DECLARATION OF JUDGE TOMKA

Declaratory judgment — Request for a declaration that the Applicant did not breach its obligations under the Genocide Convention — Burden of proof.

1. In its submission *(b)*, as formulated in its Memorial, Ukraine requests 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" (Memorial of Ukraine, para. 178, quoted in Judgment, para. 25)

The Court finds that it has jurisdiction to entertain this submission (Judgment, para. 151 (8)) and that it is admissible (*ibid*., para. 151 (9)).

2. While the Court's conclusion on its jurisdiction is almost unanimous, the conclusion on the admissibility of this submission attracted three negative votes. I admit that the issue of the admissibility of this submission is a delicate one. It also raises the issue of the burden of proof. In this declaration, I wish to offer two remarks on Ukraine's submission.

I. UKRAINE'S SUBMISSION

3. The jurisprudence of the Court and that of its predecessor confirms that "the Court may, in an appropriate case, make a declaratory judgment"[1]. In its *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)*, the Permanent Court of International Justice (PCIJ) said that the purpose of a declaratory judgment

> "is to ensure recognition of a situation at law, once and for all and with binding force as between the [p]arties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned"[2].

With its submission *(b)*, Ukraine asks the Court to make just such a declaratory judgment (Judgment, para. 79). The question is whether or not the present case is an "appropriate case" for the Court to make a declaratory judgment.

4. While I agree with much of the Court's reasoning set out in paragraphs 93 to 109 of the Judgment, I nevertheless believe it necessary to make a few observations.

5. Let it be observed first that the Parties spent some time discussing a distinct — and arguably antecedent or preliminary — issue: namely whether Ukraine's submission *(b)*, because of its particular features, is inadmissible per se. The Russian Federation has put forward several arguments in support of such a view under the heading of its fifth preliminary objection, which the Court examines and rejects in paragraphs 93 to 109 of the present Judgment. The Russian Federation has focused in particular on two admittedly curious features of Ukraine's submission. One such feature

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[1] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49, citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37.

[2] *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20.

is that the Applicant seeks a declaration by the Court that *it — the Applicant —* did not breach its obligations under the Genocide Convention. For the Respondent, the question whether Ukraine did or did not breach the Convention may be considered only in the framework of an application "brought *against* Ukraine [by another State], not *by* Ukraine"[3]. Another feature identified by the Respondent is that submission *(b)* seeks a "negative declaration" or "negative finding" — namely a declaration by the Court that "the genocide *did not* take place"[4]. For the Russian Federation, this feature alone militates in favour of finding that submission *(b)* is inadmissible.

6. It is true that Ukraine's submission is at first sight a bit unusual. But does this justify finding it inadmissible? Upon reflection, I am convinced that Ukraine's submission is admissible. What at first sight appears unusual, unprecedented or precluded is in reality not so unusual, in line with precedent, and within the Court's judicial function, which is to decide in accordance with international law such disputes as are submitted to it (Article 38, paragraph 1, of the Statute).

7. The Respondent asserts that the Court may not make a "negative declaration". The Respondent does not explain why this is so. In reality, the Court and its predecessor have found on numerous occasions, in the operative parts of their Judgments, that a party appearing before it had not breached the obligations at issue. In the *"Lotus"* case, the PCIJ held in the operative part of its Judgment that, in assuming jurisdiction over a French subject with respect to a collision which occurred on the high seas, Turkey "ha[d] not acted in conflict with the principles of international law"[5]. In the *Corfu Channel* case, the Court found that "the United Kingdom did not violate the sovereignty of the People's Republic of Albania by reason of the acts of the British Navy in Albanian waters on October 22nd, 1946"[6]. In the *Anglo-Norwegian Fisheries* case, the Court found in the operative part of its judgment that "the method employed [by Norway] for the delimitation of the fisheries zone by the Royal Norwegian Decree of July 12th, 1935, is not contrary to international law" and that "the base-lines fixed by the said Decree in application of this method are not contrary to international law"[7]. These formulations in the Judgment mirrored those employed by Norway, the respondent, in its submissions. In the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court notably declared, again in the operative part of its Judgment, that Serbia "ha[d] *not* committed genocide" through its organs or persons whose acts engaged its responsibility under customary international law in violation of its obligations under the Genocide Convention[8]. And, in the *Pulp Mills on the River Uruguay* case, the Court found that Uruguay had not breached its substantive obligations under the treaty at issue[9].

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[3] Preliminary Objections of the Russian Federation, para. 280 (emphasis in original).

[4] CR 2023/13, p. 95, para. 28 (Udovichenko) (emphasis in original).

[5] *"Lotus", Judgment No. 9, 1927, P.C.I.J., Series A, No. 10*, p. 32.

[6] *Corfu Channel (United Kingdom* v. *Albania), Merits, Judgment, I.C.J. Reports 1949*, p. 36.

[7] *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 143.

[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. 237, para. 471 (2) (emphasis added).

[9] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 106, para. 282 (2).

8. These are but a few examples taken from the jurisprudence. They show that the Court may, if it deems it appropriate in a particular case, make a declaration to the effect that a party has *not* breached its obligations under international law[10].

9. In other words, the Court has on several occasions rendered a declaratory judgment of the kind sought today by Ukraine. It is immaterial that some of the declarations just mentioned formed replies to questions put to the Court by way of a special agreement. When deciding a dispute submitted to it by way of a special agreement, the Court must always ensure that the task entrusted to it is compatible with its judicial function[11]. A special agreement could not have empowered the Court to make a judgment that would have been contrary to its function. It must also not be overlooked that, in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, the Court made three declarations stating that the respondent had not breached its obligations under the Genocide Convention[12]. This was not specifically requested by the respondent. The foregoing leads me to conclude that Ukraine's submission *(b)* asking the Court to declare that "there is no credible evidence that Ukraine is responsible for committing genocide . . . in the Donetsk and Luhansk oblasts of Ukraine" is in line with precedent and not incompatible with the Court's judicial function.

10. The question to be addressed next is whether the conclusion just reached is altered in any way by the fact that Ukraine is the one making the request for a declaratory judgment. In my opinion, the fact that Ukraine's request for a declaratory judgment concerns its own conduct is immaterial for purposes of the admissibility of its request. The Court's function is to decide such disputes as are submitted to it. Neither the Statute nor the Rules of the Court require that disputes be brought to the Court under a certain "party configuration"[13]. In this sense, the character of a dispute and of the issue to be decided is essentially the same whether it is presented by an applicant or by a respondent[14]. Nor does the Genocide Convention preclude either scenario (Judgment, para. 99).

11. I would also note that applicants have sometimes asked the Court to make a declaratory judgment concerning their own conduct[15]. Some instances are noted in the Judgment (Judgment, para. 101). By way of illustration, as recently as in *Dispute over the Status and Use of the Waters of the Silala*, the applicant in the case requested a declaration that it did not breach its obligations under

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[10] See Pierre d'Argent, "Les déclarations de non-violation du droit international dans les arrêts de la Cour internationale de Justice" in Maurice Kamga and Makane Moïse Mbengue (eds), *L'Afrique et le droit international : Variations sur l'Organisation internationale : Liber Amicorum Raymond Ranjeva* (A. Pedone, 2013), p. 477.

[11] *Free Zones of Upper Savoy and the District of Gex, Judgment, 1932, P.C.I.J., Series A/B, No. 46*, p. 161.

[12] *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. 237-238, para. 471 (2), (3), and (4).

[13] Written observations of France, para. 16; CR 2023/15, p. 66, para. 6 (Alabrune).

[14] See *Aetna Life Ins. Co.* v. *Haworth, 300 U.S. 227 (1937)*. See also Edwin Borchard, *Declaratory Judgments* (Banks-Baldwin Law Publishing Co., 1941), p. 21.

[15] See *I.C.J. Pleadings, Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, Vol. I, Memorial of the French Republic, pp. 29-30, where France noted that

> "[l]es difficultés d'ordre intérieur qui s'élevèrent aux États-Unis ont empêché le Gouvernement de ce pays de négocier un compromis et *le Gouvernement de la République française a accepté de saisir la Cour par requête bien que, en droit comme en fait, la position du Gouvernement de la République française soit celle de défendeur et non pas de demandeur*. Il n'était pas possible d'admettre qu'un organe des États-Unis se croie maître de décider si la France était ou non responsable d'une violation d'un engagement international. Le Gouvernement de la République française, pour saisir le juge, *a donc passé outre à la logique et abandonné la position de défendeur qu'un compromis lui eût reconnue, puisqu'il s'agit de décider si des mesures réglementaires prises par les autorités chérifiennes dans l'exercice de la compétence étatique sont ou non conformes au droit international.*" (Emphasis added.)

international law[16]. True, the Court has not formulated a specific legal criterion concerning the admissibility of such requests (*ibid*.). In the end, when there is a clear opposition of views, it is immaterial which party institutes the proceedings to settle the dispute[17].

12. The Parties have spent much time debating the proper characterization of submission *(b)*. The Applicant has described its submission *(b)* as seeking a "declaration of conformity", that is, a declaration by the Court that it has acted in conformity with its obligations under the Genocide Convention. The Respondent, for its part, has used the term "reverse compliance request". Intervening States have used yet other terms. In paragraph 93 of the Judgment, the Court does not find it necessary to pick and choose from amongst the various terms employed by the Parties and the intervening States. It notes simply that Ukraine's submission *(b)* is a request for a declaration that the Applicant did not breach its obligations under the Convention. I agree. Other terms could always be employed, and the Court is quite right to focus on substance. As early as 1935, Borchard described the kind of judgment sought by Ukraine as a "judgment of non-liability"[18]. Another publicist has described it as a "*jugement déclaratoire négatoire*"[19]. What matters is whether the Court may, in the circumstances, render a declaratory judgment of the kind sought by Ukraine (see paragraph 3 above). This is essentially an issue of admissibility which cannot be determined on any *a priori* basis, but must be considered in light of the circumstances of the particular case.

13. Is Ukraine's submission admissible in the present case?

The Court concludes that, "[i]n the particular circumstances of the present case", Ukraine's request for a declaration that it did not breach its obligations under the Convention is admissible (Judgment, para. 109). The somewhat elliptical reference to the "particular circumstances of the present case" should not be read in isolation. In parts II and III of the Judgment, the Court, after a careful examination of the arguments of the Parties, concludes notably: *(a)* that a dispute exists between the Parties on the question whether acts of genocide attributable to Ukraine have been committed in the Donbas region (*ibid*., para. 51); *(b)* that a declaratory judgment on whether there exists credible evidence that Ukraine is responsible for committing genocide in violation of its obligations under the Convention would have the effect of clarifying whether the Applicant acted in accordance with its obligations under Article I of the Convention (*ibid*., para. 79); *(c)* that Ukraine has a legal interest under the Convention to resolve the dispute regarding its submission (*ibid*., para. 108); and *(d)* that Ukraine's submission does not contradict the principles of judicial propriety and the equality of the parties (*ibid*., para. 106). With regard to Ukraine's legal interest, I would add that, in the presence of a dispute, which is the relevant condition, there is no doubt in my mind that a State may institute proceedings before the Court against an accuser "to establish the truth of such charges instead of permitting them to fester into open conflict without any adjudication or of permitting an ostensible legal ground to be used as a cover for political designs"[20].

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[16] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II),* p. 642, para. 72.

[17] Similarly, when determining whether a dispute exists as a condition of the Court's jurisdiction, "[i]t does not matter which one of [the parties] advances a claim and which one opposes it" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I),* p. 26, para. 50).

[18] Edwin Borchard, "Declaratory Judgments in International Law" (1935), *American Journal of International Law*, Vol. 29 (3), pp. 489-490 (stating that a judgment of non-liability enables "a party normally the defendant to initiate an action for a declaration that he or it is not liable as charged").

[19] Nicolas Scandamis, *Le jugement déclaratoire entre États : la séparabilité du contentieux international* (A. Pedone, 1975), p. 221.

[20] Edwin Borchard, "Declaratory Judgments in International Law" (1935), *American Journal of International Law*, Vol. 29 (3), p. 490.

14. The present case thus may provide an opportunity for the Respondent to prove the most serious allegation made publicly against the Applicant by the President of the Russian Federation very shortly before it launched the "special military operation", which raises the most serious questions of international law.

II. THE BURDEN OF PROOF

15. This brings me to my next remark, which concerns the proper allocation of the burden of proof at the merits stage. According to the "well-established principle of *onus probandi incumbit actori*, it is the duty of the party which asserts certain facts to establish the existence of such facts"[21]. As the Court proceeds to the next stage of the case, should it be for the Russian Federation therefore to shoulder the burden of proving that Ukraine has committed genocide in the Donbas, given that it has — repeatedly and at the highest level — asserted that Ukraine is responsible for such an act? Or should it be for Ukraine, as the Applicant, to make good on its submission *(b)* by disproving the allegations that it has committed genocide? These questions take on a particular salience given the specific formulation of Ukraine's submission *(b)*, which essentially asks the Court to make a negative finding, i.e. that there is no evidence that Ukraine is responsible for committing genocide.

16. The Russian Federation has expressed, already at this stage, some concerns about the burden of proof being placed on it alone. Ukraine, for its part, has expressed its readiness to present relevant evidence at the merits to substantiate its submission *(b)*.

17. The Court has recognized that the principle of *onus probandi incumbit actori* is not an absolute one applicable in all circumstances. It has underlined that "[t]he 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 case"[22]. In particular, when faced with a submission or claim concerning a negative fact, the Court has shown some flexibility in its approach, and, on occasion, reversed or partly reversed the burden of proof such that the applicant would not be alone in shouldering it[23].

18. A brief overview of the Court's case law shows that approaches vary greatly.

19. The Court has recognized that there may be circumstances in which the applicant should be allowed a more liberal recourse to inferences of fact in order to prove a negative. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, the Court had before it an allegation by the United States that Nicaragua was involved in arms supply, an allegation which the latter sought to refute. In this context, the Court observed that the evidence offered by Nicaragua had to be assessed "bearing in mind the fact that, in responding to that allegation, Nicaragua has to prove a negative"[24]. The Court has also recognized that there may be circumstances in which the applicant cannot be required to prove a negative fact. This was the case in *Ahmadou Sadio Diallo*, where the Court had before it a claim by Guinea that its citizen had not been afforded, by a public authority of the Democratic Republic of the Congo (DRC), certain procedural guarantees to which he was entitled. In this context, the Court found it appropriate that

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[21] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 71, para. 162.

[22] *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 660-661, paras. 54-55.

[23] See Robert Kolb, *The International Court of Justice* (Hart, 2013), p. 938.

[24] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Merits, Judgment, I.C.J. Reports 1986*, p. 80, para. 147.

neither party be alone in bearing the burden of proof[25]. By contrast, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court did not find it appropriate to contemplate a reversal of the burden of proof[26]. It considered that it was not for Serbia, as the respondent, to prove a negative fact, such as the absence of facts constituting the *actus reus* of genocide. More recently, in *Armed Activities on the Territory of the Congo*, the Court considered that it was for Uganda to establish, at the reparations phase of the case, that a particular injury alleged by the DRC in Ituri "was *not* caused by Uganda's failure to meet its obligations as an occupying Power"[27]. In other words, the Court in that case placed the burden of proving a negative squarely on the respondent.

20. I take no position at this time on the question of how the burden of proof should be allocated in the present case concerning the question whether Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts. I would only point out that it would be useful for the Parties to address this fundamental question as the case proceeds to the merits.

(Signed) Peter TOMKA.

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

[26] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, pp. 73-74, para. 174.

[27] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Reparations, Judgment, I.C.J. Reports 2022 (I)*, pp. 44-45, para. 78 (emphasis added).