

**STATEMENT ADJUSTING THE DECLARATION OF INTERVENTION
OF THE GRAND DUCHY OF LUXEMBOURG**

[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 brief statement adjusting the Declaration of intervention filed on 11 October 2022 pursuant to Article 63, paragraph 2, of the Statute of the Court (hereinafter “the Statute”), for the purpose of maintaining Luxembourg’s intervention in the merits phase of the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

2. In the letter from the Registrar dated 18 June 2024, the States seeking to intervene at the preliminary objections stage and at the merits stage were invited to indicate whether they maintained their declarations of intervention and, if deemed necessary, to adjust their declarations by 2 August 2024. This statement is provided in response to that request.

3. By its Judgment of 2 February 2024, the Court found that it had jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the “Genocide Convention”), to entertain submission (b) in paragraph 178 of the Memorial of Ukraine, whereby it asked the Court to “[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine”; the Court also found that this submission was admissible¹.

4. Firstly, Luxembourg wishes to recall 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 law². The rights and obligations enshrined in the Convention are owed to the international community as a whole (rights and obligations *erga omnes*)³. 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

¹ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States Intervening)*, Preliminary Objections, Judgment of 2 February 2024, pp. 56-57, para. 149.

² *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), pp. 110-111, paras. 161-162.

³ *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, I.C.J. Reports 2022 (II), pp. 515-516, para. 107.

treaty as a sort of “*collective guarantee* of the observance of the obligations contracted by the States parties”⁴.

5. By its Declaration dated 11 October 2022, Luxembourg availed itself of the right conferred upon it by Article 63, paragraph 2, of the Statute to intervene in the preliminary objections phase and the merits phase. The Court has recognized that Article 63 confers a “right” of intervention⁵, that such an 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”⁶.

6. In its above-mentioned Declaration, Luxembourg focused on the construction of Articles IX and I of the Genocide Convention. In keeping with the limited scope of interventions under Article 63 of the Statute, the present statement supplements Luxembourg’s position as set out in its Declaration, addressing the construction of Articles I and II of the Convention in accordance with the customary rules of interpretation, as regards the merits of the case⁷.

7. Luxembourg reiterates that it does not intend to become a party to the dispute and that it accepts that the Court’s construction of the Genocide Convention given in its Judgment will be equally binding upon it. Its intervention will not concern matters pertaining to the application of the Convention.

THE CONVENTION IN QUESTION IN THESE PROCEEDINGS: SUPPLEMENTARY STATEMENT ON THE MERITS

8. For the purposes of the present proceedings, Luxembourg wishes to supplement its construction of Articles I and II of the Genocide Convention, in so far as this construction is relevant for the merits of the case.

9. Article I of the Convention reads as follows:

“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.”

⁴ 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).

⁵ *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.

⁶ *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.

⁷ *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 (II)*, p. 510, 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. 95, para. 75, with further references.

10. Article I therefore provides that all States parties are required to prevent and punish genocide. Luxembourg recalls that, 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 law⁸. Moreover, the duty provided for under Article I of the Convention must be carried out in good faith. The Court has 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”⁹. Good faith interpretation therefore shields against the misuse of a convention’s terms and institutions. 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”¹⁰.

11. In this respect, Luxembourg reiterates the point made in its Declaration of 11 October 2022 that the notion of “undertak[ing] to prevent” implies that each State party must assess the existence of genocide or the serious threat thereof before characterizing a situation as genocide and taking measures under Article I¹¹. Such an assessment must be supported by substantial and objective evidence “that is fully conclusive”¹².

12. It may thus 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 Convention¹³.

13. The correct construction of Article I is therefore that a State that claims to be acting to prevent genocide has a due diligence obligation to gather substantial and conclusive evidence from independent sources on the question whether genocide has been “committed”, before alleging that another State party to the Genocide Convention is responsible for genocide.

14. This construction of Article I involves determining the burden of proof in cases where a State claims to have been the subject of a false allegation of genocide made by another State. In general, it is for the party alleging a fact in support of its claims to prove the existence of that fact. However, this is not an absolute rule. The determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case¹⁴.

⁸ *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)*, Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), p. 225, para. 57.

⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 79, para. 142.

¹⁰ *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. [268, para. 46].

¹¹ *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), pp. 221-222, paras. 430-431.

¹² *Ibid.*, p. 129, para. 209.

¹³ See e.g. the fact that The Gambia relied on the reports of the Independent International Fact-Finding Mission on Myanmar established by the United Nations Human Rights Council before seizing 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, I.C.J. Reports 2022 (II), pp. 502-504, paras. 65-69.

¹⁴ *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, Merits, Judgment, I.C.J. Reports 2010 (II), p. 660, para. 54.

15. In particular, the Court has recognized that there may be circumstances in which it cannot be demanded of the applicant that it prove the negative fact which it is asserting¹⁵.

16. Bearing in mind this context, Luxembourg contends that a State party instituting proceedings against another State party on the grounds of a false allegation of genocide must present prima facie evidence that its acts, or any acts of its forces, did not fall within the definition of genocide under Article II of the Convention. In turn, if the respondent wishes to defend itself by maintaining that its allegation was not false, it must prove that there is credible and conclusive evidence that the applicant is responsible for committing genocide as alleged. It would then be for the Court to evaluate all the evidence produced by the two parties and duly subjected to adversarial scrutiny, with a view to forming its conclusions¹⁶.

17. Accordingly, Luxembourg considers that the proper construction of Article I, which includes a duty of due diligence when assessing the existence of genocide, indicates that the party making allegations of genocide bears the burden of proof that such genocide is indeed being committed.

18. Luxembourg also wishes to add a number of observations on Article II of the Genocide Convention which are of relevance for the examination of the merits. That Article sets out the following definition of genocide:

“In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.”

19. Luxembourg considers that these elements of genocide are already well established in the jurisprudence of the Court and supports the current interpretation.

20. In particular, in order for a situation to be characterized as genocide under Article II, it is necessary to establish objectively and in good faith both a genocidal “act” and a (specific) genocidal “intent” alongside the mental elements included in the acts listed in subparagraphs (a) to (e) of this provision¹⁷.

¹⁵ *Ibid.*, pp. 660-661, para. 55.

¹⁶ *Ibid.*, p. 661, para. 56.

¹⁷ *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), pp. 121-122, paras. 186-189.

21. Moreover, the wording of Article II of the Convention is replicated in Article 6 of the Rome Statute, which provides additional context. The “Elements of Crimes”, adopted by the Assembly of State Parties under Article 9 of the Rome Statute, provide further assistance in the interpretation and application of Article 6 thereof¹⁸. With regard to Articles 6 (a) to (d) of the Rome Statute, for the purpose of establishing the offence of genocide possibly giving rise to the individual criminal responsibility of the perpetrators, the Elements of Crimes sets out a cumulative requirement of conduct (act of genocide), consequences associated with that conduct, and a special mental element.

22. The definition of genocide in Article II of the Convention provides a clear and exhaustive list of the acts which may constitute acts of genocide and which, according to the Court, are all “by their very nature conscious, intentional or volitional”¹⁹. To this must be added genocidal intent, which is to be distinguished from other motives the perpetrator may have for committing the act. In establishing this special mental element, the Court has emphasized that “[g]reat care must be taken in finding in the facts a sufficiently clear manifestation of that intent”²⁰. It is not sufficient for the members of the group to be targeted for belonging to that group; the perpetrator must have a discriminatory intent²¹.

23. In the absence of direct evidence, the evidentiary standard for inferring the existence of specific intent is high. The Court has held that “in order to infer the existence of *dolus specialis* from a pattern of conduct, it is necessary and sufficient that this is the only inference that could reasonably be drawn from the acts in question”²².

24. With regard to the standard of proof, the Court considers that claims against a State involving charges of exceptional gravity must be proved by evidence that is fully conclusive. The Court thus requires “that it be fully convinced that allegations made in the proceedings, that the crime of genocide or the other acts enumerated in Article III have been committed, have been clearly established. The same standard applies to the proof of attribution for such acts.”²³

CONCLUSION

25. On the basis of the information set out in its Declaration of intervention of 11 October 2022, as amplified in the present statement, Luxembourg continues to avail itself of the right of intervention conferred upon it by Article 63, paragraph 2, of the Statute, as an intervening party in the proceedings instituted by Ukraine against the Russian Federation in the present case.

¹⁸ International Criminal Court, “Elements of Crimes”, *Official Records of the Review Conference of the Rome Statute of the International Criminal Court, First session, New York, 3-10 September 2002*, supplemented by the “Elements of Crimes” adopted at the 2010 Review Conference, Kampala, 31 May-11 June 2010 (<https://www.icc-pi.int/sites/default/files/Publications/Elements-of-Crimes.pdf>).

¹⁹ [*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. 121], para. 186.

²⁰ *Ibid.*, p. 122, para. 189.

²¹ *Ibid.*, p. 121, para. 187, p. 122, para. 189.

²² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, *Judgment, I.C.J. Reports 2015 (I)*, p. 67, para. 148.

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. 129, para. 209.

26. The Government of Luxembourg maintains the appointment of its Agents for the purposes of these proceedings. The Registrar of the Court may also continue to 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, 31 July 2024

Respectfully,

(Signed) Alain GERMEAUX,
Agent of the Government.

Annex A: Letter from the Registrar of the International Court of Justice, dated 18 June 2024, to the Agent of the Grand Duchy of Luxembourg
