DECLARATION OF JUDGE BENNOUNA

1. I voted in favour of the Order indicating provisional measures in this case because I 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.

2. However, I am not convinced that the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "1948 Convention") was conceived, and subsequently adopted, in 1948, 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. We know, since the adoption of the Charter of the United Nations, that the only exceptions to the prohibition of the use of force in international relations are individual or collective self-defence, under Article 51 of the Charter (which has also been invoked by the Russian Federation), and authorization by the Security Council, in accordance with Chapter VII of that text.

3. The Genocide Convention is one of the major conventions of the United Nations, a monument of human civilization, which aims to prevent and punish genocide, defined as one of the acts set out in Article II "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

4. I am aware that this concept of genocide has been overused and indiscriminately employed by propagandists of all persuasions. This is neither in the interest of the human groups under serious threat of destruction, nor in the interest of the credibility and efficiency of the 1948 Convention, which has enjoyed massive support from States and their consent to the jurisdiction of the International Court of Justice for the settlement of disputes relating to the Convention.

5. The Convention obliges the States parties to adopt the legislation required for its proper application and to enable those accused of genocide to be brought to justice, or before the competent international criminal court. These States may, if they deem it necessary, seise the competent organs of the United Nations (Article VIII) and submit to the International Court of Justice any dispute relating to the responsibility of another State for genocide (Article IX). The Convention does not cover, in any of its provisions, either allegations of genocide or the use of force allegedly based on such allegations.

6. It is not sufficient for the Court to state 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" (Order, paragraph 60). The Court must also be able to found this alleged plausible right on one of the provisions of the Genocide Convention which the Russian Federation is said to have breached. The Court clearly failed in this task; it did not identify the rights of Ukraine under the Convention which must be preserved by provisional measures pending the judgment on the merits (Statute of the Court, Article 41).

7. Following the military intervention of the countries of the North Atlantic Treaty Organization (NATO), from 24 March to 10 June 1999, in the Federal Republic of Yugoslavia (now Serbia), without the authorization of the Security Council, which was aimed at preventing a "serious humanitarian disaster in Kosovo", the matter was debated at the international level. The then Secretary-General of the United Nations, Mr. Kofi Annan, underlined the tension that existed within the international community between the need to prevent massive human rights violations and the limits imposed on humanitarian intervention in the context of respect for State sovereignty (*We the peoples: the role of the United Nations in the twenty-first century,* report of the Secretary-General to the Millennium Assembly of the United Nations, doc. A/54/2000, 27 March 2000, para. 218). This was followed, after long discussions, by the adoption at the 2005 United Nations Summit of the concept of "responsibility to protect", according to which it falls to each State to protect its population from massive human rights violations, in particular genocide, and, if necessary, other States may intervene to this end with the authorization of the Security Council (*2005 World Summit Outcome*, resolution adopted by the General Assembly on 16 September 2005, doc. A/RES/60/1, paras. 138-139).

8. Sadly, in practice, the concept of responsibility to protect has been diverted from its purpose. When, on 17 March 2011, the Security Council authorized Member States to take action through air strikes to protect civilian populations in Libya (resolution 1973, doc. S/RES/1973 (2011)), NATO forces deviated from their initial mandate, by favouring régime change in that country. This saw the end of the concept of responsibility to protect.

9. In fact, it is difficult to link the question of the legality of the use of force in international relations, as such, to the Genocide Convention. When, in 1999, Yugoslavia instituted proceedings before the Court, on the basis of the Convention, against a number of NATO countries, which had launched air strikes against Belgrade, the Court adopted orders indicating provisional measures, considering, in particular, that it

> "must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of [the Genocide Convention] and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX" (*Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 372, para. 25).

The Court concluded that this was not so.

10. From a legal standpoint, that case is similar to the present proceedings, in so far as, in both instances, the applicant invoked the Genocide Convention in the context of an unlawful use of force by the respondent. Although the Court rejected the Request for the indication of provisional measures submitted to it by Yugoslavia, it underlined that

> "[w]hereas, whether or not States accept the jurisdiction of the Court, they remain in any event responsible for acts attributable 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" (*Legality of Use of Force (Yugoslavia* v. *France), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 374, para. 36).

11. The Court thus recalled that respect for international legality is binding on all States and in all circumstances, whether or not they have consented to a particular method for the peaceful settlement of the disputes between them. The fact remains 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 International Court of Justice, which is an essential provision in the prevention and punishment of the crime of genocide.

(Signed) Mohamed BENNOUNA.