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**INTERVENTION UNDER ARTICLE 63 OF THE STATUTE
OF THE INTERNATIONAL COURT OF JUSTICE**

[Translation]

To the Registrar of the International Court of Justice (hereinafter “the Court”), the undersigned being duly authorized by the Government of the Grand Duchy of Luxembourg (hereinafter “Luxembourg”):

1. On behalf of Luxembourg, I have the honour to submit to the Court a Declaration of intervention pursuant to Article 63, paragraph 2, of the Statute of the Court (hereinafter “the Statute”) in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

2. Article 82, paragraph 2, of the Rules of Court (hereinafter “the Rules”) provides that the declaration by which a State seeks to avail itself of the right of intervention conferred upon it by Article 63 of the Statute 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. These matters are addressed in sequence below. Luxembourg also intends to set out certain preliminary observations beforehand.

PRELIMINARY OBSERVATIONS

4. On 26 February 2022, Ukraine instituted proceedings against the Russian Federation in a dispute relating to the interpretation, application and fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”)¹.

5. In paragraphs 4 to 12 of its Application instituting proceedings², Ukraine claims that there is a dispute between it and the Russian Federation within the meaning of Article IX, relating to the interpretation, application and fulfilment of the Genocide Convention.

6. On the merits, Ukraine asserts, citing Articles I to III of the Genocide Convention, that the Russian Federation’s use of force in and against Ukraine since 24 February 2022 and its acts of

¹ Convention on the Prevention and Punishment of the Crime of Genocide, signed in Paris on 9 Dec. 1948, United Nations, *Treaty Series (UNTS)*, Vol. 78, p. 277 (entered into force on 12 Jan. 1951).

² Application instituting proceedings filed in the Registry of the Court on 26 Feb. 2022 in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (hereinafter the “Application of Ukraine”).

recognition based on a false claim of genocide, which preceded the military operation, are incompatible with the Convention (paragraphs 26 to 29 of the Application).

7. Following a Request for provisional measures submitted by Ukraine, on 16 March 2022 the Court ordered that:

- (1) the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
- (2) the Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above; and
- (3) both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

8. As of the date of this Declaration, Russia has not complied with the Order; it has intensified and expanded its military operations in the territory of Ukraine and has thus aggravated the dispute pending before the Court.

9. On 30 March 2022, pursuant to Article 63, paragraph 1, of the Statute, the Registrar duly notified the Government of Luxembourg, as a party to the Genocide Convention, that, in Ukraine's Application, the Genocide Convention "is invoked both as a basis of the Court's jurisdiction and as a substantive basis of [Ukraine's] claims on the merits". The Registrar also noted that:

"[Ukraine] seeks to found the Court's jurisdiction on the compromissory clause contained in Article IX of the Genocide Convention, asks the Court to declare that it has not committed a genocide as defined in Articles II and III of the Convention, and raises questions concerning the scope of the duty to prevent and punish genocide under Article I of the Convention. It therefore appears that the construction of this instrument will be in question in the case."³

10. Luxembourg considers that the Genocide Convention is of the utmost importance in preventing genocide and holding its perpetrators accountable for their acts. Any act committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group constitutes a crime under international law. The prohibition of genocide is recognized as a *jus cogens* norm in international law⁴. The rights and obligations enshrined in the Convention are owed to the international community as a whole (rights and obligations *erga omnes partes*)⁵. The late Judge Cançado Trindade remarked that, in circumstances such as these, when an international instrument embodies matters of collective interest, it is for all States parties to contribute to the proper interpretation of the treaty as a sort of "*collective guarantee* of the observance of the obligations

³ Letter of 30 Mar. 2022 from the Registrar of the Court; see Ann. A.

⁴ Case concerning *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. 111, paras. 161-162.

⁵ *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, with further references; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.

contracted by the States parties”⁶. Luxembourg considers that intervention in the present case enables States parties to the Genocide Convention to reaffirm their collective commitment to upholding the rights and obligations contained therein, in particular by supporting the essential role of the Court.

11. By this Declaration, Luxembourg intends to avail itself of the right of intervention conferred upon it by Article 63, paragraph 2, of the Statute. The Court has recognized that Article 63 of the Statute confers a “right” of intervention on any State party to a convention whose construction is in question in a case⁷. The Court has also stated that intervention

“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; and [that] such an intervention cannot affect the equality of the parties to the dispute”⁸.

12. As a State party to the Genocide Convention, Luxembourg has a direct interest in the proper interpretation, application and fulfilment of the obligations contained therein. Luxembourg considers it all the more necessary to avail itself of its right of intervention in the present case given the particular nature of the Genocide Convention, in which “the contracting States do not have any interests of their own [and] merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the convention”⁹.

13. In view of the limited scope of intervention under Article 63 of the Statute, Luxembourg will present its interpretation of the relevant articles of the Genocide Convention in accordance with the rules of interpretation contained in Article 31 of the Vienna Convention on the Law of Treaties, which also reflects customary international law¹⁰. Article 31, paragraph 1, provides that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose”. Thus, together with the context, the interpretation of a treaty must also take into account the subsequent practice in the application of the treaty, by which the agreement of the parties regarding its interpretation is established, as well as any relevant rules of international law applicable in the relations between the parties. In some circumstances, recourse may also be had to supplementary means of interpretation, including the *travaux préparatoires* and the circumstances of the treaty’s conclusion.

14. Luxembourg notes that Article 63 of the Statute makes no distinction between conventional provisions concerning questions of jurisdiction and those pertaining to questions on the merits. In the words of Judge Schwebel, “intervention in the jurisdictional phase of a proceeding is

⁶ Separate opinion of Judge Cançado Trindade, appended 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 (emphasis in the original).

⁷ *Haya de la Torre (Colombia/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.

⁸ *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.

⁹ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

¹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, p. 31, para. 87: “the Court will have recourse to the rules of customary international law on treaty interpretation as reflected in Articles 31 to 33 of the Vienna Convention on the Law of Treaties of 23 May 1969”; see also *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 24, para. 75, with further references.

within the scope of the right with which States are endowed by the terms of Article 63”¹¹. In both situations, States may offer their assistance to the Court in interpreting a particular convention. Consequently, interventions relating to both aspects are authorized¹², and the wording of Article 82, paragraph 1, of the Rules, which requires declarations to be filed “as soon as possible, and not later than the date fixed for the opening of the oral proceedings”, confirms that the filing of a declaration under Article 63 of the Statute is admissible at this stage of the proceedings.

15. In this Declaration, Luxembourg will focus on the interpretation of Article IX of the Convention, concerning the jurisdiction of the Court; it will also set out some additional considerations relevant to the merits of the case, recalling in particular the importance of the principle of good faith in international relations. Luxembourg does not intend to become a party to the dispute, and it accepts that the Court’s construction of the Convention will be equally binding upon it.

16. Luxembourg would like to assure the Court that its Declaration has been filed as soon as reasonably possible, in accordance with Article 82 of the Rules. It asks to be furnished with copies of all pleadings filed by Ukraine and the Russian Federation, and the documents annexed, in accordance with Article 86, paragraph 1, of the Rules. Considering that Luxembourg has complied with the procedural obligation set out in Article 82, paragraph 1, of the Rules to file its Declaration “as soon as possible”, it reserves the right to amend or supplement this Declaration and the scope of its observations should additional questions relating to jurisdiction or relevant to the merits of the case subsequently be raised before the Court, or should they come to the attention of Luxembourg on receiving the pleadings and documents annexed, in accordance with the aforementioned Article 86 of the Rules.

17. Finally, Luxembourg hereby informs the Court that it is willing to assist the Court by grouping its intervention with identical or essentially similar interventions of other Member States of the European Union that choose to adopt a unified approach for future stages of the proceedings, should the Court consider such a course of action to be in the interest of the sound administration of justice.

THE BASIS ON WHICH LUXEMBOURG IS A PARTY TO THE CONVENTION

18. Luxembourg deposited its instrument of accession to the Convention on the Prevention and Punishment of the Crime of Genocide with the Secretary-General of the United Nations on 7 October 1981, in accordance with Article XI, paragraph 4, of the Convention.

THE PROVISIONS OF THE CONVENTION IN QUESTION IN THE PRESENT CASE: JURISDICTION

19. Article IX of the Genocide Convention reads as follows:

“Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the

¹¹ See the opinion of Judge Schwebel in the case concerning *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, pp. 235-236.

¹² See, e.g., M. Shaw (ed.), *Rosenne’s Law and Practice of the International Court 1920-2015*, 5th ed., Vol. III, Brill Nijhoff, 2016, p. 1533; H. Thirlway, *The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence*, Vol. I, OUP, 2013, p. 1031; A. Miron and C. Chinkin, Article 63, in Zimmermann *et al.* (eds.), *The Statute of the International Court of Justice: A Commentary*, 3rd ed., OUP, 2019, p. 1763, fn. 46.

responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”

The terms of this article suggest that there is no limitation on the Court’s jurisdiction in situations where the applicant State accuses the respondent State of violating its obligations under the Convention. Moreover, Article IX expressly provides for the jurisdiction of the Court “at the request of *any of the parties* to the dispute” (emphasis added). The Court has observed that this phrase “clarifies that only a party to the dispute may bring it before the Court”¹³. The pertinent limitation is that the party seising the Court must be a party to the dispute, but there is no restriction as to which party it must be. It can be “any” party to the dispute.

20. The disputes that may be submitted to the Court under Article IX expressly include “those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III”. Thus, when a dispute exists as to whether a State has engaged in conduct contrary to the Convention, the State accused of such conduct has the same right to submit the dispute to the Court as the State making the accusation, and the Court will have jurisdiction to entertain that dispute. In order to determine whether a dispute before it falls within the scope of Article IX of the Convention, the Court “cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it”¹⁴. Accordingly, a State may, in particular, ask the Court to make a “negative” declaration, finding that another State’s allegations that it is responsible for genocide have no legal or factual basis.

21. The notion of a “dispute” has also long been established in the jurisprudence of both the Court and its predecessor, the Permanent Court of International Justice, and Luxembourg supports the broad interpretation given to this term in public international law, which was very recently reaffirmed by the Court¹⁵. Luxembourg thus approves of the meaning ascribed to term “dispute” by the Permanent Court of International Justice in 1924, i.e. “a disagreement on a point of law or fact, a conflict of legal views or of interests” between the parties¹⁶.

22. This Court has found that, in order for a dispute to exist, “[i]t must be shown that the claim of one party is positively opposed by the other”¹⁷, and that “[a] dispute between States exists where they hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations”¹⁸. In addition, “in case the respondent has failed to reply to the applicant’s claims, it may be inferred from this silence, in certain circumstances, that it rejects those

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, para. 111.

¹⁴ *Legality of Use of Force (Yugoslavia v. Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 38.

¹⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, para. 63.

¹⁶ *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11.

¹⁷ *South West Africa (Ethiopia v. South Africa; Liberia v. South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328.

¹⁸ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

claims and that, therefore, a dispute exists”¹⁹. Finally, in the specific context of the Genocide Convention, the existence of a dispute may be established despite there being no “specific reference” to the Convention or its provisions in the public statements of the parties, as long as the statements made by a State refer “to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to identify that there is, or may be, a dispute with regard to that subject-matter”²⁰.

23. Luxembourg will thus focus on the interpretation of the other parts of Article IX, namely that the scope of such disputes must “relat[e] to the interpretation, application or fulfilment of the present Convention”. Luxembourg considers that Article IX is a broad jurisdictional clause, enabling the Court to rule on disputes concerning a Contracting Party’s alleged fulfilment of its obligations under the Convention. As noted by Judge Oda, the inclusion of the term “fulfilment” is “unique as compared with the compromissory clauses found in other multilateral treaties which provide for submission to the International Court of Justice of such disputes between the Contracting Parties as relate to the *interpretation* or *application* of the treaties in question”²¹. This inclusion of the term “fulfilment” attests to the particular emphasis that was placed by the drafters of the Convention on compliance with the obligation to perform treaties in good faith, which gives practical effect to the fundamental principle of *pacta sunt servanda* in public international law.

24. The ordinary meaning of the phrase “relating to the interpretation, application or fulfilment of the . . . Convention” can be divided into two parts.

25. The first part (“relating to”) establishes a link between the dispute and the Convention.

26. The second part (“interpretation, application or fulfilment of . . . the Convention”) encompasses a number of different scenarios, especially since Article IX covers all disputes “relating to the responsibility of a State for genocide”. That there are no exclusions with regard to responsibility has been confirmed by the Court²². Moreover, it is useful to consult the French text of the Convention in order to clarify the phrase “for genocide” in the English version, since “*en matière de genocide*” can cover both the commission and non-commission of acts of genocide. Finally, the term “including” suggests the categories of disputes capable of falling within the scope of Article IX are not exhaustive, thus opening the seising of the Court as largely as possible.

27. There may be a dispute relating to the interpretation, application or fulfilment of the Convention when one State alleges that another has committed genocide²³. In such an event, the

¹⁹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, p. 27, para. 71.

²⁰ *Ibid.*, para. 72.

²¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, declaration of Judge Oda, p. 627, para. 5 (emphasis in the original).

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), Preliminary Objections, Judgment, I.C.J. Reports 1996 (II)*, p. 616, para. 32.

²³ *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 (I)*, p. 75, para. 169.

Court verifies the factual basis of the allegation; if it is not convinced that acts of genocide have in fact been committed by the respondent State, it may find that it lacks jurisdiction, even *prima facie*²⁴.

28. Although situations involving (alleged) responsibility for acts of genocide are an important category of dispute relating to the “interpretation, application or fulfilment” of the Convention, they are not the only category. For example, in the (pending) case between The Gambia and Myanmar, the applicant asserts that the respondent is not only responsible for acts prohibited under Article III, but that it is also violating its obligations under the Convention by not preventing genocide, in breach of Article I, and by not punishing genocide, in violation of Articles I, IV and V²⁵. In that instance, one State is alleging that another State is failing to comply with its undertaking to “prevent” and “punish” genocide, by allowing acts of genocide to be committed with impunity on its territory. Hence, disputes can also arise in respect of “non-action”, as a violation of the substantive obligations provided for in Articles I, IV and V.

29. Accordingly, the ordinary meaning of Article IX clearly indicates that it is not necessary to establish whether acts of genocide have occurred in order for the Court’s jurisdiction to be affirmed. On the contrary, the Court has jurisdiction to ascertain *whether or not* acts of genocide have been or are being committed²⁶. It follows that the Court also has jurisdiction *ratione materiae* to declare that genocide has not occurred, and that there has been a violation of the obligation to perform the Convention in good faith, resulting in an abuse of rights. In particular, the Court’s jurisdiction extends to disputes concerning the unilateral use of military force for the stated purpose of preventing and punishing alleged genocide²⁷.

30. The context of the phrase “relating to” also confirms this reading. As mentioned above, the unusual use of the term “including” in the intermediary clause suggests that Article IX of the Convention is broader in scope than a traditional compromissory clause²⁸. Disputes relating to a State’s responsibility for genocide or any other act listed in Article III are therefore only one type of dispute covered by Article IX, which is “included” in the broader phrase “disputes . . . relating to the interpretation, application or fulfilment” of the Convention²⁹.

²⁴ *Legality of Use of Force (Yugoslavia v. France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, pp. 372-373, paras. 24-31. The Court subsequently found that it was not competent on the grounds that, when the proceedings were instituted, Serbia and Montenegro did not have access to the Court under Article 35 of the Statute (see e.g. *Legality of Use of Force (Serbia and Montenegro v. France), Preliminary Objections, Judgment, I.C.J. Reports 2004 (II)*, p. 595).

²⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022*, p. 12, para. 24, point (1) (c), (d) and (e).

²⁶ *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*, p. 10, para. 43; *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. 14, para. 30.

²⁷ *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*, p. 11, para. 45.

²⁸ See also *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 (I)*, p. 75, para. 169.

²⁹ See also Written Observations of The Gambia on the Preliminary Objections of Myanmar in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, 20 Apr. 2021, pp. 18-19, para. 3.22 (“Article IX expressly states that ‘the responsibility of a State for genocide’ can be the subject-matter of the ‘disputes between the Contracting Parties’ that can be ‘submitted to the International Court of Justice at the request of any of the parties to the dispute’. The inclusion of disputes ‘relating to the responsibility of a State for genocide’ among those that can be brought before the Court unmistakably means that responsibility for genocide can be the object of a dispute brought before the Court by any contracting party” (emphasis in the original).).

31. The context of Article IX thus confirms that the Court's jurisdiction covers not only inter-State disputes concerning responsibility for alleged acts of genocide, but also inter-State disputes concerning the absence of genocide and the violation of a good faith performance of the Convention, resulting in an abuse of rights.

32. Finally, the object and purpose of the Convention provide additional support for a broad interpretation of Article IX. In its 1951 Advisory Opinion, the Court stated that:

“The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.”³⁰

33. The Court recently reaffirmed these principles, noting that “[a]ll the States parties to the Genocide Convention thus have a common interest to ensure the prevention, suppression and punishment of genocide, by committing themselves to fulfilling the obligations contained in the Convention”³¹.

34. The object of the Convention, which is to protect the most elementary principles of international morality, also precludes any misuse of its provisions by a State party for other purposes. The credibility of the Convention as a universal instrument aimed at prohibiting the most heinous crime of genocide would be undermined if a State party could abuse its authority without the victim of such abuse being able to turn to the Court. The Convention's object thus clearly supports a reading of Article IX whereby disputes relating to the interpretation, application or fulfilment of the Convention include those relating to abuse of the Convention's authority to justify the action taken by one State party to the Convention against another.

35. In conclusion, Luxembourg is of the view that it is clear from the ordinary meaning and context of Article IX of the Convention, and from the object and purpose of the Convention as a whole, that a dispute relating to acts carried out by one State against another on the basis of false allegations of genocide falls under the notion of “disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention”. Therefore, the Court has jurisdiction to declare that there has been no genocide and that there has been a violation of a good faith performance of the Convention, resulting in an abuse of rights.

³⁰ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23.*

³¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment of 22 July 2022, p. 36, para. 107.*

ON THE MERITS

36. Luxembourg also wishes to share with the Court its interpretation of certain provisions of the Convention that are relevant to the merits of the case.

37. Article 1 of the Genocide Convention reads: “The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish.”

38. Under this article, all States parties are required to prevent and punish genocide. Given the *jus cogens* character of the prohibition of genocide, its prevention and punishment are not domestic matters but concern the international community as a whole (obligation *erga omnes*)³². However, as the Court has previously noted, in carrying out their duty to prevent genocide, the Contracting Parties must act within the limits permitted by international law³³. And like all international treaty provisions, Article 1 of the Convention must be interpreted and performed in good faith, in accordance with Article 26 and Article 31, paragraph 1, of the Vienna Convention on the Law of Treaties, which reflect customary international law. The obligation to perform a treaty in good faith also derives from the principle of *pacta sunt servanda*, a fundamental principle of public international law³⁴.

39. Good faith is indissociable from the treaty whose application or interpretation is being examined and requires that the integrity of the treaty be respected. The Court has thus observed that the principle of good faith “obliges the Parties to apply [a treaty] in a reasonable way and in such a manner that its purpose can be realized”³⁵. Good faith interpretation therefore shields against the misuse of a convention’s terms. As “[o]ne of the basic principles governing the creation and performance of legal obligations”, good faith is also directly linked to “[t]rust and confidence[, which] are inherent in international co-operation”³⁶.

40. In Luxembourg’s opinion, the notion of “undertak[ing] to prevent” implies that each State party must assess the existence of genocide or the serious threat of genocide before taking measures under Article 1³⁷. This assessment must be justified by substantial evidence that is “fully conclusive”³⁸.

³² Above, para. 10 of the Declaration.

³³ *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 (I), p. 221, para. 430; *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. 57.

³⁴ See also above, para. 23 of the Declaration.

³⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, pp. 78-79, para. 142.

³⁶ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 268, para. 46.

³⁷ *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, pp. 221-222, paras. 430-431.

³⁸ *Ibid.*, p. 129, para. 209.

41. As a current member of the United Nations Human Rights Council, Luxembourg would point out that this intergovernmental body of the United Nations

“[c]alls upon all States, in order to deter future occurrences of genocide, to cooperate, including through the United Nations system, in strengthening appropriate collaboration among existing mechanisms that contribute to the early detection and prevention of massive, serious and systematic violations of human rights that, if not halted, could lead to genocide”³⁹.

It may therefore be considered good practice to have recourse to the findings of independent investigations conducted under the auspices of the United Nations before characterizing a situation as genocide and taking any other measures under the Convention⁴⁰.

42. A State that claims to be acting to prevent genocide therefore has a due diligence obligation to gather substantial and conclusive evidence from independent sources before it takes any other measures. The Court has affirmed that this notion of due diligence “is of critical importance”, further noting that “every State may only act within the limits permitted by international law”⁴¹. It is incompatible with the principle of good faith for a State party to the Convention to fulfil its due diligence obligation in a manner that is abusive. This interpretation of Article 1 is supported by the *travaux préparatoires* of the Genocide Convention, which show that during the drafting of the Convention, the delegates took care to maintain as precise a definition of genocide as possible, so as to prevent the Convention being used as a “pretext for interference in the internal affairs of States”⁴².

43. The scope of the “undertak[ing] to prevent” is also made clear by the last paragraph of the Convention’s preamble, which emphasizes the need for “international co-operation”. Moreover, pursuant to Article VIII, States can request that the competent organs of the United Nations take action, while Article IX provides for judicial settlement. All these elements suggest a duty to use first multilateral and pacific means to prevent genocide, before taking unilateral measures as a last resort. This reading is also consistent with the general obligation of States under the United Nations Charter to settle their disputes by peaceful means⁴³.

44. It follows from the obligation to carry out a good faith assessment of the existence of genocide or the serious risk of genocide that, when a State has failed to carry out such an assessment, it cannot invoke the “undertak[ing] to prevent” genocide provided for in Article I of the Convention as justification for its conduct. Thus, a Contracting Party cannot invoke Article I in order to render lawful conduct that would otherwise be unlawful under international law if it has not established, on an objective basis and pursuant to a good faith assessment of all relevant evidence from independent sources, that genocide is occurring or that there is a serious risk of genocide occurring.

³⁹ United Nations Human Rights Council, resolution 43/29: Prevention of genocide (29 June 2020), UN doc. A/HRC/RES/43/29, para. 11.

⁴⁰ See e.g. the fact that Gambia relied on the reports of the Independent International Fact-Finding Mission on Myanmar established by the United Nations Human Rights Council before seising the Court; for more information, see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment of 22 July 2022, pp. 25-27, paras. 65-69.

⁴¹ *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. 221, para. 430.

⁴² See H. Abtahi and P. Webb, *The Genocide Convention: The Travaux Préparatoires*, Martinus Nijhoff, 2008, Vol. I, p. 1230.

⁴³ Chapter VII of the Charter also points to the primacy of enforcement measures taken by the United Nations Security Council, thus encouraging collective measures by the international community.

45. Luxembourg notes, in particular, that all States parties have undertaken to eliminate genocide throughout the world for the good of humanity as a whole, and not to protect their own interests. It would be a denial, to say the least, of the Convention's "purely humanitarian and civilizing purpose", which reflects the "most elementary principles of morality" as well as the "aims of the United Nations"⁴⁴, if a State could misuse Article I in order to commit acts of aggression, violations of international humanitarian law or crimes against humanity under the guise of preventing genocide. Consequently, when action allegedly aimed at preventing genocide follows false allegations of genocide, these allegations and any subsequent action cannot under any circumstances be considered reasonable; indeed they run counter to the object and purposes of the Convention itself. Any measure taken on the basis of such allegations, as part of a purported application of Article I of the Convention, can therefore only be considered a serious violation of the obligation to interpret and apply that provision in good faith.

46. With regard to the undertaking "to punish", which appears in Article I of the Convention, Luxembourg considers that this obligation is limited to the individual criminal responsibility of the perpetrators of the crime of genocide. This is confirmed by Articles IV to VI of the Convention. In other words, a State should use its domestic criminal law or, in accordance with the principle of complementarity, rely on investigations by the International Criminal Court (ICC) — which has jurisdiction over the crime of genocide under Article 5, paragraph 1 (a), of the Rome Statute⁴⁵ — in order to punish genocide committed by individual perpetrators, and abstain from taking any other type of measure, in particular forcible or military measures intended to "punish" a State or a people.

DOCUMENTS IN SUPPORT OF THE DECLARATION

47. The following documents in support of this Declaration are attached hereto:

- (A) Letter from the Registrar of the International Court of Justice, dated 30 March 2022, to the Ambassador of Luxembourg to the Kingdom of the Netherlands;
- (B) Luxembourg's instrument of accession to the Genocide Convention.

CONCLUSION

48. On the basis of the information set out above, Luxembourg avails itself of the right of intervention conferred upon it by Article 63, paragraph 2, of the Statute, as a party to the Convention on the Prevention and Punishment of the Crime of Genocide, the construction of which is in question in the present case brought before the Court by Ukraine against the Russian Federation.

49. The Government of the Grand Duchy of Luxembourg has appointed as Agents:

- Mr. Alain Germeaux, *Conseiller de légation adjoint*, Director of Legal Affairs, Ministry of Foreign and European Affairs of the Grand Duchy of Luxembourg; and
- Mr. Jean-Marc Hoscheit, Ambassador of the Grand Duchy of Luxembourg to the Kingdom of the Netherlands.

⁴⁴ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23.

⁴⁵ Rome Statute of the International Criminal Court, signed in Rome on 17 July 1998, *UNTS*, Vol. 2187, p. 3 (entered into force on 1 July 2002).

The Registrar of the Court may send all communications relating to the present case to the following address:

Embassy of the Grand Duchy of Luxembourg in the Kingdom of the Netherlands
Nassaulaan 8
2514 JS The Hague
Netherlands

Luxembourg, 11 October 2022.

Respectfully,

(Signed) Alain GERMEAUX,
Agent of the Government.

Annex A: Letter from the Registrar of the International Court of Justice, dated 30 March 2022, to the Ambassador of the Grand Duchy of Luxembourg to the Kingdom of the Netherlands

Annex B: Instrument of accession of the Grand Duchy of Luxembourg to the Convention on the Prevention and Punishment of the Crime of Genocide
