



# INTERNATIONAL COURT OF JUSTICE

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## Summary

Unofficial

Summary 2022/2

16 March 2022

### **Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)**

#### **Request for the indication of provisional measures**

The Court begins by recalling that, on 26 February 2022, at 9.30 p.m., Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation concerning “a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide” (hereinafter the “Genocide Convention” or the “Convention”). In its Application, Ukraine contends that the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, recognized on that basis the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic”, and then declared and implemented a “special military operation” against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. Ukraine emphatically denies that any such genocide has occurred.

The Court then recalls that, together with the Application, Ukraine submitted a Request for the indication of provisional measures, seeking in particular that the Russian Federation immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine, and immediately 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, direction or influence, take no steps in furtherance of the military operations which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

Lastly, the Court notes that the Russian Federation indicated, on 5 March 2022, that it had decided not to participate in the oral proceedings. It further notes, however, that, on 7 March 2022, the Ambassador of the Russian Federation to the Kingdom of the Netherlands communicated to the Court a document setting out “the position of the Russian Federation regarding the lack of jurisdiction of the Court in t[he] case”, in which it contends that the Court lacks jurisdiction to entertain the case and “requests [it] to refrain from indicating provisional measures and to remove the case from its list”.

#### **I. INTRODUCTION (PARAS. 17-23)**

The Court observes that the context in which the present case comes before it is well known. On 24 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, declared that he

had decided to conduct a “special military operation” against Ukraine. Since then, there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine and is deeply concerned about the continuing loss of life and human suffering.

The Court declares itself to be profoundly concerned about the use of force by the Russian Federation in Ukraine, which raises very serious issues of international law. The Court is mindful of the purposes and principles of the United Nations Charter and of its own responsibilities in the maintenance of international peace and security, as well as in the peaceful settlement of disputes under the Charter and the Statute of the Court. It deems it necessary to emphasize that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law.

The Court further notes that the ongoing conflict between the Parties has been addressed in the framework of several international institutions. The General Assembly of the United Nations adopted a resolution referring to many aspects of the conflict on 2 March 2022 (doc. A/RES/ES-11/1). The present case before the Court, however, is limited in scope, as Ukraine has instituted these proceedings only under the Genocide Convention.

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The Court regrets the decision taken by the Russian Federation not to participate in the oral proceedings on the Request for the indication of provisional measures. It recalls in this regard that the non-appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party could have provided to it. Nevertheless, the Court must proceed in the discharge of its judicial function at any phase of the case.

The Court notes that, though formally absent from the proceedings, non-appearing parties sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules. Since it is valuable to know the views of both parties in whatever form those views may have been expressed, the Court states that it will take account of the document communicated by the Russian Federation to the extent that it finds this appropriate in discharging its duties.

The Court lastly observes that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures and emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its decision.

## **II. PRIMA FACIE JURISDICTION (PARAS. 24-49)**

### **1. General observations (paras. 24-27)**

The Court recalls that, according to its jurisprudence, it may indicate provisional measures only if the provisions relied on by the applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but it need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case. In the present case, Ukraine seeks to found the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. The Court must therefore first determine whether those provisions

prima facie confer upon it jurisdiction to rule on the merits of the case, enabling it — if the other necessary conditions are fulfilled — to indicate provisional measures.

The Court notes that Ukraine and the Russian Federation are both parties to the Genocide Convention and that neither has a reservation in force with regard to Article IX.

## **2. Existence of a dispute relating to the interpretation, application or fulfilment of the Genocide Convention (paras. 28-47)**

The Court recalls that Article IX of the Genocide Convention makes the Court's jurisdiction conditional on the existence of a dispute relating to the interpretation, application or fulfilment of the Convention. Since Ukraine has invoked, as the basis of the Court's jurisdiction, the compromissory clause in an international convention, the Court must ascertain whether it appears that the acts complained of by the Applicant are capable of falling within the scope of that convention *ratione materiae*.

The Court recalls that, for the purposes of deciding whether there was a dispute between the Parties at the time of the filing of the Application, it takes into account in particular any statements or documents exchanged between the Parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content.

Having examined the arguments of the Parties, the Court observes that, since 2014, various State organs and senior representatives of the Russian Federation have referred, in official statements, to the commission of acts of genocide by Ukraine in the Luhansk and Donetsk regions. It observes in particular that the Investigative Committee of the Russian Federation — an official State organ — has, since 2014, instituted criminal proceedings against high-ranking Ukrainian officials regarding the alleged commission of acts of genocide against the Russian-speaking population living in the above-mentioned regions “in violation of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide”.

The Court also recalls that, in an address made on 21 February 2022, the President of the Russian Federation, Mr. Vladimir Putin, described the situation in Donbass as a “horror and genocide, which almost 4 million people are facing”.

By a letter dated 24 February 2022, the Permanent Representative of the Russian Federation to the United Nations requested the Secretary-General to circulate, as a document of the Security Council, the “text of the address of the President of the Russian Federation, Vladimir Putin, to the citizens of Russia, informing them of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence”. In his address, delivered on 24 February 2022, the President of the Russian Federation explained that he had decided,

“in accordance with Article 51 (chapter VII) of the Charter of the United Nations . . . to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic”.

He specified that the “purpose” of the special operation was “to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years”. He added that the Russian Federation had to stop “a genocide” against millions of people and that it would seek the prosecution of those who had committed numerous bloody crimes against civilians, including citizens of the Russian Federation.

The Permanent Representative of the Russian Federation to the United Nations, referring to the address by the President of the Russian Federation of 24 February 2022, explained at a meeting of the Security Council on Ukraine that “the purpose of the special operation [was] to protect people who ha[d] been subjected to abuse and genocide by the Kyiv regime for eight years”.

Two days later, the Permanent Representative of the Russian Federation to the European Union stated in an interview that the operation was a “peace enforcement special military operation” carried out in an “effort aimed at de-Nazification”, adding that people had been actually “exterminated” and that “the official term of genocide as coined in international law[, if one] read[s] the definition, . . . fits pretty well”.

The Court notes that, in response to the Russian Federation’s allegations and its military actions, the Ministry of Foreign Affairs of Ukraine issued a statement on 26 February 2022, saying that Ukraine “strongly denies Russia’s allegations of genocide” and disputes “any attempt to use such manipulative allegations as an excuse for Russia’s unlawful aggression”.

The Court recalls that, at the present stage of these proceedings, it is not required to ascertain whether any violations of obligations under the Genocide Convention have occurred in the context of the present dispute. Such a finding could be made by the Court only at the stage of the examination of the merits of the present case. At the stage of making an order on a request for the indication of provisional measures, the Court’s task is to establish whether the acts complained of by Ukraine appear to be capable of falling within the provisions of the Genocide Convention.

The Court further recalls that, while it is not necessary for a State to refer expressly to a specific treaty in its exchanges with the other State to enable it later to invoke the compromissory clause of that instrument to institute proceedings before it, the exchanges must refer to the subject-matter of the treaty with sufficient clarity to enable the State against which a claim is made to ascertain that there is, or may be, a dispute with regard to that subject-matter. The Court considers that, in the present proceedings, the evidence in the case file demonstrates prima facie that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke the compromissory clause in this instrument as a basis for the Court’s jurisdiction.

The Court notes that statements made by the State organs and senior officials of the Parties indicate a divergence of views as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention. In the Court’s view, the acts complained of by the Applicant appear to be capable of falling within the provisions of the Genocide Convention.

The Court recalls the Russian Federation’s assertion that its “special military operation” is based on Article 51 of the United Nations Charter and customary international law. It observes in this respect that certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty. The above-mentioned assertion of the Russian Federation does not therefore preclude a prima facie finding by the Court that the dispute presented in the Application relates to the interpretation, application or fulfilment of the Genocide Convention.

The Court finds, therefore, that the above-mentioned elements are sufficient at this stage to establish prima facie the existence of a dispute between the Parties relating to the interpretation, application or fulfilment of the Genocide Convention.

### **3. Conclusion as to prima facie jurisdiction (paras. 48-49)**

In light of the foregoing, the Court concludes that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case. Given the above conclusion, the Court considers that it cannot accede to the Russian Federation's request that the case be removed from the General List for manifest lack of jurisdiction.

### **III. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE LINK BETWEEN SUCH RIGHTS AND THE MEASURES REQUESTED (PARAS. 50-64)**

Regarding the rights whose protection is sought, the Court points out that its power to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that the Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.

The Court notes that, in the present proceedings, Ukraine argues that it seeks provisional measures to protect its rights "not to be subject to a false claim of genocide", and "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention". It states that the Russian Federation has acted inconsistently with its obligations and duties, as set out in Articles I and IV of the Convention.

The Court observes that, in accordance with Article I of the Convention, all States parties thereto have undertaken "to prevent and to punish" the crime of genocide. Article I does not specify the kinds of measures that a Contracting Party may take to fulfil this obligation. However, the Contracting Parties must implement this obligation in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its Preamble.

Pursuant to Article VIII of the Convention, a Contracting Party that considers that genocide is taking place in the territory of another Contracting Party "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". In addition, pursuant to Article IX, such a Contracting Party may submit to the Court a dispute relating to the interpretation, application or fulfilment of the Convention.

A Contracting Party may resort to other means of fulfilling its obligation to prevent and punish genocide that it believes to have been committed by another Contracting Party, such as bilateral engagement or exchanges within a regional organization. However, the Court emphasizes that, in discharging its duty to prevent genocide, "every State may only act within the limits permitted by international law".

The acts undertaken by the Contracting Parties "to prevent and to punish" genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter.

The Court can only take a decision on the Applicant's claims if the case proceeds to the merits. At the present stage of the proceedings, it suffices to observe that the Court is not in possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State, for the purpose of preventing or punishing an alleged genocide.

Under these circumstances, the Court considers that Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine.

The Court then turns to the condition of the link between the rights claimed by Ukraine and the provisional measures requested. It recalls that Ukraine is asserting a right that is plausible under the Genocide Convention. It considers that, by their very nature, the first two provisional measures sought by Ukraine (see above) are aimed at preserving the right of Ukraine that the Court has found to be plausible. As to the third and fourth provisional measures requested by Ukraine, the Court notes that the question of their link with that plausible right does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance with any specific provisional measure indicated by the Court.

The Court concludes, therefore, that a link exists between the right of Ukraine that the Court has found to be plausible and the requested provisional measures.

#### **IV. RISK OF IRREPARABLE PREJUDICE AND URGENCY (PARAS. 65-77)**

The Court recalls that, pursuant to Article 41 of its Statute, it has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences. However, this power will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can “occur at any moment” before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings. The Court is not called upon, for the purposes of its decision on the Request for the indication of provisional measures, to establish the existence of breaches of obligations under the Genocide Convention, but to determine whether the circumstances require the indication of provisional measures for the protection of the right found to be plausible.

Having determined that Ukraine can plausibly assert a right under the Genocide Convention and that there is a link between this right and the provisional measures requested, the Court then considers whether irreparable prejudice could be caused to this right and whether there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to this right before the Court gives its final decision.

The Court considers that the right of Ukraine that it has found to be plausible is of such a nature that prejudice to it is capable of causing irreparable harm. Indeed, any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment.

The Court considers that the civilian population affected by the present conflict is extremely vulnerable. The “special military operation” being conducted by the Russian Federation has resulted in numerous civilian deaths and injuries. It has also caused significant material damage, including the destruction of buildings and infrastructure. Attacks are ongoing and are creating increasingly difficult living conditions for the civilian population. Many persons have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating. A very large number of people are attempting to flee from the most affected cities under extremely insecure conditions.

In this regard, the Court takes note of resolution A/RES/ES-11/1 of 2 March 2022, of the General Assembly of the United Nations, which, *inter alia*, “[e]xpress[es] grave concern at reports

of attacks on civilian facilities such as residences, schools and hospitals, and of civilian casualties, including women, older persons, persons with disabilities, and children”, “[r]ecogniz[es] that the military operations of the Russian Federation inside the sovereign territory of Ukraine are on a scale that the international community has not seen in Europe in decades and that urgent action is needed to save this generation from the scourge of war”, “[c]ondemn[s] the decision of the Russian Federation to increase the readiness of its nuclear forces” and “[e]xpress[es] grave concern at the deteriorating humanitarian situation in and around Ukraine, with an increasing number of internally displaced persons and refugees in need of humanitarian assistance”.

In light of these circumstances, the Court concludes that disregard of the right deemed plausible by the Court could cause irreparable prejudice to this right and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case.

#### V. CONCLUSION AND MEASURES TO BE ADOPTED (PARAS. 78-85)

The Court concludes from all of the above considerations that the conditions required by its Statute for it to indicate provisional measures are met. It is therefore necessary, pending its final decision, for the Court to indicate certain measures in order to protect the right of Ukraine that the Court has found to be plausible. The Court recalls that it has the power, under its Statute, when a request for provisional measures has been made, to indicate measures that are, in whole or in part, other than those requested.

In the present case, having considered the terms of the provisional measures requested by Ukraine and the circumstances of the case, the Court finds that the measures to be indicated need not be identical to those requested. The Court considers that, with regard to the situation described above, the Russian Federation must, pending the final decision in the case, suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine. In addition, recalling the statement of the Permanent Representative of the Russian Federation to the United Nations that the “Donetsk People’s Republic” and the “Lugansk People’s Republic” had turned to the Russian Federation with a request to grant military support, the Court considers that the Russian Federation must also 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 these military operations.

The Court recalls that Ukraine also requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the Russian Federation. When it indicates provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of the dispute if it considers that the circumstances so require. In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute.

The Court further recalls that Ukraine requested it to indicate a provisional measure directing the Russian Federation to “provide a report to the Court on measures taken to implement the Court’s Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court”. In the circumstances of the present case, however, the Court declines to indicate this measure.

**VI. OPERATIVE CLAUSE (PARA. 86)**

The full text of the operative clause of the Order reads as follows:

“For these reasons,

THE COURT,

*Indicates* the following provisional measures:

(1) By thirteen votes to two,

The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge ad hoc* Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(2) By thirteen votes to two,

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;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; *Judge ad hoc* Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Xue;

(3) Unanimously,

Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

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Vice-President GEVORGIAN appends a declaration to the Order of the Court; Judges BENNOUNA and XUE append declarations to the Order of the Court; Judge ROBINSON appends a separate opinion to the Order of the Court; Judge NOLTE appends a declaration to the Order of the Court; Judge *ad hoc* DAUDET appends a declaration to the Order of the Court.

### **Declaration of Vice-President Gevorgian**

Vice-President Gevorgian voted against the first and the second provisional measure indicated by the Court in its Order, basing his position on a purely substantial legal ground. He does not believe that the Court has jurisdiction over this case, even of prima facie character. In this connection he stresses that the Court's jurisdiction is based on consent and that such consent given by the Russian Federation and by Ukraine is limited to disputes over the 1948 Genocide Convention.

In the present case, the dispute that Ukraine wants the Court to decide upon relates to the use of force. However, as the Court has held in previous cases, the use of force is not governed by the Genocide Convention. Therefore, he concludes that the Court lacks jurisdiction and cannot indicate the provisional measures sought by Ukraine.

This conclusion notwithstanding, the Vice-President declares that he voted in favour of requesting the Parties not to aggravate their dispute since the power to indicate such measure is a power inherent to the Court.

### **Declaration of Judge Bennouna**

In his declaration, Judge Bennouna states that he voted in favour of the Order because he felt compelled by this tragic situation, in which terrible suffering is being inflicted on the Ukrainian people, to join the call by the World Court to bring an end to the war.

Judge Bennouna is nonetheless not persuaded that the Genocide Convention was conceived to enable a State, Ukraine, to seize the Court of a dispute concerning allegations of genocide made against it by another State, the Russian Federation.

Noting that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions, Judge Bennouna considers that artificially linking a dispute concerning the unlawful use of force to the Genocide Convention does nothing to strengthen that instrument, in particular its Article IX on the peaceful settlement of disputes by the Court, an essential provision in the prevention and punishment of the crime of genocide.

### **Declaration of Judge Xue**

1. While fully endorsing the call that the military operations in Ukraine should immediately be brought to an end so as to restore peace in the country as well as in the region, Judge Xue reserves her position on the first two provisional measures indicated in the Order. She considers that those measures are not linked with the rights that Ukraine may plausibly claim under the Genocide Convention. More importantly, given the complicated circumstances that give rise to the conflict between Ukraine and the Russian Federation, she questions whether the measures that the Russian Federation is solely required to take will contribute to the resolution of the crisis in Ukraine.

2. Judge Xue considers that the acts complained of by Ukraine — namely Russia's recognition of the independence of the Luhansk and Donetsk regions of Ukraine and Russia's military operations in Ukraine — cannot be directly addressed by the interpretation and application of the provisions of the Genocide Convention, as the issues they have raised are concerned with questions of recognition and use of force in international law. They do not appear to be capable of falling within the scope of the Genocide Convention.

3. Judge Xue states that Ukraine's contention is based on a mischaracterization of the Russian Federation's position on its military operations. She notes that the Russian Federation invokes Article 51 of the United Nations Charter on self-defence and customary international law as the legal basis for its military operations. Nowhere has the Russian Federation claimed that the Genocide Convention authorizes it to use force against Ukraine as a means of fulfilling its obligation under Article I thereof to prevent and punish genocide. Whether the Russian Federation may exercise self-defence as it claims under the circumstances is apparently not governed by the Genocide Convention.

4. Judge Xue points out that as Ukraine's claim ultimately boils down to the very question whether recourse to use of force is permitted under international law in case of genocide, Ukraine's grievances against the Russian Federation directly bear on the legality of use of force by Russia under general international law rather than the Genocide Convention; therefore, the rights and obligations that Ukraine claims are not plausible under the Genocide Convention.

5. Judge Xue refers to the *Legality of Use of Force* cases, where the Court reminded the States before it that "they remain in any event responsible for acts attributed to them that violate international law, including humanitarian law; whereas any disputes relating to the legality of such acts are required to be resolved by peaceful means, the choice of which, pursuant to Article 33 of the Charter, is left to the parties".

6. Judge Xue underscores that the present situation in Ukraine demands all efforts that will contribute to a peaceful resolution of the dispute between Ukraine and the Russian Federation. She regrets that the Order prejudices the merits of the case (see paragraphs 56-59 of the Order) and doubts that the measures indicated can be meaningfully and effectively implemented by only one Party to the conflict. When the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen.

#### **Separate opinion of Judge Robinson**

1. In his opinion, Judge Robinson explains why he has supported the orders granted by the Court, and in particular the order requiring Russia to suspend its military operation in Ukraine.

2. First, Judge Robinson considers the question of the Court's prima facie jurisdiction. He finds that the evidence before the Court clearly shows a claim by Russia that Ukraine has committed acts that constitute genocide under the 1948 Genocide Convention and a denial by Ukraine of that claim. In Judge Robinson's view, this is the real issue in the dispute before the Court — and not the use of force, as argued by Russia. This conclusion, Judge Robinson notes, is supported by the several investigations carried out by the Russian Investigative Committee in the period from 2014 to 2017 into alleged acts of genocide committed by Ukrainian officials against the Russian-speaking population in the Donetsk and Luhansk oblasts, in breach of the Genocide Convention. He concludes that the Court has prima facie jurisdiction to entertain the dispute brought by Ukraine.

3. Judge Robinson next considers the second element of the dispute as put forward by Ukraine, that is, that there is a legal dispute between the Parties as to whether Russia may take military action in and against Ukraine to punish and prevent alleged acts of genocide within the meaning of Article I of the Convention. He finds that, although Russia has relied on the right of self-defence provided for in Article 51 of the United Nations Charter in justifying its "special military campaign" in Ukraine, Russia has expressed that the aim of the military operation is to protect against alleged acts of

genocide committed by Ukraine, acts which Russia previously classified as being contrary to Ukraine's obligations under the Genocide Convention. Judge Robinson concludes that the fact that there may be a question of the lawfulness of Russia's use of force within the framework of the United Nations Charter and customary international law does not preclude the Court from assuming jurisdiction with respect to the aspect of the dispute which falls within its jurisdiction under the Genocide Convention.

4. According to Judge Robinson, the *Legality of Use of Force* cases must be distinguished. He notes that the finding of the Court in the cases brought against Spain and the United States that Article IX of the Genocide Convention "manifestly does not constitute a basis of jurisdiction . . . even prima facie" was not related to the action that formed the basis of the claims, that is, the use of force by the respondent States; rather, the Court's manifest lack of jurisdiction resulted from reservations made by the respondent States to Article IX which had the effect of excluding the jurisdiction of the Court in those cases. In Judge Robinson's view, the Court does not manifestly lack jurisdiction in the present case since both Ukraine and Russia are parties to the Genocide Convention and neither State has entered a reservation to Article IX of the Convention. Judge Robinson further notes that Ukraine has not put before the Court a general question of the legality of Russia's use of force but has asked the Court to adjudge and declare that the operation carried out by Russia "is based on a false claim of genocide and therefore has no basis in the Genocide Convention".

5. In Judge Robinson's view, given the object and purpose of the Genocide Convention and the circumstances of its conclusion, it is possible to interpret the duty under Article I to prevent and punish genocide as precluding the force used by Russia in its "special military operation" in Ukraine. Consequently, and in view of the relatively low evidentiary threshold applicable at this stage of the proceedings, Judge Robinson concludes that the breach of the Genocide Convention alleged by Ukraine, that is, that Russia has acted contrary to Article I of the Convention in initiating a military campaign with the aim of preventing genocide, appears to be capable of falling within the provisions of the Convention.

6. In conclusion, Judge Robinson offers comments on the measures granted by the Court. First, he notes that, in view of the plausibility of Ukraine's right not to have force used against it by Russia as a means of preventing the alleged genocide in Ukraine, the patent irreparable harm caused by the special military operation and the urgent need for measures, it is appropriate for the Court to grant Ukraine's request for an order requiring Russia to suspend its military operation. Second, while he voted in favour of the non-aggravation measure ordered by the Court, Judge Robinson expresses the view that there is no justification for directing this measure to Ukraine. Finally, Judge Robinson opines that it is regrettable that the Court did not grant Ukraine's request for the Russian Federation to provide periodic reports on the measures taken to implement the Court's Order in view of the very grave situation in Ukraine caused by the military operation.

#### **Declaration of Judge Nolte**

In his declaration, Judge Nolte observes that the decision of the Court to order the suspension of military operations by way of a provisional measure is consistent with its decisions in the *Legality of Use of Force* cases. In these earlier cases, the Court found that it lacked prima facie jurisdiction under the Genocide Convention to order the cessation of acts of use of force by certain member States of NATO, as had been requested by the Federal Republic of Yugoslavia. Judge Nolte notes that the subject-matter of the application by the Federal Republic of Yugoslavia was whether the use of force by the intervening States amounted to genocide. In contrast, the subject-matter of the Application submitted by Ukraine concerns the question whether the allegations of genocide and the military operations undertaken by the Russian Federation with the stated purpose of preventing and punishing

genocide are in conformity with the Genocide Convention. Judge Nolte believes that the differences between the present case and the earlier cases justify that the Court has, in the present case, found *prima facie* jurisdiction based on Article IX of the Genocide Convention.

**Declaration of Judge *ad hoc* Daudet**

In his declaration appended to the Judgment, Judge *ad hoc* Daudet expresses his regret that both Parties are instructed to refrain from any action which might aggravate the dispute. Although he voted in favour of the measure, he is of the view that, in the circumstances of the case, it should have been addressed to the Russian Federation. The obvious escalation of the conflict, as it is developing day by day, is largely due, in his opinion, to Russian military strikes and increasing human rights violations committed against civilians, particularly women and children.

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