) to a subjective test (was the government's intention "genuine"?) has no basis in the case law of the Court. Accordingly, Poland's political motivation underlying its Declaration of Intervention is irrelevant. Similarly, the question of whether an intervener would be "taking sides" cannot trigger the inadmissibility of an intervention. Already in the *Wimbledon* case, the Court accepted that Poland as intervener shared the applicant's arguments<sup>5</sup>.
8. Poland's Declaration satisfies all the necessary requirements. Poland is a party to the Genocide Convention and thus has the right to intervene under Article 63 of the Statute. As stated in the Declaration:

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

<sup>4</sup> *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, *I.C.J. Reports 2013*, para 8-9.

<sup>5</sup> *S.S. Wimbledon*, Judgment of 28 June 1923 (Question of Intervention by Poland), *PCIJ*, Series A, No. 1, p. 11, p. 13.

“the Republic of Poland will present its views to the Court on the issues of interpretation under the Convention relevant to the determination of the case. In that regard, the Republic of Poland emphasizes that it does not seek to be a party to the proceedings. But, in accordance with Article 63 of the Statute, the Republic of Poland confirms that by availing itself of its right to intervene, it accepts that the construction given by the judgment in the case will be equally binding upon it”<sup>6</sup>.

9. Indeed, Poland presented its view concerning the interpretation of Article IX and Article I (in connection with Article II) of the Genocide Convention.

10. Contrary to what Russia tries to suggest, the fact that Poland invoked the Court’s jurisprudence indicating the prohibition of genocide has the character of a peremptory norm (*jus cogens*) and that the rights and obligations enshrined in the Genocide Convention have an *erga omnes* character in no way implies that Poland acts as a “de facto co-applicant alongside Ukraine”. It is Poland’s view that the cited jurisprudence undeniably sheds light on the object and purpose of the Genocide Convention and thus should be taken into account when constructing provisions of the treaty at hand.

11. With respect to the Article 82 of the Rules it is to be noted that:

11.1 Poland filed its Declaration before the opening of oral proceedings;

11.2 Poland has appointed an agent;

11.3 Poland indicated the basis on which it considers itself a party to the Genocide Convention;

11.4 Poland has identified and interpreted particular provisions of the Genocide Convention whose construction it considers to be in question; and

11.5 Poland attached listed documents in support of its position.

12. Finally, Poland indicates that contrary to Russia’s suggestion in its written observations, Poland has not participated in *Legality of Use of Force* cases.

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<sup>6</sup> Declaration of intervention under Article 63 of the Statute of the Court submitted by the Republic of Poland, 15 September 2022, para 15.

13. Accordingly, Poland respectfully requests that the Court reject Russia's first objection to the admissibility of its intervention.

**Russia's second ground: Poland's Declaration is incompatible with the principle of equality of parties and the requirements of good administration of justice**

14. Article 63 of the Statute does not limit in any way the number of State Parties to the Convention that can invoke the right of intervention in cases before the Court where construction may be in question.

15. The fact of a plethora of interventions made by the State Parties to the Genocide Convention does not in any way impair the principle of equality of parties before the Court, nor is it contrary to the requirements of good administration of justice, as both the Applicant and the Respondent continuously benefit from the same rights and obligations as envisaged in the Statute and the Rules of the Court.

16. Furthermore, Poland recalls the Court's position on the point at issue in the Whaling case, according to which "an intervention [under Article 63] cannot affect the equality of the Parties to the dispute".<sup>7</sup>

17. The Genocide Convention is of fundamental value to the entire international community. It is therefore unsurprising that a plethora of states take interest in the construction of this Convention. In such a situation, when the treaty encompasses matters of collective interest, the late Judge Cançado Trindade called upon all State Parties to contribute to the proper interpretation of the treaty as a "collective guarantee of the observance of the obligations contracted by the State parties"<sup>8</sup>. What is surprising is Russia's expression of concern for the interests of States with respect to the Genocide Convention, since it was

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<sup>7</sup> Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, *I.C.J. Reports 2013*, para 18.

<sup>8</sup> 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.

the plethora of statements by Russian officials about Ukraine's application of the Convention that led the Court to establish *prima facie* the existence of a dispute<sup>9</sup>.

18. In light of the above, Poland respectfully requests that the Court reject Russia's second objection to the admissibility of its intervention.

**Russia's third ground: The Court cannot decide on the admissibility of Poland's Declaration before it considers Russia's preliminary objections**

19. It should be remembered that Poland filed its Declaration on 15 September 2022, that is, before Russia's filing on 3 October 2022 of preliminary objections to the jurisdiction of the Court and to the admissibility of the Application.

20. First, Article 63 of the Statute does not make any distinction between separate phases before the Court. Rather, the opening word "whenever" indicates that a State is allowed to intervene in all phases of the proceedings. Moreover, the second sentence of Article 82(1) of the Rules sets only an outer time limit, i.e., a duty to intervene no later than the date fixed for the oral hearing. Again, the mention of an "oral hearing" does not distinguish between separate phases of Court proceedings – the intervention may be filed before the oral hearings set for the jurisdictional/admissibility phase or before the merits phase. In addition, the invitation to file a declaration "as soon as possible" in that provision confirms that the filing of an Article 63 declaration is admissible at this stage. Thus, Poland holds the view that a declaration pursuant to Article 63 of the Statute may assist the Court in the construction of Convention provisions concerning the Court's jurisdiction as well.

21. In consequence, Poland's Declaration is to large extent concentrated on interpreting the Genocide Convention's jurisdictional provisions and can assist the Court in deciding on the jurisdictional aspect of the case. Reference to the construction of substantive

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<sup>9</sup> Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Order of 16 March 2022, para. 37-47.

provisions of the Genocide Convention, with special regard to Articles I-II, is made also for the purpose of interpreting Article IX.

22. Russia's third ground is based on a faulty assumption. From the fact that previous interventions under Article 63 of the Statute primarily concerned merits, it implies that the Court does not allow interventions at the jurisdictional phase of the proceedings. This position has no legal basis in the Statute or Court decisions.

23. With respect to the Declaration of the Republic of El Salvador in Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), which Russia extensively discusses in its written observations, Poland notes that the Court first decided on the admissibility of El Salvador's declaration and only subsequently in the oral proceedings opened the issues of jurisdiction and admissibility. Thus, in those proceedings, the Court acted contrary to Russia's suggestion in its third ground.

24. Furthermore, in that case, the Court considered El Salvador's Declaration of Intervention inadmissible because, within the jurisdictional phase, the Declaring State did not address provisions pertaining to the Court's jurisdiction, but only to the merits<sup>10</sup>.

25. Therefore, it follows that the Court can decide on the admissibility of Poland's Declaration before it considers Russia's preliminary objections.

26. Alternatively, the Court can decide solely on the admissibility of the part of Poland's Declaration concerning jurisdiction before it considers Russia's preliminary objections.

27. In light of the above, Poland respectfully requests that the Court reject Russia's third objection to the admissibility of its intervention.

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<sup>10</sup> 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, paras 1-2.

**Russia's fourth ground: Poland seeks 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**

28. According to Russia's written observations, the Polish Declaration is inadmissible because it addresses matters that are not limited to the construction or interpretation of the treaty provisions in question in a contentious case. In particular, according to Russia's position, those other matters concern "issues relating to the existence of a dispute between the Russian Federation and Ukraine; whether evidence that genocide has occurred or may occur in Ukraine exists; the doctrine of abuse of rights; and matters relating to the use of force"<sup>11</sup>.

29. Poland holds that those accusations are groundless.

30. As to the "issues relating to the existence of a dispute between the Russian Federation and Ukraine" – there is no such indication in Poland's Declaration. In para 25 of the Declaration, Poland presents an interpretation of the term "disputes" contained in Article IX of the Genocide Convention.

31. On "whether evidence that genocide has occurred or may occur in Ukraine exists" – there is no such indication in Poland's Declaration. Paragraphs 38 and 40 of the Declaration refer only to interpretation of Article I (in connection with Article II) of the Convention.

32. On "the doctrine of abuse of rights", it should be noted that para 30 of Poland's Declaration refers to "abuse of the law". This element can be considered as corollary to good faith, which is a crucial element in the interpretation of treaties or can be considered as a norm that is part of general international law, which in accordance with Article 31,

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<sup>11</sup> 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 85 (g).

para 3, letter c of the Vienna Convention on the Law of Treaties shall be taken into account together with the context in the process of interpretation.

33. Poland's Declaration mentions "matters relating to the use of force" solely in the context of interpreting Article I of the Genocide Convention:

"the Republic of Poland agrees with the interpretation that invoking a manifestly ill-founded allegation of genocide as justification for the use of force against another State is in clear contravention of Article I of the Genocide Convention"<sup>12</sup>.

34. In sum, contrary to Russia's allegations, Poland does not seek in its Declaration to address issues unrelated to the "construction" of the Genocide Convention.

35. For the above reasons, Poland respectfully requests that all objections raised by Russia to the admissibility of its intervention be rejected and that its Declaration of Intervention under Article 63 of the Statute be declared admissible.

36. In addition, Poland respectfully requests that the Court decide on the admissibility of Poland's Declaration before it considers Russia's preliminary objections.



Dr. Konrad Jan Marciniak

Agent of the Government of the Republic of Poland

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<sup>12</sup> Declaration of Intervention under Article 63 of the Statute of the Court submitted by the Republic of Poland, 15 September 2022, para 42.