

DECLARATION OF JUDGE BENNOUNA

[Original English text]

1. The case brought before the Court by Ukraine against the Russian Federation is exceptional in more ways than one. These proceedings were instituted further to the “special military operation” launched by Russia on 24 February 2022 against Ukraine, which Russia presented as “measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence” (letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN doc. S/2022/154 (24 February 2022)). On the same day that the Court was seised, namely 26 February 2022, Ukraine referred to “Russia’s false and offensive allegations of genocide as a pretext for its unlawful military aggression against Ukraine” (Statement of 26 February 2022, subsequently distributed as a document of the General Assembly and the Security Council as an annex to the letter dated 26 February 2022 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN doc. A/76/727-S/2022/161 (28 February 2022)). Ukraine invoked Article IX of the United Nations Genocide Convention as a basis for the Court’s jurisdiction.

2. The Court has, of course, had occasion to rule on the 1948 Convention, in respect of either its advisory jurisdiction (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15) or its contentious jurisdiction (*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. 43; *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. 3). But this is the first time that a State has asked the Court to exercise its jurisdiction to consider allegations of genocide made by another State as a pretext for the use of force and to establish the unlawfulness of such conduct.

3. When the Court adopted its Order of 16 March 2022 indicating provisional measures, I observed at the time that this Convention was not conceived and adopted “to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force” (*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)*, declaration of Judge Bennouna, p. 236). However, it was the Court's *prima facie* jurisdiction that was under consideration at that stage.

4. In its Judgment on the objections to jurisdiction and admissibility raised by Russia, the Court has found that a dispute exists between the Parties under the Genocide Convention. It considers that there are two aspects to this dispute. The first "seeks a judicial finding that [Ukraine] has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine's view, imputed to it in public statements" (Judgment, para. 54). The second seeks to invoke Russia's international responsibility by imputing internationally wrongful conduct to it (*ibid.*, para. 55). This conduct consists in Russia's recognition of the independence of the two "republics" of Donetsk and Luhansk and its use of force in violation of Articles I and IV of the Convention (*ibid.*).

5. While I voted with the majority with regard to the Court's lack of jurisdiction over the latter aspect of the dispute (the second aspect), I nevertheless voted against the Court's finding that Ukraine's claim relating to the first aspect of the dispute concerning a declaration of non-violation by Ukraine of the Genocide Convention is admissible (Judgment, para. 151, subpara. 9 (operative part)).

6. This first aspect relates to what Russia considers to be "reverse compliance requests", whereby Ukraine has requested the Court to "[a]djudge and declare that there is no credible evidence that [it] is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine" (Judgment, para. 78).

7. In my view, such declarations are not part of the Court's judicial function, which is to settle legal disputes between States concerning the interpretation or application of international law. Yet the only dispute between the Parties in this case concerns the legality of the use of force by Russia, which, according to Ukraine, is based on false allegations of genocide. This is the heart of the legal controversy between the Parties and the Court considered that it lacked jurisdiction to entertain such a dispute.

8. As regards the question of a declaration of compliance, it is just one step in a line of reasoning that, in fact, seeks a proclamation by the Court that the use of force by Russia is unlawful.

9. Dividing the dispute into two separate aspects has, in my opinion, proved to be an artificial and even hazardous exercise in so far as it has led the Court to set a precedent for it to entertain requests for declarations of compliance, which is contrary to the Court's judicial function under its Statute and Rules.

10. The artificiality of this separation is, moreover, highlighted by the Court itself, when it defines Ukraine's legal interest in requesting such a

declaration of compliance. The Court, at this point, introduces a new principle whereby the question of the admissibility of a State's request for a declaration of compliance depends on the "circumstances" in which such a request is made (Judgment, para. 107). The Court goes on to state that the particular circumstances in this case relate to the armed conflict that began on 24 February 2022 on Ukrainian territory with a view to preventing or punishing genocide. Thus, although the Court stated that the two aspects of the dispute were "fundamentally different" (*ibid.*, para. 56), it justifies Ukraine's legal interest by referring to facts that characterize the second aspect of the dispute, namely the use of force.

11. Although there are indeed particular "circumstances" relating to the war that began nearly two years ago between the two Parties, the Court has not, in my view, shown that Ukraine had standing before the Court to challenge the allegations of the Russian Federation. First, such allegations are commonplace in political discourse uttered by State representatives and they are often refuted at the same level. Consequently, they cannot form the subject-matter of proceedings before the International Court of Justice in so far as they do not concern compliance with obligations under the Genocide Convention. Even if an accusation of genocide is false, international law — unlike domestic law — does not allow States to institute what are simply defamation proceedings. Second, the compliance request submitted by Ukraine could not have any practical effect, even if it were upheld by the Court at the merits stage of the case.

(Signed) Mohamed BENNOUNA.
