

**Before the
International Court of Justice**

Written Observations

**of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of
Germany, the Kingdom of the Netherlands, and the Kingdom of Great Britain and
Northern Ireland**

on the Admissibility of their Joint Declaration of Intervention

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

**Application of the Convention on the Prevention and Punishment of the Crime of
Genocide (*The Gambia v. Myanmar*)**

WRITTEN OBSERVATIONS

OF CANADA, THE KINGDOM OF DENMARK, THE FRENCH REPUBLIC, THE FEDERAL REPUBLIC OF GERMANY, THE KINGDOM OF THE NETHERLANDS, AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND

ON THE ADMISSIBILITY OF THEIR JOINT DECLARATION OF INTERVENTION

1. On 15 November 2023, Canada, the Kingdom of Denmark (“Denmark”), the French Republic (“France”), the Federal Republic of Germany (“Germany”), the Kingdom of the Netherlands (“the Netherlands”), and the United Kingdom of Great Britain and Northern Ireland (“the United Kingdom”) (together “the Declarants”), invoking their right under Article 63 of the Statute of the International Court of Justice (“the Statute”), submitted a joint declaration of intervention (the “Joint Declaration”) in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*.
2. On 15 January 2024, Myanmar and The Gambia filed written submissions on the admissibility of the Declarations of Intervention submitted by the Declarants and the Maldives. The Registrar provided these written observations to the Declarants on 16 and 17 January 2024, respectively.
3. While The Gambia contends that the Joint Declaration meets the requirements of the Statute and the Rules of Court and is admissible, Myanmar objects to the admissibility of the Joint Declaration and requests the Court to decide that it is inadmissible.
4. On 24 January 2024, the Declarants were notified of the Court’s decision to fix 26 February 2024 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 the Declarants on the admissibility of their Joint Declaration. For the reasons outlined below, the Declarants respectfully submit that their Joint Declaration is admissible and that Myanmar’s objections to the admissibility of their Joint Declaration must therefore be rejected.
6. These Written Observations are divided into four parts. First, the Declarants argue that their Joint Declaration meets the criteria set out in the Statute and the Rules of Court (“the Rules”) of the International Court of Justice (“ICJ”), and that it is therefore admissible (Section A). They then submit that there is no merit to the suggestion that certain paragraphs of the Joint Declaration should be deemed inadmissible because they refer to the “common interest” of the States Parties to the *Convention on the Prevention and Punishment of the Crime of Genocide*¹ (the “Genocide Convention”) (Section B). The Declarants then submit that they are entitled to rely on, and point to, other sources of international law outside the Genocide Convention to support the construction of that Convention (Section C). Finally, the Declarants submit that all arguments in their Joint Declaration concern issues of interpretation and are therefore admissible under Article 63 of the Statute (Section D).

¹ 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.

A. The Joint Declaration meets the criteria set out in the Statute and Rules of the ICJ 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 and Article 82 of the Rules.² In this regard, the Court has recognized that Article 63 confers a right of intervention³ 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.”⁴

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.”⁵

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 case.⁶ As the Court has stated, “in determining the admissibility of a declaration of intervention, the Court’s task is limited to ascertaining whether that declaration relates to the interpretation of a convention in question in the proceedings.”⁷

11. The Declarants note that it is for the Court to ensure the equality of the parties, and that the motivation behind the decision to intervene as well as the political position of intervening States is irrelevant when considering whether a declaration of intervention is admissible.⁸

12. Here, the Joint Declaration filed by the Declarants falls within the scope of Article 63 of the Statute, as the Declarants – which are States Parties to the Genocide Convention without reservation – seek to present their observations on the interpretation of the provisions of the Genocide Convention, the construction of which is in question in the proceedings.

² *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.

³ *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.

⁴ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya), Application for Permission to Intervene*, Judgment, I.C.J. Reports 1981, p. 15, para. 26.

⁵ *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.

⁶ *Haya de la Torre (Colombia v. Peru)*, Judgment, I.C.J. Reports 1951, p. 77.

⁷ *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 5 June 2023, I.C.J. Report 2023, para 44.

⁸ *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 5 June 2023, I.C.J. Report 2023, para 44.

13. Myanmar argues that Article II is not in dispute as it is not referred to in The Gambia's Application, and by implication that references to Article II in the Joint Declaration are inadmissible. However, in its Application, The Gambia alleges violations of the Genocide Convention through "acts adopted, taken and condoned by the Government of Myanmar against members of the Rohingya group."⁹ Myanmar, for its part, denies that it has committed any of the violations of the Genocide Convention alleged by The Gambia, arguing in particular the absence of any genocidal intent.¹⁰

14. In light of the above, the proper construction of the Genocide Convention, including Article II, which defines genocide, is in question in the case and is directly relevant to the resolution of the dispute placed before the Court by The Gambia's Application.

15. 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.

16. 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.

17. The Joint Declaration was filed well before the oral proceedings on the merits, which have not yet been scheduled. 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

⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings, 11 November 2019, para. 2.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3, para 29

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. Myanmar does not suggest otherwise.

18. 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 therefore be declared admissible by the Court.

B. There is no merit to Myanmar's suggestion that certain paragraphs of the Joint Declaration should be deemed inadmissible because they refer to the "common interest" of the States Parties to the Genocide Convention.

19. Myanmar has submitted that the Court should determine that paragraphs 9 and 10 and the first sentence of paragraph 14 of the Joint Declaration should be deemed inadmissible on the basis that they "contain references to the common interest of parties to the Genocide Convention, which are irrelevant to an intervention pursuant to Article 63 of the Statute."¹¹ This submission should be dismissed.

20. In *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, the declarations of intervention generally contained contextual paragraphs on the importance of the issues in the case, including the fact that obligations under the Genocide Convention are owed *erga omnes partes*, as a motivation for the States seeking to intervene.¹² The Court did not find any of these contextual statements inadmissible.¹³

21. Similarly, paragraphs 9 and 10 and the first sentence of paragraph 14 of the Joint Declaration provide context for the Joint Declaration, in that they explain why the Declarants have chosen to exercise their right of intervention in the present case. They do not contain substantive submissions on the construction of the Genocide Convention. The Declarants' observation that their decision to submit the Joint Declaration was informed by the *erga omnes partes* nature of the obligations in the Genocide Convention¹⁴ is thus no reason for declaring the Joint Declaration – or parts thereof – inadmissible.

¹¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Written Observations on the Admissibility of the Declarations of Intervention by Myanmar, para. 11.

¹² *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Declarations of Intervention of Australia (para. 6), Austria (para. 14), Belgium (para. 9), Bulgaria (para. 11), Canada and the Netherlands (para. 11), Croatia (para. 10), Cyprus (para. 10), Czech Republic (para. 11), Denmark (para. 9), Estonia (paras. 13-14), Finland (paras. 10-11), France (para. 8), Germany (paras. 12-13), Greece (paras. 14-16), Ireland (para. 10), Italy (paras. 14-16), Latvia (para. 22), Liechtenstein (para. 9), Lithuania (para. 17), Luxembourg (para. 10), Malta (para. 11), New Zealand (para. 12), Norway (para. 7), Poland (paras. 22-23), Portugal (paras. 11-12), Romania (para. 11), Slovakia (paras. 15-17), Slovenia (para. 10), Spain (para. 10), Sweden (paras. 11-12), United Kingdom (para. 11), United States of America (paras. 9-10).

¹³ *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of June 5, 2023.

¹⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland, 15 November 2023, paras. 9, 10 and 14.

22. To be clear, as States Parties to the Genocide Convention, the Declarants may avail themselves individually or jointly¹⁵ of the right to submit a declaration of intervention under Article 63 of the Statute. This right exists due to their status as States Parties and does not flow from the *erga omnes partes* nature of the obligations under the Genocide Convention. The *erga omnes partes* nature of an international legal obligation is immaterial to the question of whether the States Parties to the convention containing that obligation may submit a declaration pursuant to Article 63 of the Statute. The same right would exist in a case concerning a treaty that does not contain obligations *erga omnes partes*.

C. The Declarants are entitled to rely on, and point to, other sources of international law outside the Genocide Convention to support the construction of that Convention.

23. Contrary to Myanmar's submission, an intervention under Article 63 of the Statute may refer to other rules and principles of international law outside the Genocide Convention in so far as these references concern the construction of the Convention's provisions, in accordance with the customary rule of interpretation reflected in Article 31, paragraph 3(c), of the Vienna Convention on the Law of Treaties.¹⁶ This provision states that "any relevant rules of international law applicable in the relations between the parties" shall be taken into account in the interpretation of a treaty.

24. The Declarants are therefore entitled to rely on, and point to, other sources of international law outside the Genocide Convention to support the construction of that Convention.

D. The Declarants' arguments in their Joint Declaration all concern issues of construction and are therefore admissible in an intervention under Article 63 of the Statute.

25. The Joint Declaration provides the Declarants' views on the construction of Articles I, II, IV, V and VI. The construction of all these provisions is in question in this case. This has been confirmed by The Gambia, which stated that "the Declarations appropriately [...] identify the provisions of the Convention which the States consider to be in question."¹⁷ As part of their views on the construction of the Genocide Convention, the Declarants have included their views on issues of construction pertaining to the establishment of its breach.

26. Addressing the conditions for the establishment of a breach of a convention as a matter of construction of that convention is in accordance with Article 63 of the Statute, as demonstrated by the practice of previous interventions before the Court. In *Whaling in the Arctic*, New Zealand submitted its view on how a 'scientific purpose' could be established. It elaborated on this point in its Declaration of Intervention and stated that "that purpose must also be capable of being established on the basis of an objective assessment, taking into account such matters as the programme's methodology, design and characteristics."¹⁸ According to New Zealand, the relevant "objective assessment" would require a contracting State:

¹⁵ *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 5 June 2023, I.C.J. Report 2023, para. 88.

¹⁶ *Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order of 5 June 2023, I.C.J. Report 2023, para 84.

¹⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Written Observations on the Admissibility of the Declarations of Intervention by The Gambia, p. 2.

¹⁸ *Whaling in the Arctic (Australia v. Japan), Declaration of Intervention of New Zealand*, 20 November 2012, para. 29.

to demonstrate that it has limited the number of whales killed under special permit to the minimum level that is both necessary for, and proportionate to, the objectives of the research and that will have no adverse effect on the conservation of the stock.¹⁹

27. New Zealand continued by submitting that:

Any discretion that Contracting Governments have with respect to Special Permits, including the discretion to determine the number of whales to be taken under a Special Permit, is not unfettered and its exercise remains subject to review to ensure that it is exercised properly and in good faith.²⁰

28. New Zealand thus presented the Court with its view on how a State party to the International Convention for the Regulation of Whaling should comply with its obligations as a matter of construction of that convention. The Court, having declared the intervention by New Zealand admissible, directly referred to this part of New Zealand's Declaration of Intervention.²¹

29. Thus, in general, States intervening under Article 63 may offer their view on the construction of the provisions in question in terms of the establishment of a breach, including matters related to the standard of proof and evidence. In the present dispute, it is particularly appropriate, considering the special characteristics of the prohibition of genocide, and the element of genocidal intent.

30. As the Court has noted, genocidal intent is the "essential characteristic of genocide, which distinguishes it from other serious crimes."²² As mentioned in the Court's caselaw, genocidal intent is not usually susceptible to direct proof and may be established by inference. It is in this light that the Declarants present their views on the interpretation of this key component of the Genocide Convention. This necessarily includes their views on, and interpretation of, the factors identified in the Court's own jurisprudence that are relevant in identifying whether genocidal intent can be established, either directly or by inference. These are inherently questions of interpretation and construction; they are without prejudice to the question of whether genocidal intent is established in the present case.

31. The Declarants consider that considerations on the applicable standard of proof are relevant to the construction of Article II, in particular with respect to the requirement of genocidal intent. Indeed, as the establishment of a breach requires the interpretation of the relevant international legal obligation, considering which standard of proof is to be applied for the establishment of genocidal intent is indispensable for the proper construction of the Genocide Convention. Thus, the considerations brought forward by the Declarants on this matter are admissible as part of their intervention under Article 63 of the Statute.

32. The Declarants' approach on this aspect is also in line with the Court's jurisprudence. In *Croatia v. Serbia*,²³ the Court addressed general considerations regarding the establishment of genocidal intent as part of its examination of the "Applicable Law" governing the case. In the Court's understanding, to examine the "applicable law" included the examination of general factors guiding the treatment of "Evidence of the *dolus specialis*." The Court distinguished these general

¹⁹ *Whaling in the Arctic (Australia v. Japan), Declaration of Intervention of New Zealand*, 20 November 2012, para. 30.

²⁰ *Whaling in the Arctic (Australia v. Japan)*, Written Observations of New Zealand, 4 April 2013, para. 45.

²¹ *Whaling in the Arctic (Australia v. Japan), Declaration of Intervention of New Zealand*, Order of 6 February 2013, para. 14.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, para. 132.

²³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 3, paras. 143 et seq.

considerations from its later “Considerations of the Merits of the Principal Claim.” The Declarants’ approach in their Joint Declaration is guided by the same understanding.

33. Furthermore, as the Declarants have explained in their Joint Declaration, they consider that the special characteristics of the prohibition of genocide, in particular the requirement of specific intent to commit genocide, requires – as part of the construction of Article II – a consideration of the evidentiary value of particular documents.²⁴

E. Conclusion

34. On the basis of these Written Observations, the Declarants respectfully request that the Court:

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



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²⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Joint Declaration of Intervention of Canada, the Kingdom of Denmark, the French Republic, the Federal Republic of Germany, the Kingdom of the Netherlands, and the United Kingdom of Great Britain and Northern Ireland*, 15 November 2023, para. 76.