## DECLARATION OF JUDGE BRANT

*[Translation]*

1. I voted to reject the fifth preliminary objection of the Russian Federation, founded on the inadmissibility of the request for a declaration that the Applicant did not breach its obligations under the Convention (paragraph 151, subparagraph 6, of the operative clause of the Judgment). While I broadly agree with the reasoning that led the Court to this decision, I think it would be useful to clarify one particular aspect of it which, in my opinion, could have been addressed in more detail by the Court.

2. In support of its fifth preliminary objection, the Respondent argued in particular that the request made by Ukraine in submission *(b)* in paragraph 178 of its Memorial contradicted the principles of judicial propriety and the equality of the parties. According to the Russian Federation, the force of *res judicata* attaching to a judgment rendered at the merits stage of this case could have the effect of pre-empting the Russian Federation's right to invoke Ukraine's responsibility at a later date. The Respondent contends that if a State were allowed to secure a pre-emptive and, in its view, "premature" favourable finding based on incomplete evidence, it would be protected against all subsequent claims against it, even those made on the basis of compelling new evidence that becomes available in the future (see paragraphs 86 and 104 of the Judgment).

3. The Court addresses this argument in paragraph 105 of the Judgment. First, it draws attention to the hypothetical nature of the questions raised by the Russian Federation's argument and correctly states that "[i]t is not for the Court to speculate about these matters". Next, it acknowledges that there is a possibility that a future claim of the Russian Federation may be covered by the *res judicata* effect of the judgment that the Court may render on the merits of the present case. It concludes, however, that "[t]his possibility . . . does not per se provide a basis for finding that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties", without explaining how it reaches this conclusion.

It is this point that I would like to address in more detail by offering some considerations that I believe can supplement this part of the Court's reasoning.

4. There are, in my opinion, three considerations precluding the finding that Ukraine's request undermines the principles of judicial propriety and the equality of the parties.

5. Turning first to the allegedly "premature" nature of Ukraine's claim, it should be pointed out, as the Court rightly notes in paragraph 44 of the Judgment, that "[t]he existence of a dispute between the parties is a requirement for [its] jurisdiction under Article IX of the Genocide Convention"[1].

In this case, the Court relied on two elements to find that this requirement was met. First, it observed that certain organs of the Russian Federation having the authority to represent that State in international relations had alleged that certain acts attributable to Ukraine constituted genocide (paragraph 47 of the Judgment). Second, it noted that Ukraine had consistently rejected those accusations (paragraph 48 of the Judgment). The Court thus rightly concluded that the combination

[1] Judgment, para. 44, citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J Reports 2022 (II)*, p. 502, para. 63.

of these two factors established the existence of a dispute relating to the Genocide Convention on the date that the proceedings were instituted by Ukraine (paragraph 51 of the Judgment).

The two elements identified by the Court can be considered as both necessary and sufficient for the purpose of establishing the existence of such a dispute. In other words, had one or other of them been absent, the Court would not have been able to make such a finding and would thus have been forced to decline its jurisdiction to entertain the case submitted by Ukraine. Therefore, if the Russian Federation had wished to protect itself against the possibility of proceedings being brought on the basis of the Genocide Convention before it had gathered the relevant evidence, it had only to refrain from making such accusations against Ukraine or to defer those accusations until such time as it deemed itself to be in possession of sufficient evidence.

Consequently, I consider that the requirement that a dispute exists adequately protects the rights of the States parties to the Genocide Convention against "premature" claims. In order to guard against such claims, those States need only exercise caution and refrain from levelling accusations, in particular such grave ones, before they have gathered the evidence to corroborate them. Therefore, the so-called premature nature of Ukraine's claim cannot be regarded as contravening the principles of judicial propriety and the equality of the parties.

6. Turning next to the so-called "incomplete" nature of the evidence that will be submitted to the Court in this case, it should be noted that the discovery by the Russian Federation of new facts "of such a nature as to be a decisive factor, which fact[s] w[ere], when the judgment was given, unknown to the Court and also to the [Russian Federation], always provided that such ignorance was not due to negligence", would open the way to the filing of an application for revision, in accordance with Article 61 of the Statute of the Court. It is true that the filing of such an application is subject to certain provisos, particularly in terms of time-limits: first, "[t]he application for revision must be made at latest within six months of the discovery of the new fact" (Article 61, paragraph 4, of the Statute); and, second, "[n]o application for revision may be made after the lapse of ten years from the date of the judgment" (Article 61, paragraph 5, of the Statute). Taking into account the fact that the first accusations of genocide were made by the Investigative Committee of the Russian Federation in 2014, it appears that the latter will have a relatively long period in which to gather the evidence to corroborate its accusations.

I am therefore of the opinion that the right of the Russian Federation to present all relevant evidence in support of its accusations against Ukraine is sufficiently protected by Article 61 of the Statute, such that it cannot be considered that, in this regard, Ukraine's claim undermines the principles of judicial propriety and the equality of the parties.

7. Turning finally to the force of *res judicata* that will attach to a judgment rendered at the merits stage of this case, I consider that the Court has shown caution in confining itself to asserting that "there is a possibility [of] a future claim [of the Russian Federation] [being] covered by the *res judicata* effect of that judgment". There is, however, no certainty on this point. If necessary, it would be for the Court to decide, in accordance with its jurisprudence, whether the principle of *res judicata* had the effect of rendering inadmissible an application of the Russian Federation filed after the judgment on the merits in this case[2]. Among other things, this would entail ascertaining whether the object of such a claim was identical to the request contained in submission *(b)* in paragraph 178 of Ukraine's Memorial. It would not be unprecedented for the Court to give more than one ruling on different aspects of the same dispute through successive judgments rendered in separate cases. Examples of this include, in particular, the *Asylum* and *Haya de la Torre* cases between

[2] See in particular *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 59.

Colombia and Peru in the context of the diplomatic asylum granted to Mr Haya de la Torre by the Colombian authorities. In the Judgment rendered in the *Haya de la Torre* case, the Court stated the following about the *res judicata* of the judgment rendered in the earlier case:

> "[T]he question of the surrender of the refugee was not decided by the Judgment of November 20th. This question is new; it was raised by Peru in its Note to Colombia of November 28th, 1950, and was submitted to the Court by the Application of Colombia of December 13th, 1950. There is consequently no *res judicata* upon the question of surrender."[3]

Thus, one cannot *a priori* exclude the possibility of any subsequent claim of the Russian Federation having a different object to Ukraine's claim in the present case, particularly since it could involve new questions not covered by the judgment rendered in these proceedings. This could be the case, for example, were the Russian Federation not to confine itself to seeking a declaratory judgment on Ukraine's responsibility for alleged violations of the Genocide Convention, but to ask the Court to determine the consequences of such violations, notably in terms of reparation. Therefore, the Russian Federation will not necessarily be deprived of the possibility of instituting proceedings against Ukraine by the handing down of a judgment on Ukraine's claim at the merits stage. In view of these considerations, I do not believe that the *res judicata* attaching to the judgment rendered in this case is capable of undermining the principles of judicial propriety and the equality of the parties.

8. In conclusion, while I agree with the position taken by the Court that it "is not for the Court to speculate about these matters", I would like to emphasize that this is not, in my opinion, the main reason not to uphold the Russian Federation's argument. The decisive factor in my view is that the legal framework applicable to judicial proceedings before the Court, and thus to this case and to any hypothetical new claim subsequently presented by the Russian Federation, enables the latter's rights to be protected in an entirely satisfactory manner, without undermining the principles of judicial propriety and the equality of the parties.

*(Signed)* Leonardo Nemer Caldeira BRANT.

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[3] *Haya de la Torre (Colombia* v. *Peru), Judgment, I.C.J. Reports 1951*, p. 80.