

INTERNATIONAL COURT OF JUSTICE

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

Written observations of the Republic of the Union of Myanmar
pursuant to Article 83, paragraph 1, of the Rules of Court
on the declaration of intervention of the Democratic Republic of the Congo

10 February 2025

A. Introduction

1. On 10 December 2024, the Government of the Democratic Republic of the Congo (the “**DRC**”), referring to Article 63 of the Statute of the Court, filed in the Registry a declaration of intervention in this case. In accordance with Article 83, paragraph 1, of the Rules of Court, the Republic of the Union of Myanmar (“**Myanmar**”) files the present written observations on that declaration of intervention, within the time-limit notified in the letter of the Registrar dated 10 December 2024.
2. The declaration of intervention of the DRC states that it is made pursuant to Article 63 of the Statute of the Court. It does not purport to be made pursuant to, or purport in any way to rely upon, Article 62 of the Statute. It follows that the declaration of intervention falls to be considered exclusively from the perspective of Article 63 of the Statute and the relevant provisions of the Rules of Court relating to Article 63 of the Statute.
3. In its Order in the present case dated 3 July 2024 concerning the admissibility of two earlier declarations of intervention (the “**3 July 2024 Order**”),¹ the Court affirmed that although intervention under Article 63 of the Statute involves the exercise of a right, “[w]hen a declaration of intervention is filed, the Court must ensure that it falls within the provisions of Article 63 of the Statute and that it meets the requirements set forth in Article 82 of the Rules of Court”.² This has also consistently been made clear in earlier case law of the Court.³

¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 3 July 2024, <https://www.icj-cij.org/sites/default/files/case-related/178/178-20240703-ord-01-00-en.pdf>.

² *Ibid.*, paras. 20 and 22.

³ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, *Admissibility of the Declarations of Intervention*, Order of 5 June 2023, *I.C.J. Reports 2023*, p. 362, para. 28; *Whaling in the Antarctic (Australia v. Japan)*, *Declaration of Intervention of New Zealand*, Order of 6 February 2013, *I.C.J. Reports 2013*, pp. 5-6, para. 8; *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. 216; *Haya de la Torre (Colombia v. Peru)*, *Judgment*, *I.C.J. Reports 1951*, pp. 76-77.

4. The position of Myanmar is that the declaration of intervention of the DRC does not meet the requirements set forth in Article 82 of the Rules of Court, and that it is therefore inadmissible.

B. Relevant provisions of the Statute and Rules of Court

5. 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.

6. Article 82 of the Rules of Court relevantly provides that:

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 no later than the date fixed for the filing of the Counter Memorial.

2. If the Court has authorized further written pleadings ... under Article 45, paragraph 2 ... of these Rules, a declaration of intervention shall be filed as soon as possible, and not later than the date fixed for the filing of the last written pleading.

...

4. In exceptional circumstances a declaration submitted later may however be admitted.
5. The declaration shall state the name of an agent. It shall specify the case and the convention to which it relates and shall contain:

...

- (c) a statement of the construction of those provisions for which it contends;

C. The DRC's declaration of intervention is inadmissible because it does not comply with Article 82, paragraph 1, of the Rules of Court

7. The DRC's declaration of intervention does not satisfy the requirements of admissibility since, apart from anything else, it does not comply with Article 82, paragraph 1, of the Rules of Court.
8. Article 82, paragraph 1, of the Rules of Court provides that a declaration of intervention under Article 63 of the Statute shall be "signed in the manner provided for in Article 38, paragraph 3, of these Rules".
9. Article 38, paragraph 3, of the Rules of Court in turn provides for signature of an application instituting proceedings in the following manner:

The original of the application shall be signed either by the agent of the party submitting it, or by the diplomatic representative of that party in the country in which the Court has its seat, or by some other duly authorized person. If the application bears the signature of someone other than such diplomatic representative, the signature must be authenticated by the latter or by the competent authority of the applicant's foreign ministry.

10. The declaration of intervention of the DRC does not comply with this requirement for the following reasons.
11. The person signing the declaration of intervention as Agent of the DRC was not the diplomatic representative of the DRC in the country in which the Court has its seat. Rather, it appears from the letter and the "procuracion speciale", both signed by HE Constant MUTAMBA TUNGUNGA, which accompanied the declaration of intervention, that the person who signed the declaration of intervention as Agent of the DRC, Me Ivon Mingashang, is a Professor of Law at the University of Kinshasa and an advocate of the bar of Kinshasa/Gombe.
12. That being the case, Article 82, paragraph 1, of the Rules of Court, read with Article 38, paragraph 3, required the Agent's signature to be authenticated by the diplomatic representative of the DRC in the country in which the Court has its seat, or by the competent authority of the foreign ministry of the DRC. However, the signature was not so authenticated. This is because HE Constant MUTAMBA TUNGUNGA signed the letter and the "procuracion speciale," which accompanied the declaration of intervention, as Minister of Justice of the DRC. There is no suggestion that he is the foreign minister of the DRC, or a competent authority of the foreign ministry of the DRC, or a diplomatic representative of the DRC in the country in which the Court has its seat.
13. In the 3 July 2024 Order in the present case, the Court held at paragraph 31 that the signature of the Agent must be authenticated in the manner provided for in Article 38, paragraph 3, of the Rules of Court at the time the declaration of intervention is presented. This means that at present, the declaration of intervention of the DRC is inadmissible, apart from anything else, due to non-compliance with this requirement.
14. In the 3 July 2024 Order, the Court found that the declaration of intervention of the Maldives was admissible, in circumstances where it contained a similar defect at the time

that it was filed, but where that defect had subsequently been remedied before the Court gave its decision on the admissibility of that declaration of intervention. However, in the present case, the defect has not been remedied by the DRC, and the declaration of intervention therefore remains inadmissible at present. Furthermore, in the case of the Maldives, at the time that the defect was remedied, there was no suggestion that the time limit for the filing of a declaration of intervention had yet expired. In contrast, in the present case, the time limit for the filing of declarations of intervention has now expired (see further paragraphs 17-35 below). Thus, even if the DRC were now to remedy the defect, the result would be that no admissible declaration of intervention will have been filed within the applicable time limit.

15. The DRC should have been well aware of the requirements concerning the signature on a declaration of intervention, given that these are stated clearly in the Rules of Court, and given that these requirements have been in issue in these very proceedings in relation to an earlier declaration of intervention by another State. The 3 July 2024 Order of the Court, which addressed these requirements in its paragraphs 29 to 32, has been accessible to the public on the website of the Court.
16. The Court should therefore find that the declaration of intervention of the DRC is inadmissible because it was not signed in the manner required by Article 82, paragraph 1, of the Rules of Court.

D. The DRC’s declaration of intervention is inadmissible because it was not filed “as soon as possible” as required by Article 82, paragraph 2, of the Rules of Court

17. In an order of 16 October 2023, pursuant to Article 45, paragraph 2, of the Rules of Court, the Court authorised the filing of a second round of written pleadings in this case.⁴ The relevant time-limit for the filing of any declaration of intervention by the DRC was therefore the time-limit found in Article 82, paragraph 2, of the Rules of Court.
18. The time-limit in Article 82, paragraph 2, of the Rules of Court consists of two separate requirements. First, it requires that any declaration of intervention must be filed “as soon as possible”. Secondly, it requires that any declaration of intervention must in any event be filed “not later than the date fixed for the filing of the last written pleading”.
19. The position of Myanmar is that a declaration of intervention must satisfy both of these requirements in order to comply with Article 82, paragraph 2, of the Rules of Court. Thus, even where a declaration of intervention is filed before the date fixed for the filing of the last written pleading, it will not comply with Article 82, paragraph 2, of the Rules of Court if it was not filed “as soon as possible”.
20. The declaration of intervention of the DRC fails to meet the second of these requirements, for the reasons given in paragraphs 7 to 15 above.

⁴ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Order of 16 October 2023, <https://www.icj-cij.org/sites/default/files/case-related/178/178-20231016-ord-01-00-en.pdf>.

21. Furthermore, and in any event, the declaration of intervention of the DRC does not meet the first of these requirements. It was not filed as soon as possible.
22. The Court's judgment on the preliminary objections in this case was delivered on 22 July 2022.⁵ There is no apparent reason why the declaration of intervention of the DRC could not have been filed at any time after that date. Indeed, a declaration of intervention of the Maldives, and a joint declaration of intervention of Canada, Denmark, France, Germany, the Netherlands and the United Kingdom, were both filed in this case on 15 November 2023, over a year before the DRC filed its declaration of intervention. Ultimately, the declaration of intervention of the DRC was filed over *two years and four months* after the judgment of the Court on the preliminary objections, and only some *three weeks* before the date fixed for the filing of the last written pleading in the case. No explanation is given in the declaration of intervention of the DRC as to why it could not have been filed very much earlier than it was. Based on the information before the Court, the inevitable conclusion is that the declaration of intervention of the DRC was not filed "as soon as possible".
23. The delay of the DRC in filing its declaration of intervention will lead to delays in these proceedings that would have been avoided if the declaration of intervention had been filed earlier. On 30 December 2024, the very day that the last written pleading in this case was filed, the pleadings in this case were transmitted to the seven States whose declarations of intervention have already been found admissible, and these seven States were informed that the President of the Court has fixed 3 March 2025 as the time-limit for the filing of their written observations on the subject-matter of their intervention. If the declaration of the DRC were now to be found to be admissible, a later date would need to be fixed for the filing by the DRC of its written observations on the subject-matter of its intervention. On the other hand, if the declaration of intervention of the DRC had been filed earlier, and if it had been found to be admissible, the intervention of the DRC could have been subject to the same schedule as the interventions of the seven other States whose declarations of intervention have already been found to be admissible.
24. The DRC should have been aware in November 2023 of the previous declarations of intervention filed in this case, as they were at the time made accessible to the public on the Court's website. The DRC should furthermore have been aware in July 2024 that these previous declarations of intervention were found by the Court to be admissible, since the 3 July 2024 Order was also made accessible to the public on the Court's website at that time. The DRC should therefore also have been aware that its own declaration of intervention would cause delays in the proceedings if it was not filed in time for any objections to its admissibility to be dealt with before the date fixed for the filing of the last written pleading.
25. In *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)*, the Court said, in relation to an application by the Philippines for permission to intervene under Article 62 of the Statute:

Given these circumstances, the time chosen for the filing of the Application by the Philippines can hardly be seen as meeting the requirement that it be filed "as soon as possible" as contemplated

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022*, p. 477, <https://www.icj-cij.org/sites/default/files/case-related/178/178-20220722-jud-01-00-en.pdf>.

in Article 81, paragraph 1, of the Rules of Court. This requirement which, although when taken on its own might be regarded as not sufficiently specific, is nevertheless essential for an orderly and expeditious progress of the procedure before the Court. In view of the incidental character of intervention proceedings, it emphasizes the need to intervene before the principal proceedings have reached too advanced a stage. In one of the recent cases, dealing with another type of incidental proceeding the Court observed that: “the sound administration of justice requires that a request for the indication of provisional measures ... be submitted in good time” (*LaGrand (Germany v. United States of America), Provisional Measures, Order of 3 March 1999, I.C.J. Reports 1999 (I)*), p. 14, para. 19). The same applies to an application for permission to intervene, and indeed even more so, given that an express provision to that effect is included in Article 81, paragraph 1, of the Rules of Court.⁶

26. It is acknowledged that, in that judgment, the Court ultimately rejected the objection based on the alleged untimely filing of the Philippines application.⁷ It is furthermore accepted that the Court could be understood as having stated in that judgment that the words “as soon as possible” do not impose an additional and separate requirement of admissibility, since the Court said that:

... despite the filing of the Application at a late stage in the proceedings, which does not accord with the stipulation of a general character contained in Article 81, paragraph 1, of the Rules requiring that “[a]n application for permission to intervene ... shall be filed as soon as possible”, the Philippines cannot be held to be in violation of the requirement of the same Article, which establishes a specific deadline for an application for permission to intervene, namely “not later than the closure of the written proceedings”.⁸

27. However, this statement by the Court was an *obiter dictum*, given that the application by the Philippines for permission to intervene was in any event rejected on other grounds. There has in fact never been a previous case before the Court in which the Court has granted an application for permission to intervene under Article 62 of the Statute, or has found a declaration of intervention under Article 63 of the Statute to be admissible, in circumstances where one of the parties to the case has objected that the application or declaration was not filed “as soon as possible”. The question whether a declaration of intervention will be inadmissible in circumstances where it was not filed “as soon as possible” has therefore never before been directly decided by the Court.
28. Article 82, paragraph 2, of the Rules of Court should not be interpreted in a way that deprives the words “as soon as possible” of any practical effect. The English version of the Rules of Court is expressed in mandatory language: a declaration of intervention “shall” be filed as soon as possible. The Court has recognised that observance of this

⁶ *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia), Application for Permission to Intervene, Judgment, I.C.J. Reports 2001*, p. 585, para. 21.

⁷ *Ibid.*, p. 586, para. 26.

⁸ *Ibid.*, pp. 585-586, para. 23.

requirement is “essential for an orderly and expeditious progress of the procedure before the Court” (see paragraph 15 above).

29. It is accepted that the words “as soon as possible” are imprecise, and it is not suggested that a declaration of intervention would be inadmissible by reason alone of the fact that, theoretically, it might have been filed somewhat earlier than it was. For instance, Article 79*bis*, paragraph 1, of the Rules of Court provides that a party shall file any preliminary objections “as soon as possible, and not later than three months after the delivery of the Memorial”. Given that a respondent cannot be expected to decide whether to file preliminary objections before the applicant’s memorial has first been filed, and given that three months is a relatively short period of time thereafter in which to prepare preliminary objections once that decision is taken, it would be difficult to imagine a situation where it could ever be concluded that preliminary objections were not filed “as soon as possible”, even when filed on the last day of the three month period provided for in Article 79*bis*, paragraph 1, of the Rules of Court.⁹
30. However, the position is different in a case such as the present.
31. First, this is not a case where no more can be said than that, theoretically, the relevant document might have been filed somewhat earlier than it was. On the contrary, this is a case where it is *clear* that the document could and should have been filed *very much earlier* than it was (see paragraph 12 above).
32. Secondly, the present case involves the observance of a time-limit by an intervener, rather than by a party. An intervener under Article 63 of the Statute does not become a party to the case.¹⁰ Nor is such an intervener a party to the dispute that the Court is called upon to settle. Nor will such an intervener normally even have an interest of a legal nature which may be affected by the decision of the Court. Such an intervener is a stranger to the litigation, and typically a stranger to the facts of the case and to the dispute. Even stricter compliance with the requirements of the Statute and Rules of Court must be expected of such a stranger to the litigation than would be expected of a party in the case.
33. In circumstances where there is no apparent reason why the declaration could not have been filed very much earlier than it was, and in which it should have been apparent to the declarant State that it would cause delay in the proceedings by not filing its declaration of intervention sooner, it must be open to the Court to find that the declaration of intervention is inadmissible on the ground that it was not filed “as soon as possible”. The present case is such a case.
34. Although Article 82, paragraph 4, of the Rules of Court provides that “In exceptional circumstances a declaration submitted later may however be admitted”, no exceptional circumstances have been established by the DRC.

⁹ See K. Maćák, “Article 43”, in A. Zimmermann and C. Tams, *Commentary on the Statute of the International Court of Justice* (3rd edition, 2019), p. 1293, margin no. 187: “A respondent who wishes to submit preliminary objections is entitled before doing so to be informed as to the precise nature of the claim by the submission of a memorial by the applicant”.

¹⁰ *Whaling in the Antarctic (Australia v. Japan), Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013*, p. 9, para. 18: “[I]ntervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court”.

35. The Court should therefore find that the declaration of intervention of the DRC is inadmissible because it was not filed as soon as possible, and therefore does not comply with Article 82, paragraph 2, of the Rules of Court.

E. The DRC's declaration of intervention goes beyond the permitted scope of an intervention under Article 63 of the Statute

36. It is the settled case law of the Court that an intervention under Article 63 of the Statute is strictly limited to the construction of the convention in question, and cannot extend to any other matters.

37. In *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, the Court said that “the right to intervene under Article 63 is confined to the point of interpretation which is in issue in the proceedings, and does not extend to general intervention in the case”.¹¹

38. In *Whaling in the Antarctic (Australia v. Japan)*, the Court reaffirmed 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*”,¹²

and that:

intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor, which does not become a party to the proceedings, to deal with any other aspect of the case before the Court.¹³

39. In *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, the Court reiterated that:

(1) “[t]he object of the intervention under Article 63 of the Statute is limited to the construction of the convention concerned”,¹⁴

(2) “intervention under Article 63 of the Statute allows a third State not party to the proceedings, but which is party to a convention the construction of which is in

¹¹ *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, *Application to Intervene, Judgment*, I.C.J. Reports 1981, p. 15, para. 26, referring to *Haya de la Torre Case, Judgment of June 13th, 1951*, I.C.J. Reports 1951, pp. 74, 76-77.

¹² *Whaling in the Antarctic (Australia v. Japan)*, *Declaration of Intervention of New Zealand, Order of 6 February 2013*, I.C.J. Reports 2013, p. 5, para. 7 (emphasis added).

¹³ *Ibid*, p. 9, para. 18. See also at p. 5, para. 7: “... 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”.

¹⁴ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, *Admissibility of the Declarations of Intervention, Order of 5 June 2023*, I.C.J. Reports 2023, p. 362, para. 27.

question in those proceedings, to present to the Court its observations on the construction of that convention”;¹⁵

- (3) “intervention under Article 63 of the Statute has a limited scope, since the intervening State can only submit observations on the construction of the convention in question and does not become a party to the proceedings”;¹⁶ and
- (4) “intervention under Article 63 of the Statute is limited to the construction of the provisions in question at the relevant stage of the proceedings”.¹⁷

40. The Court added in that case that:

... to the extent that some Declarations also address other matters, such as the existence of a dispute between the Parties, the evidence, the facts or the application of the Convention in the present case, the Court will not consider them. Further, while some of the Declarations also refer to other rules and principles of international law outside the Genocide Convention, such references will only be considered by the Court in so far as they 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.¹⁸

41. In its 3 July 2024 Order in the present case, the Court affirmed yet again that:

The object of the intervention under Article 63 of the Statute is limited to the construction of the convention concerned ... [T]he right of intervention under Article 63 of its Statute is limited to the construction of a convention’s provisions in question at the relevant stage of the proceedings ...

The Court observes that the declarations at issue, in some instances, address matters other than the construction of provisions of the Genocide Convention, such as facts and the evidentiary value of a certain category of documents. To that extent, the Court will not consider such issues and expects the interveners to refrain from addressing them any further. Moreover, references to other rules and principles of international law outside the Genocide Convention will only be taken into account by the Court in so far as they may be relevant for the construction of the Convention’s provisions, in accordance with the customary rules of treaty interpretation reflected in the Vienna Convention on the Law of Treaties, in particular Article 31, paragraph 3 (c). ...

¹⁵ *Ibid.*, p. 365, para. 44.

¹⁶ *Ibid.*, p. 366, para. 49.

¹⁷ *Ibid.*, p. 374, para. 84.

¹⁸ *Ibid.*

The Court will not have regard to any parts of the observations going beyond the scope thus fixed.¹⁹

42. It was thus pellucidly clear to the DRC at the time that it filed its declaration of intervention that it was not permitted to deal in it with anything other than the construction of the Genocide Convention, and in particular, that it was required to refrain from addressing in it matters such as the evidence, the facts, the application of the Genocide Convention in the present case, or the evidentiary value of certain categories of documents.
43. Despite this, a substantial part of the declaration of intervention of the DRC is devoted to matters that go beyond the permitted scope of an intervention under Article 63 of the Statute.
 - (1) Paragraphs 51 to 67 of the declaration of intervention deal specifically with the means by which facts alleged to fall within provisions of the Convention might be proved. Such matters do not involve the construction of the Genocide Convention, since the Genocide Convention does not itself prescribe any rules of procedure or evidence to be applied by domestic or international courts when determining whether there have been any breaches of the Convention. Any international or domestic court dealing with claimed violations of the Genocide Convention will apply its own rules of procedure and evidence. Such impermissible matters are also dealt with in other paragraphs of the declaration of intervention (see for instance paragraph 10, first dot point (“the question of proof of genocidal intent”), paragraph 115, second dot point (“Article II: Proof of genocidal intent”). Statements in the declaration of intervention to the effect that “the existence of an objective of war cannot in any way exclude the existence of genocidal intent” (see paragraph 115 of the declaration of intervention) are also statements about the circumstances in which it said that the existence of a genocidal intent can or cannot be inferred, that is to say, statements about means of proof rather than about the construction of the Convention itself. So are statements to the effect that “the existence of genocide is by no means excluded by the fact that material acts falling within the scope of Article II of the Convention are committed in a context of armed conflict” (see paragraphs 14 and 16 to 21 of the declaration of intervention), that “genocide may be perpetrated even though the perpetrator is pursuing objectives other than the destruction of a group of people” (see paragraphs 14 and 22 to 46 of the declaration of intervention), that “the existence of genocide is by no means excluded by the fact that material acts falling within the scope of Article II of the Convention are committed in a context of armed conflict” (see paragraphs 14 and 47 to 50 of the declaration of intervention), and that “genocide may be perpetrated even though the perpetrator is pursuing objectives other than the destruction of a group of people” (see paragraph 14 of the declaration of intervention).
 - (2) Paragraphs 68 to 76 of the declaration of intervention deal with the standard of proof to be applied when determining whether there have been breaches of the Genocide Convention. This too is a matter that does not involve the construction of the Genocide Convention, since the Genocide Convention does not itself prescribe the standard of proof to be applied. Any international or domestic court dealing with claimed violations of the Genocide Convention will apply the relevant

¹⁹ 3 July 2024 Order, paras. 21, 42, 45-46.

standard of proof prescribed in its own rules of procedure and evidence. Thus, in the *Bosnia Genocide* case²⁰ and the *Croatia Genocide* case,²¹ the Court determined the standard of proof that it would apply in accordance with the general principle in its established jurisprudence that “claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive”.²² In both of those cases, the Court indicated that the leading case for this principle was the *Corfu Channel* case, which had nothing to do with the Genocide Convention.²³ In the *Croatia Genocide* case, the Court also made clear that the rules it applied concerning the burden of proof, standard of proof, and methods of proof were derived from its general jurisprudence, comprising earlier judgments of the Court that have nothing to do with the Genocide Convention.²⁴

- (3) Certain paragraphs of the declaration of intervention refer to the application of the Convention to the present case (see for instance paragraphs 52, 81)
 - (4) Paragraph 7 of the declaration of intervention deals with what the DRC claims is its interest in this case, based on the *erga omnes partes* character of obligations under the Genocide Convention. However, this claimed interest is irrelevant to the construction of the Convention. The mere fact that the DRC is a party to the Genocide Convention gives it the right to intervene under Article 63 of the Statute.²⁵ Any additional interest that the DRC may claim to have in relation to compliance by States with the Genocide Convention is irrelevant to its right to intervene, as well as irrelevant to the construction of the Convention. Any statement by an intervener under Article 63 of the Statute as to its motives for intervening or its interest in the factual subject-matter of the proceedings therefore go beyond the permitted scope of such an intervention.
44. Myanmar also adds the following. If an intervener under Article 63 of the Statute is confined to presenting *its* observations on the construction of the convention in question, it would go beyond the permissible scope of such an intervention for that State to present observations on the *arguments of the parties in the case* concerning the interpretation of the convention. An intervener under Article 63 can make statements concerning “the construction ... for which *it* contends” (Article 82, paragraph 5 (c) of the Rules of Court), but should not be permitted to engage in an analysis or critique of the arguments presented by the parties in relation to the construction of the convention, as if the intervener were itself one of the parties to the case. The declaration of intervention impermissibly does so for instance in its paragraphs 12, 51-52 and 84.
45. In successive cases, the Court has stated increasingly clearly, in increasingly stronger terms, that interventions under Article 63 of the Statute must not be used by interveners as a platform for making statements going beyond the permitted scope of such an intervention.

²⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 4.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 4.

²² *Bosnia Genocide* case, p. 129, para. 209; *Croatia Genocide* case, p. 74, para. 178.

²³ *Ibid.*

²⁴ *Croatia Genocide* case, pp. 73-79, paras. 170-199.

²⁵ 3 July 2024 Order, para. 21: “The legal interest of the declarant State in the construction of the convention is presumed by virtue of its status as a party thereto”.

- (1) Initially, the Court stated very clearly the general principle that “intervention under Article 63 of the Statute is limited to submitting observations on the construction of the convention in question and does not allow the intervenor ... to deal with any other aspect of the case before the Court” (*Whaling in the Antarctic (Australia v. Japan)*): see paragraph 28 above).
- (2) Subsequently, the Court stated more strongly that it “will not consider” observations of an intervener that go beyond the construction of the Convention’s provisions (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*): see paragraphs 29-30 above).
- (3) Finally, in this very case, the Court stated more forcefully still that it “expects the interveners to refrain from addressing [matters other than the construction of the Convention] any further” (3 July 2024 Order: see paragraph 31 above).

Yet, despite this clear and mandatory language in the case law of the Court, a very substantial part of the DRC’s declaration of intervention is devoted to matters other than the construction of the Genocide Convention. This is a direct affront to, and tends to undermine, the authority of the Court.

46. Given that the clear and increasingly stronger admonitions from the Court have not deterred interveners from continuing to seek to use the right of intervention under Article 63 of the Statute as a platform for making statements going beyond the permitted scope of such an intervention, the stage has now been reached at which the Court should take stronger action to ensure compliance with the Rules of Court in this respect. Any declaration of intervention that contains substantial amounts of material going beyond the permitted scope of such an intervention should be found by the Court to be inadmissible.
47. The declaration of intervention of the DRC should be found to be inadmissible for this reason.

F. Alternatively, the DRC’s intervention must be confined to the points of construction set out in its declaration of intervention

48. For the reasons given above, the DRC’s declaration of intervention should be found to be inadmissible. However, in any event, Myanmar contends that any intervention under Article 63 of the Statute must be confined to the specific points of construction of the Convention set out in the declaration of intervention itself.
49. Consistently with the case law of the Court set out in paragraphs 26-31 above, the Court should not consider any matter in an intervention under Article 63 of the Statute that goes beyond the construction of provisions of the Genocide Convention.
50. Furthermore, the intervener’s substantive written observations on the subject-matter of the intervention (Article 86, paragraph 1, of the Rules of Court), and any observations in the oral proceedings with respect to the subject-matter of the intervention (Article 86, paragraph 2, of the Rules of Court) must be strictly confined to arguments in support of the specific construction of the convention that was previously articulated in the prior

declaration of intervention which the Court found to be admissible. An intervener cannot, in its substantive written and oral observations under Article 86 of the Rules of Court, contend for new or different constructions of provisions of the convention, that were not originally set out in its declaration of intervention under Article 82 of the Rules of Court. It is the statement of construction of provisions of the convention contained in the declaration of intervention, pursuant to Article 82, paragraph 5 (c) of the Rules of Court, that defines the “subject-matter of the intervention” for purposes of Article 86 of the Rules of Court. That statement pursuant to Article 82, paragraph 5 (c) of the Rules of Court is, according to the express wording of that provision, “the construction ... for which [the intervener] contends” (emphasis added). The observations of the intervening State under Article 86 of the Rules of Court must be confined to that subject-matter.

G. Conclusion

51. In the 3 July 2024 Order in this case, the Court recalled that it “cannot allow itself to be hampered by a mere defect of form, the removal of which depends solely on the Party concerned”.²⁶ However, the matters above do not relate to mere defects of form. The fact that a document is filed outside the applicable time-limit, or deals with matters with which it is not permitted to deal, is a defect of substance, not a defect of form.
52. It must be recognised that interventions under Article 63 of the Statute have significant effects on the parties. Such interventions will increase the amount of time that will be required before a case is finally concluded. Such interventions will furthermore impose additional costs and burdens on the parties, including by diverting resources that would otherwise be available to each party to address the arguments presented by the other party. Interventions under Article 63 of the Statute may also impose challenges for the Court itself. About a half of the contentious cases presently pending before the Court involve alleged violations of multilateral treaties to which very large numbers of States are parties.²⁷ There is an obvious risk that the work of the Court could become unmanageable if significant numbers of cases were to have significant numbers of such interveners. There are presently over 150 Contracting Parties to the Genocide

²⁶ 3 July 2024 Order, para. 31, quoting *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 14.

²⁷ (1) *Glas Espinel (Ecuador v. Mexico)* (various multilateral treaties); (2) *Embassy of Mexico in Quito (Mexico v. Ecuador)* (various multilateral treaties); (3) *Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)* (Genocide Convention); (4) *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)* (Genocide Convention); (5) *Aerial Incident of 8 January 2020 (Canada, Sweden, Ukraine and United Kingdom v. Islamic Republic of Iran)* (Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation); (6) *Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic)* (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment); (7) *Request relating to the Return of Property Confiscated in Criminal Proceedings (Equatorial Guinea v. France)* (United Nations Convention against Corruption); (8) *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (Genocide Convention); (9) *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia)* (International Convention on the Elimination of All Forms of Racial Discrimination); (10) *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* (International Convention on the Elimination of All Forms of Racial Discrimination); (11) *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* (Vienna Convention on Diplomatic Relations).

Convention, and, as *Ukraine v. Russia* has demonstrated, the prospect of very large numbers of those States intervening under Article 63 in a single case is not unrealistic.

53. In the century from 1922 to 2021, declarations of intervention under Article 63 of the Statute of this Court and the corresponding provision of the Statute of its predecessor were filed in only five cases (an average of one case every 20 years),²⁸ and the interventions were admitted in only three of those cases (an intervention by a single State in a case on average once every 33 years).²⁹ The *Bosnia Genocide* case³⁰ and the *Croatia Genocide* case³¹ were both decided in this period, and it is noteworthy that there were no interventions under either Article 62 or Article 63 of the Statute in either of those cases. However, since July 2022, there has been a dramatic change in the use of Article 63 of the Statute. In the space of approximately two and a half years, there have now been declarations of intervention under Article 63 by 33 States in *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, by 11 States in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, as well as by 11 States in the present case. Together, that is an average in the last two and a half years of declarations of intervention under Article 63 by over 21 States per year. This cannot be assumed to be a temporary anomaly.
54. In order to ensure the good administration of justice, to respect the rights and the equality of both parties to contentious cases, and to preserve the judicial character of the Court in its contentious jurisdiction, it is necessary that the provisions of the Statute and Rules of Court relating to intervention be applied with rigour.
55. Myanmar requests the Court to find that the declaration of intervention of the DRC is inadmissible, for the reasons given in paragraphs 7-36 above.
56. Pending a decision of the Court on the admissibility of the declaration of intervention, Myanmar does not consider itself called upon to respond to any substantive arguments that it makes. Myanmar fully reserves its rights in this respect. In particular, Myanmar does not concede at this stage that any of the arguments contained within the declaration of intervention would be relevant to the Court's decision in this particular case.

²⁸ There was only ever one declaration of intervention under the materially identical Article 63 of the Statute of the Permanent Court of International Justice: S.S. "*Wimbledon*", *Judgments, 1923, P.C.I.J., Series A, No. 1*, pp. 11-14 (Question of Intervention by Poland, Judgment of 28 June 1923). Declarations of intervention under Article 63 of the Statute of this Court were filed in four cases prior to 2022: *Haya de la Torre Case, Judgment of June 13th, 1951, I.C.J. Reports 1951*, p. 71 (see at pp. 76-77); *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; *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case, I.C.J. Reports 1995*, p. 288; and *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.

²⁹ The interventions were admitted in S.S. "*Wimbledon*", *Haya de la Torre Case*, and *Whaling in the Antarctic*.

³⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, *Judgment, I.C.J. Reports 2007*, p. 4.

³¹ *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.

H. Submission

57. For the reasons set out above, the Republic of the Union of Myanmar requests the Court to decide that the declaration of intervention of the Democratic Republic of the Congo is inadmissible.



H.E. U Ko Ko Hlaing
Union Minister for Ministry 2 at Office of the Chairman of the
State Administration Council of the Republic of the Union of Myanmar

Agent of Myanmar