DECLARATION OF JUDGE BENNOUNA

[Original English Text]

Non-aggravation measure — Complementary measure — No violation — The Court has stepped outside its jurisdiction given the subject-matter of the dispute in the present case.

1. In paragraph 404 (6) of the operative part of the present Judgment, the Court has found that the Russian Federation "has violated its obligation under paragraph 106 (2) of the Order of 19 April 2017 indicating provisional measures to refrain from any action which might aggravate or extend the dispute between the Parties, or make it more difficult to resolve".

2. In paragraph 103 of the Order of 19 April 2017 indicating provisional measures, the Court recalled that "Ukraine ha[d] requested it to indicate measures aimed at ensuring the non-aggravation of the dispute with the Russian Federation". It added that,

> "[w]hen it is indicating provisional measures for the purpose of preserving specific rights, the Court also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of a dispute whenever it considers that the circumstances so require".

3. The Court has always considered that it cannot order non-aggravation as a sole provisional measure: such a measure is intended to accompany substantive or specific measures aimed at the preservation of certain rights, when the circumstances so require. Accordingly, while under Article 41 of the Statute of the Court substantive measures are aimed directly at preserving the rights of the parties, the "non-aggravation" measure was conceived as a mere exhortation, to the parties, to respect their international obligations. Thus, a "non-aggravation" measure is a complementary measure recommending, in general terms, that the parties respect international law. That is why, in my view, this measure does not have the same binding character of specific measures that are intended to preserve the rights of the parties.

4. That is why, in its jurisprudence, the Court has never ventured to sanction alleged non-compliance with the "non-aggravation" measure. Moreover, the question may be asked whether it had jurisdiction to do so in the present case. In other words, can it pronounce on the "special military operation" against Ukraine and on the recognition of the "Donetsk People's Republic" (DPR) and of the "Luhansk People's Republic" (LPR) as independent States? These questions do not fall within the dispute submitted to the Court.

5. For these reasons, I regret that the majority has decided, in the present case, that the Russian Federation has violated the "non-aggravation" measure, besides which it has not determined any practical consequence. By departing from its jurisprudence in this matter, the Court risks falling foul of Article 41 of its Statute.

(Signed) Mohamed BENNOUNA.
