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Cour internationale
de Justice

LA HAYE

YEAR 2022

Public sitting

held on Monday 7 March 2022, at 10 a.m., at the Peace Palace,

President Donoghue presiding,

in the case concerning Allegations of Genocide under the Convention on the Prevention
and Punishment of the Crime of Genocide
(Ukraine v. Russian Federation)

VERBATIM RECORD

ANNÉE 2022

Audience publique

tenue le lundi 7 mars 2022, à 10 heures, au Palais de la Paix,

sous la présidence de Mme Donoghue, présidente,

en l'affaire relative à des Allégations de génocide au titre de la convention pour la prévention
et la répression du crime de génocide
(Ukraine c. Fédération de Russie)

COMPTE RENDU

Present: President Donoghue
Vice-President Gevorgian
Judges Tomka
Abraham
Bennouna
Yusuf
Xue
Sebutinde
Bhandari
Robinson
Salam
Iwasawa
Nolte
Charlesworth
Judge *ad hoc* Daudet
Registrar Gautier

Présents : Mme Donoghue, présidente
M. Gevorgian, vice-président
MM. Tomka
Abraham
Bennouna
Yusuf
Mmes Xue
Sebutinde
MM. Bhandari
Robinson
Salam
Iwasawa
Nolte
Mme Charlesworth, juges
M. Daudet, juge *ad hoc*

M. Gautier, greffier

The Government of Ukraine is represented by:

H.E. Mr. Anton Korynevych, Permanent Representative of the President of Ukraine in the Autonomous Republic of Crimea,

as Agent;

H.E. Ms Oksana Zolotaryova, Director, International Law Department, Ministry of Foreign Affairs of Ukraine,

as Co-Agent;

Ms Marney L. Cheek, Covington & Burling LLP, member of the Bar of the District of Columbia,

Mr. Jonathan Gimblett, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of Virginia,

Mr. David M. Zionts, Covington & Burling LLP, member of the Bars of the Supreme Court of the United States and the District of Columbia,

Mr. Harold Hongju Koh, Sterling Professor of International Law, Yale Law School, member of the Bars of the State of New York and the District of Columbia,

Mr. Jean-Marc Thouvenin, Professor at the University of Paris Nanterre, Secretary-General of The Hague Academy of International Law, associate member of the Institut de droit international, member of the Paris Bar, Sygna Partners,

as Counsel and Advocates;

H.E. Ms Olena Zerkal, Ambassador-at-large,

Mr. Taras Kachka, Deputy Minister of Economy of Ukraine and Trade Representative of Ukraine,

H.E. Mr. Maksym Kononenko, Ambassador of Ukraine to the Kingdom of the Netherlands,

Ms Olga Bondarenko, First Secretary, Embassy of Ukraine in the Netherlands,

Ms Myroslava Krasnoborova, Counsellor of the Embassy of Ukraine in the Netherlands, Liaison Prosecutor for Ukraine at Eurojust,

Ms Clovis Trevino, Covington & Burling LLP, member of the Bars of the District of Columbia and of the States of New York and Florida,

Mr. Volodymyr Shkilevych, Covington & Burling LLP, member of the Bar of the State of New York,

Ms Paris Aboro, Covington & Burling LLP, member of the Bar of the State of New York and of the Bar of England and Wales,

Mr. Paul Strauch, Covington & Burling LLP, member of the Bars of the District of Columbia and the State of California,

Ms Jill Warnock, Covington & Burling LLP, member of the Bar of the District of Columbia,

Le Gouvernement de l'Ukraine est représenté par :

S. Exc. M. Anton Korynevych, représentant permanent du président de l'Ukraine en République autonome de Crimée,

comme agent ;

S. Exc. Mme Oksana Zolotaryova, directrice du département du droit international au ministère des affaires étrangères de l'Ukraine,

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M. Harold Hongju Koh, professeur de droit international, titulaire de la chaire Sterling, faculté de droit de l'Université de Yale, membre des barreaux de l'Etat de New York et du district de Columbia,

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comme conseils et avocats ;

S. Exc. Mme Olena Zerkal, ambassadrice itinérante,

M. Taras Kachka, vice-ministre de l'économie de l'Ukraine, représentant au commerce de l'Ukraine,

S. Exc. M. Maksym Kononenko, ambassadeur de l'Ukraine auprès du Royaume des Pays-Bas,

Mme Olga Bondarenko, première secrétaire, ambassade d'Ukraine aux Pays-Bas,

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Ms Caroline Ennis, Covington & Burling LLP,

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comme conseils ;

M. Timothy Aulet, cabinet Covington & Burling LLP,

Mme Caroline Ennis, cabinet Covington & Burling LLP,

comme assistants.

The PRESIDENT: Please be seated. The sitting is open. The Court meets this morning, under Article 74, paragraph 3, of the Rules of Court, to hear the oral argument of Ukraine on its Request for the indication of provisional measures submitted in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

Certified copies of the Application and the Request for the indication of provisional measures submitted by Ukraine on 26 February 2022 were immediately transmitted to the Government of the Russian Federation, and further communications were sent with details of the current hearings. By a letter dated 5 March 2022, H.E. Mr. Alexander V. Shulgin, Ambassador of the Russian Federation to the Kingdom of the Netherlands, indicated that his Government did not intend to participate in the oral proceedings. The Court regrets the non-appearance of the Russian Federation in these oral proceedings. In this regard, I note that, in accordance with the Rules of Court, the specific dates for these oral proceedings were set in light of the urgency of the request for provisional measures and in order to enable the Respondent to be represented at the hearing.

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Pursuant to Article 59, paragraph 2, of its Rules, the Court “may decide, for health, security or other compelling reasons, to hold a hearing entirely or in part by video link”. Owing to the ongoing concerns related to the COVID-19 pandemic, the Court has decided to hold these oral proceedings in a hybrid format.

The Court has taken great care to ensure the smooth conduct of this hybrid hearing. Ukraine participated in technical tests prior to the opening of the hearing. These tests were comprehensive and included, for example, tests of the interpretation system and the process for displaying exhibits. However, while these tests reduce the risk of technical difficulties, they cannot eliminate them. In the event that we experience any such difficulty, such as a loss of any audio input from a remote participant, I may have to interrupt the hearing briefly to allow the technical team to solve the problem.

In a hybrid hearing such as this one, all judges are able to view the speaker and any demonstrative exhibits, regardless of whether they are in the Great Hall or joining via video link. I would like to note that the following judges are present with me in the Great Hall of Justice: Vice-President Gevorgian, Judges Tomka, Abraham, Xue, Sebutinde, Iwasawa, Nolte and Charlesworth, and Judge *ad hoc* Daudet; while Judges Bennouna, Yusuf, Bhandari, Robinson and Salam are participating by video link. For reasons duly made known to me, Judge Cañado Trindade is unable to sit with us in these oral proceedings, either in person or by video link.

For this hybrid hearing, the Registrar informed both Parties that each of them could have up to five representatives present at the Great Hall of Justice at any one time and that the Court could make available, should a Party so desire, an additional room in the Peace Palace from which other members of the delegation could follow the proceedings via video link, which would be available to members of each delegation who would not be present in the Peace Palace.

*

Since there is no judge of Ukrainian nationality on the Bench, Ukraine has availed itself of the right conferred upon it by Article 31, paragraph 2, of the Statute to choose a judge *ad hoc*, choosing Professor Yves Daudet.

Article 20 of the Statute provides that “[e]very Member of the Court shall, before taking up his duties, make a solemn declaration in open court that he will exercise his powers impartially and conscientiously”. Pursuant to Article 31, paragraph 6, of the Statute, the same provision applies to judges *ad hoc*.

In accordance with custom, I shall first say a few words about the career and qualifications of Professor Daudet before inviting him to make his solemn declaration.

Professor Yves Daudet, who is of French nationality, is a Doctor of Law and Professor (“agrégé”) of Public International Law and Political Science. He is currently President of the Curatorium of the Hague Academy of International Law and Emeritus Professor at the University of Paris I (Panthéon-Sorbonne), where he served as the First Vice-President. Professor Daudet is an arbitrator in the Court of Conciliation and Arbitration within the Organization for Security and

Co-operation in Europe. He has held a number of academic and research positions in France, Mauritius, Morocco and Côte d'Ivoire. He was a member of the French delegation to the United Nations Conference on an International Code of Conduct on the Transfer of Technology. He has been chosen as judge *ad hoc* on numerous occasions and is currently sitting in the case concerning *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, the case concerning *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* and in the two cases concerning *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)* and *(Azerbaijan v. Armenia)*. Professor Daudet is a member of the Editorial Board of the *Annuaire français de droit international* and is a member of the French Society of International Law and the French branch of the International Law Association. He has published numerous books and articles in different areas of international law.

I shall now invite Professor Daudet to make the solemn declaration prescribed by the Statute, and I would request all those present to rise. Professor Daudet, you have the floor.

M. DAUDET: Merci, madame la présidente.

«Je déclare solennellement que je remplirai mes devoirs et exercerai mes attributions de juge en tout honneur et dévouement, en pleine et parfaite impartialité et en toute conscience.»

The PRESIDENT: I thank Professor Daudet. Please be seated. I take note of the solemn declaration made by Judge *ad hoc* Daudet and declare him duly installed as judge *ad hoc* in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

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I shall now recall the principal steps of procedure in the present case.

On 26 February 2022, 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”. I shall refer to this convention as the “Genocide Convention”. To found the jurisdiction of the Court, Ukraine invokes Article 36, paragraph 1, of the Statute of the Court and Article IX of the Genocide Convention.

In its Application, Ukraine contends, *inter alia*, that

“the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized 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. On the basis of this false allegation, Russia is now engaged in a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people.”

Ukraine denies that any such genocide has occurred and states that it submitted the Application “to establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide”.

In its Application, Ukraine also accuses the Russian Federation of carrying out the *actus reus* of genocide by intentionally killing and inflicting serious injury on Ukrainian nationals, accompanied by what Ukraine considers rhetoric suggestive of genocidal intent.

Together with its Application, Ukraine also submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and Articles 73, 74 and 75 of the Rules of Court. According to Ukraine, the purpose of its Request is to “prevent irreparable prejudice to the rights of Ukraine and its people and to avoid aggravating or extending the dispute between the parties under the Genocide Convention”.

The Registrar will now read out the passage from the Request specifying the provisional measures which the Government of Ukraine is asking the Court to indicate. You have the floor, Mr. Registrar.

The REGISTRAR: Thank you, Madam President.

“Ukraine respectfully requests that the Court indicate the following provisional measures:

- a. The Russian Federation shall 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.

- b. The Russian Federation shall 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.
- c. The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.
- d. The Russian Federation shall 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."

Thank you, Madam President.

The PRESIDENT: I thank the Registrar. As already mentioned, immediately after the Application and the Request for indication of provisional measures were filed, the Registrar transmitted certified copies thereof to the Government of the Russian Federation. He also notified the Secretary-General of the United Nations.

According to Article 74, paragraph 1, of the Rules of Court, a request for the indication of provisional measures shall have priority over all other cases. Paragraph 2 of the same provision states that the Court shall proceed to a decision on the request as a matter of urgency. As previously noted, this imperative must be balanced with the need to fix the date of oral proceedings in such a way as to afford the parties an opportunity to be represented at the hearings. Consequently, the Parties were informed that the date for the opening of the oral proceedings, during which they could present their observations on the Request for indication of provisional measures, had been fixed for Monday 7 March 2022, at 10 a.m.

I would now like to welcome the delegation of Ukraine. The Agent of Ukraine is present in the Great Hall of Justice. The Agent is accompanied by members of Ukraine's delegation, some of whom are physically present in the Great Hall of Justice while others are participating in the hearings remotely.

For purposes of this single round of oral argument, Ukraine has available to it a three-hour sitting. In this sitting, Ukraine may, if required, avail itself of a short extension beyond 1 p.m. today, in view of the time taken up by these introductory remarks.

Before giving the floor to the Agent of Ukraine, I wish to draw the attention of the Applicant to Practice Direction XI, which states as follows:

“In the oral pleadings on requests for the indication of provisional measures parties should limit themselves to what is relevant to the criteria for the indication of provisional measures as stipulated in the Statute, Rules and jurisprudence of the Court. They should not enter into the merits of the case beyond what is strictly necessary for that purpose.”

I now give the floor to the Agent of Ukraine, Mr. Anton Korynevych. You have the floor, Sir.

Mr. KORYNEVYCH:

INTRODUCTORY STATEMENT

1. Madam President, distinguished Members of the Court, it is a great honour to appear before you as the Agent of Ukraine. It is also a solemn responsibility. We are here today in this building called the Peace Palace but, at home, my country faces a war of aggression. I am standing here in a room called the Great Hall of Justice but, at home, my countrymen see only the injustice of Russia's bombs and missiles falling on our cities and neighbourhoods.

2. As I stand before the Court, Ukrainians are under deadly attacks. Millions of people are in imminent danger. The United Nations' top human rights official warns that there are significant civilian casualties¹.

3. Russia's assault on Ukraine has prompted over one and a half million people to flee the country². Many more are internally displaced³. More than 15,000 people, most of them women and children, have taken shelter in Kyiv's subway tunnels⁴. Babies are born underground, there, in tunnels, and hospitals are being shelled. All of this is the dire reality the people of Ukraine face now.

4. I serve as President Volodymyr Zelenskyy's envoy to the Autonomous Republic of Crimea, but the war is preventing me from doing my job. We can no longer provide State services to our

¹ Statement by Michelle Bachelet, United Nations High Commissioner for Human Rights, 49th Session of the Human Rights Council, 3 Mar. 2022, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28191&LangID=E>.

² *Ibid.*

³ *Ibid.*

⁴ Andrew E. Kramer, “15,000 Are Sheltering in Kyiv's Subway”, *The New York Times*, 2 Mar. 2022, available at <https://www.nytimes.com/2022/03/02/world/europe/russia-ukraine-war-shelters.html>.

citizens who reside in occupied territory, including the administrative services, education, medical services, for instance COVID vaccinations with internationally recognized vaccines.

5. This is, of course, not the first time that Ukraine has experienced first-hand Russia's disrespect for international law. Now the world understands the depth of its disrespect, and the height of its cruelty.

6. The fact that Russia's seats are empty speaks loudly. They are not here in this court of law. They are on a battlefield, waging aggressive war against my country. This is how Russia solves disputes. But Ukraine has another position and respects international law and this court of law.

7. But even still, Russia knows that international law matters. Why else would Russia try to justify its aggression?

8. This war, Russia says, is to stop a genocide. I quote Russia's president from the morning he ordered the invasion of Ukraine. He said: "We had to stop that atrocity, that genocide. The 'purpose' of the war — he said — was to 'protect' people from 'genocide'." ⁵

9. This is a horrible lie. Putin lies, and Ukrainians, our citizens, die. It is not Ukraine who commits genocide, it is Russia and its political leadership and military personnel who commit crimes against humanity and war crimes on the territory of Ukraine.

10. Over the past two weeks, I have heard many people mention World War II. Russia sullies the memory of the Holocaust by claiming to "de-Nazify" Ukraine. To "de-Nazify" Ukraine, from its democratic government. I have heard others note that Europe has not seen such aggression and conflict since World War II.

11. It is indeed appropriate to recall World War II, but for different reasons. We should recall that in World War II, Ukrainians and Russians fought together, and died together, to stop evil. We should recall that on the ashes of Europe, after the Second World War, the world built the modern pillars of international law.

12. Two of these pillars stand as the most important. The world witnessed aggression — and it answered with the Charter of the United Nations. The world witnessed the Holocaust — and it

⁵ Transcript of the address by the President of the Russian Federation (24 Feb. 2022), <http://en.kremlin.ru/events/president/transcripts/statements/by-date/24.02.2022>.

answered with a Convention to Prevent and Punish the Crime of Genocide. The world said “never again” to the twin evils of Nazism: aggression and genocide.

13. Unfortunately, today Russia has perverted those words. It does not treat the duty to prevent and punish genocide as a sacred obligation. It treats it as a weapon. With its false claim of genocide, Russia uses one pillar of modern international legal order to destroy the other. By falsely claiming genocide to justify its crime of aggression and acts of aggression, Russia has defiled the Genocide Convention.

14. Madam President, distinguished Members of the Court, Ukraine’s case is straightforward. Russia accuses Ukraine of committing genocide. Ukraine denies that claim *in the strongest possible terms*, and we will prove it. Russia claims that in order to stop a non-existent genocide, it can invade a sovereign State — Ukraine. Ukraine rejects this baseless claim.

15. My message to Russia is this: let us settle our dispute like civilized nations. Lay down your arms and put forward your evidence. Ukraine respects this Court and follows its orders. Russia must as well.

16. But if Russia will not return to international law on its own, the Court has the power to act. With respect, the Court has the responsibility to act. Russia consented to your jurisdiction under the Genocide Convention. Now it is abusing and violating that Convention in order to kill Ukrainians and destroy Ukraine. Russia must be stopped, and the Court has a role to play in stopping it. That is why the people of Ukraine, the Government of Ukraine, the President of Ukraine, Volodymyr Zelenskyy, ask you, respectfully but urgently, to grant our request for provisional measures.

17. Madam President, Members of the Court, Ukraine’s counsel here will explain why provisional measures are not only warranted, but vitally necessary.

18. First, Professor Jean-Marc Thouvenin will explain that the Court has *prima facie* jurisdiction.

19. Second, Mr. David Zions will provide the factual background showing that Russia’s allegations of genocide are absolutely false.

20. Third, Ms Marney Check will explain that the rights claimed by Ukraine in this case are at a minimum plausible, which is sufficient for provisional measures to be indicated.

21. Fourth, Mr. Jonathan Gimblett will explain that the Ukrainian people are vulnerable and in urgent need of the Court's protection.

22. Fifth, Professor Harold Hongju Koh will explain the measures Ukraine requests, and why those measures must be ordered.

23. Finally, Ms Oksana Zolotaryova, Co-Agent of Ukraine, will conclude and present Ukraine's closing statement and final submissions.

24. On behalf of Ukraine, I thank the Court for the urgency you showed in convening this hearing. I thank you, Madam President, for your urgent communication to the Russian Federation under Article 74 (4) of the Court's Rules. I thank the Court in advance for your careful attention this morning. And I thank the Court for being mindful of the extreme urgency which exists now as you deliberate. If ever there was a moment in which to exercise your power to order provisional measures, this is that moment.

25. I now ask you to give the floor to Professor Jean-Marc Thouvenin.

The PRESIDENT: Thank you, Mr. Korynevych. I now invite Professor Jean-Marc Thouvenin to take the floor. You have the floor, Professor.

M. THOUVENIN : Merci, Madame la présidente.

LA COMPÉTENCE *PRIMA FACIE* DE LA COUR EST ÉTABLIE

1. Madame la présidente, Mesdames et Messieurs les juges, les avocats qui paraissent devant vous aiment à vous faire savoir combien ils sont honorés de le faire. Ce n'est pas qu'une politesse ; c'est une évidence tant l'organe judiciaire principal de l'Organisation des Nations Unies qu'est la Cour mondiale inspire respect et confiance, et donne un corps tangible à la conviction, partagée par nombre de ceux qui prennent la parole à cette barre, que le droit international n'est pas une vaine promesse.

2. Aujourd'hui, le sentiment qui m'assaille, qui nous assaille tous, non seulement de ce côté-ci de la barre, mais partout en Ukraine, et partout dans le monde, est celui de l'extrême urgence à entendre votre Cour prendre toute sa part dans l'action entreprise par les Nations Unies et le monde. L'extrême urgence est de faire cesser sans délai la guerre de prévention d'un prétendu génocide, et

de répression de ses prétendus auteurs, lancée contre l'Ukraine, ses dirigeants, contre son peuple, contre son identité, contre son existence même, par le président Vladimir Poutine le 24 février 2022, sous couvert de la convention de 1948 sur la prévention et la répression du crime de génocide. Certains diront que le 24 février 2022 marque d'une pierre noire l'histoire de la convention de 1948. En vérité, à cette date, la Russie l'a réduite en confettis. Votre Cour, Madame la présidente, Mesdames et Messieurs les juges, peut, et je crois qu'elle doit, en rétablir l'intégrité.

3. Elle le fera. J'en suis convaincu. Mais cela prendra du temps. Et du temps, nous n'en avons pas. C'est pourquoi l'Ukraine demande à votre Cour d'agir, vite, en indiquant les mesures conservatoires qu'elle sollicite. Vous pouvez le faire. L'Ukraine croit que vous devez le faire.

4. Toutes les conditions sont réunies pour cela : je démontrerai — cela vous a été annoncé — que votre compétence, qui ne doit être vérifiée que *prima facie*, est établie ; à ma suite, M^e Zions démontrera la totale vacuité des allégations de génocide proférées par la Russie ; puis M^e Cheek montrera que les droits dont la protection est recherchée par l'Ukraine — le droit de ne pas être victime d'une interprétation et d'une application délirantes de la convention sur le génocide, le droit de ne pas voir son territoire dévasté et sa population terrorisée au nom de la convention sur le génocide, ces droits revendiqués par l'Ukraine sont, selon la formule consacrée, «à tout le moins plausibles»⁶ ; M^e Gimblett vous dira que nous sommes très malheureusement bien au-delà du «risque» de préjudice irréparable, et qu'il y a extrême urgence — le terme est vraiment pertinent ici — à éviter davantage de morts et de destructions. Enfin, le professeur Koh expliquera pourquoi les mesures provisoires demandées par l'Ukraine sont appropriées dans les circonstances extraordinaires de l'espèce, et le coagent de l'Ukraine conclura.

5. J'en viens donc à la compétence *prima facie*.

6. A cet égard, Madame la présidente, l'Ukraine relève que la Russie a décidé de ne pas se présenter devant vous, sans donner la moindre justification. Je note que dans d'autres affaires la Russie a défendu bec et ongles que vous n'aviez pas compétence. Aussi volubiles que furent alors ses adroits avocats, ici la Russie se tait. Vous y verrez la reconnaissance par la Russie qu'elle ne saurait contester la compétence *prima facie* de votre Cour. L'Ukraine est également de cet avis.

⁶ *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique), mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II), p. 638, par. 53.*

7. Madame la présidente, Mesdames et Messieurs les juges, comme vous l'avez maintes fois rappelé, et encore tout récemment :

«La Cour ... peut indiquer des mesures conservatoires ... si les dispositions invoquées par le demandeur semblent *prima facie* constituer une base sur laquelle sa compétence pourrait être fondée, mais elle n'a pas besoin de s'assurer de manière définitive qu'elle a compétence quant au fond de l'affaire»⁷.

8. Vos pouvoirs et compétence sont en l'espèce fondés sur l'article 36, paragraphe 1, de votre Statut, et sur l'article IX de la convention sur le génocide. Ce dernier texte est bien connu de la Cour mais je le cite :

«Les différends entre les Parties contractantes relatifs à l'interprétation, l'application ou l'exécution de la présente Convention, y compris ceux relatifs à la responsabilité d'un Etat en matière de génocide ou de l'un quelconque des autres actes énumérés à l'article III, seront soumis à la Cour internationale de Justice, à la requête d'une partie au différend.»

9. La compétence *ratione personae* n'appelle aucun débat. La Russie et l'Ukraine sont l'une et l'autre parties à la convention sur le génocide. Aucune n'a émis de réserve qui soit actuellement en vigueur.

10. Pour ce qui est de la compétence *ratione materiae*, ce dont vous devez vous assurer au stade des mesures conservatoires est de l'existence *prima facie* d'un différend relatif à l'interprétation, l'application ou l'exécution de la convention⁸.

11. Les points clés de votre jurisprudence concernant la notion de «différend», rappelés dans les arrêts rendus dans les affaires des *Iles Marshall*, peuvent être résumés comme suit :

— Un différend, on le sait tous, est «un désaccord sur un point de droit ou de fait, une contradiction, une opposition de thèses juridiques ou d'intérêts» entre des parties⁹. Pour qu'un différend existe, «[i]l faut démontrer que la réclamation de l'une des parties se heurte à l'opposition manifeste de

⁷ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Arménie c. Azerbaïdjan)*, mesures conservatoires, ordonnance du 7 décembre 2021, par. 15 ; *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar)*, mesures conservatoires, ordonnance du 23 janvier 2020, C.I.J. Recueil 2020, p. 9, par. 16 ; *Violations alléguées du traité d'amitié, de commerce et de droits consulaires de 1955 (République islamique d'Iran c. Etats-Unis d'Amérique)*, mesures conservatoires, ordonnance du 3 octobre 2018, C.I.J. Recueil 2018 (II), p. 630, par. 24 ; *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008, p. 377, par. 85.

⁸ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, mesures conservatoires, ordonnance du 15 octobre 2008, C.I.J. Recueil 2008, p. 386, par. 110.

⁹ *Concessions Mavrommatis en Palestine*, arrêt n° 2, 1924, C.P.J.I. série A n° 2, p. 11.

- l'autre»¹⁰. «[L]es points de vue des deux parties, quant à l'exécution ou à la non-exécution» de certaines obligations internationales, «[doivent être] nettement opposés»¹¹.
- Il s'agit d'une question de fond, et non de forme ou de procédure¹², qui appelle un examen des faits¹³. A cette fin, la Cour tient notamment compte de l'ensemble des déclarations ou documents échangés dans des enceintes multilatérales¹⁴. Ce faisant, elle accorde une attention particulière «aux auteurs des déclarations ou documents, aux personnes auxquelles ils étaient destinés ou qui en ont effectivement eu connaissance et à leur contenu»¹⁵.
- Le comportement des parties peut aussi entrer en ligne de compte, notamment en l'absence d'échanges diplomatiques¹⁶. Le désaccord ne doit en effet «pas nécessairement être énoncé[] *expressis verbis* ... [I]l est possible, comme en d'autres domaines, d'établir par inférence quelle est en réalité la position ou l'attitude d'une partie.»¹⁷
- En particulier, la Cour a jugé que «l'existence d'un différend p[ouvait] être déduite de l'absence de réaction d'un Etat à une accusation dans des circonstances où une telle réaction s'imposait»¹⁸.

12. Madame la présidente, Mesdames et Messieurs les juges, il est évident que l'Ukraine a bien des griefs à faire valoir à l'encontre de la Russie. Pour autant, ce qui est devant vous est un

¹⁰ *Sud-Ouest africain (Ethiopie c. Afrique du Sud ; Libéria c. Afrique du Sud)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1962, p. 328.

¹¹ *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 26, par. 50, citant *Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie, première phase, avis consultatif*, C.I.J. Recueil 1950, p. 74.

¹² *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 27, par. 50, citant *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I), p. 84, par. 30.

¹³ *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 27, par. 50.

¹⁴ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I), p. 94, par. 51 ; p. 95, par. 53.

¹⁵ *Ibid.*, p. 100, par. 63.

¹⁶ *Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 32-33, par. 71 et 73.

¹⁷ *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 315, par. 89.

¹⁸ *Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie)*, exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I), p. 84, par. 30, citant *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria)*, exceptions préliminaires, arrêt, C.I.J. Recueil 1998, p. 315, par. 89.

différend circonscrit. Il s'agit d'un différend relatif à l'interprétation, l'application ou l'exécution de la convention sur le génocide. Il se matérialise sous deux aspects.

I. Le différend portant sur les allégations d'actes et de politique de génocide au sens de la convention

13. La première manifestation de ce différend porte sur le fait que, selon la Russie, l'Ukraine a commis un génocide dans les oblasts de Donetsk et de Louhansk. Cette accusation est au cœur de la décision du président de la Fédération de Russie du 24 février 2022. Elle est la seule justification juridique avancée par la Russie pour justifier l'attaque de l'Ukraine dans son ensemble. Cette accusation, grave, ne date pourtant pas du 24 février 2022. En fait, la Russie la profère de manière continue, et de manière de plus en plus pressante, depuis huit ans, comme je vais maintenant le montrer.

14. Avant de m'y atteler, Madame la présidente, permettez-moi d'indiquer que tous les faits que je vais mentionner se trouvent dûment établis par des documents reproduits dans le dossier des juges, que vous pourrez consulter tout à votre aise. J'indique également que je citerai lesdits documents, dont certains sont en langue russe, dans une version française non officielle, mais que je crois fiable, afin de simplifier le travail des interprètes. Pour votre confort, une traduction en langue anglaise des documents en langue russe est également disponible dans le dossier.

15. J'en viens donc aux faits, et en particulier aux allégations de génocide.

16. Dès 2014, le journal *Nezavissimaïa Gazeta* édité à Moscou publiait un article dont la version française éditée par le magazine *Courrier international* titrait «Ukraine-Russie. Accusation de génocide : vers un scénario à la kosovare ?» Son auteur soulignait qu'«on entend de plus en plus résonner ce mot, «génocide» ; mais il relevait que «la Russie va avoir beaucoup de mal à faire qualifier de génocide la situation dans l'est de l'Ukraine par ses homologues occidentaux»¹⁹.

17. Cet article de presse est contemporain de l'ouverture par le comité d'investigation de la Fédération de Russie d'une enquête sur «le génocide de la population russophone» vivant dans les oblasts de Louhansk et Donetsk. Le comité d'investigation de la Fédération de Russie est une agence

¹⁹ *Courrier international*, «Accusation de génocide : vers un scénario à la kosovare ?» (8 October 2014), <https://www.courrierinternational.com/article/2014/10/08/accusation-de-genocide-vers-un-scenario-a-la-kosovare> [version française] ; *Nezavissimaya*, «Genocide as a Non-Turning Point in Cases of Territorial Integrity» (7 October 2014), https://www.ng.ru/editorial/2014-10-07/2_red.html?print=Y [version russe] (traduction anglaise non officielle) (dossier des juges, onglet n° 4).

russe officielle, en charge des poursuites criminelles au niveau fédéral, qui rend directement compte au président de la Fédération de Russie. Son communiqué indique que :

«L'enquête a permis de constater que, au cours de la période allant du 12 avril 2014 à aujourd'hui, en violation de la convention de 1948 pour la prévention et la répression du crime de génocide, ainsi que d'autres actes juridiques internationaux condamnant le génocide, des personnes non identifiées parmi les hauts dirigeants politiques et militaires de l'Ukraine, des forces armées de l'Ukraine, de la garde nationale de l'Ukraine et du «right sector» — je ne sais pas comment le traduire — ont donné l'ordre de détruire complètement la population spécifiquement russophone vivant sur le territoire des républiques de Donetsk et de Louhansk.»²⁰

18. En janvier 2015, de nouvelles poursuites criminelles étaient initiées par la Russie à la suite de prétendus bombardements de l'est de l'Ukraine par l'armée ukrainienne. Le comité d'investigation de la Russie affirmait que :

«ces actions des militaires ukrainiens constituent des crimes spécialement graves non seulement en vertu du droit russe, mais aussi en vertu des normes du droit international. En particulier, ... la Convention pour la prévention et la répression du crime de génocide (Paris, 09.12.1948) et d'autres textes»²¹.

19. En février 2015, la presse mondiale, par exemple *Le Soir*, en Belgique, relevait que le président de la Fédération de Russie, Vladimir Poutine, avait affirmé que le refus des autorités ukrainiennes de livrer du gaz aux provinces de l'est «ressemble déjà à un génocide»²².

20. Le 10 septembre de la même année, un communiqué officiel du comité d'investigation de Russie annonçait engager de nouvelles poursuites contre un nombre indéfini de responsables ukrainiens, y compris le ministre de la défense et d'autres responsables militaires nommément désignés, au motif qu'ils auraient violé, entre autres, la convention sur la prévention et la répression du génocide²³. Lors d'un entretien dans un média russe, Vladimir Markin, représentant officiel du parquet russe, indiquait :

²⁰ Investigative Committee of the Russian Federation, The Investigative Committee Opened a Criminal Investigation Concerning the Genocide of Russian-Speaking Population in the South-East of Ukraine (29 September 2014), <https://sledcom.ru/news/item/523738/> (traduction anglaise non officielle) (dossier des juges, onglet n° 5).

²¹ Investigative Committee of the Russian Federation, A Criminal Investigation Was Initiated Over New Facts of Genocide of Russian-Speaking Civilians During the Shelling of Towns and Settlements in Donbass (13 January 2015), (traduction anglaise non officielle) (dossier des juges, onglet n° 6).

²² *Le Soir*, «Kiev accusé de «génocide» après avoir refusé la livraison de gaz aux régions rebelles» (25 February 2015), <https://www.lesoir.be/art/804987/article/actualite/fil-info/fil-info-monde/2015-02-25/ki-ev-accuse-genocide-apres-avoir-refuse-livraison-gaz-aux-regions-re> (dossier des juges, onglet n° 7).

²³ Investigative Committee of the Russian Federation, Criminal Proceedings Have Been Initiated Against High-Ranking Ukrainian Military Personnel, As Well as Against Oleg Lyashko, A Member of the Parliament (10 September 2015), <https://sledcom.ru/news/item/886833> (traduction anglaise non officielle) (dossier des juges, onglet n° 8).

«je tiens à vous rappeler que la législation russe actuelle ainsi que les normes du droit international permettent aux organes d'enquête russes de poursuivre ces personnes. Nous parlons de juridiction extraterritoriale, où le principe universel s'applique.»²⁴

Ce même responsable précisait que la Russie entendait exercer cette juridiction extraterritoriale : «dans les affaires prévues par les traités internationaux auxquels la Russie est partie, si les étrangers n'ont pas été poursuivis dans l'Etat étranger»²⁵.

21. En septembre 2017, le comité d'investigation de Russie annonçait des poursuites criminelles contre vingt autres hauts responsables du ministère de la défense de l'Ukraine, y compris, à nouveau, le ministre de la défense. Selon le représentant du comité d'investigation, le même Vladimir Markin :

«les personnes mentionnées, en violation ... de la convention pour la prévention et la répression du crime de génocide et d'autres actes juridiques normatifs, exerçant la direction générale des opérations militaires, ont donné sciemment des ordres criminels aux combattants des agences de sécurité ukrainiennes pour qu'ils mènent des attaques ciblées»²⁶.

22. En novembre 2021, le président de la Fédération de Russie adoptait un décret (un «oukaze») en rapport avec le territoire de l'est de l'Ukraine. L'ambassadeur de la Fédération de Russie auprès du groupe de contact pour le règlement de la situation dans l'est de l'Ukraine, Boris Gryzlov, déclarait alors que ce décret était une réponse aux actions de Kiyv, qui : «relèvent en fait de la convention des Nations Unies sur la prévention et la répression du génocide»²⁷.

23. Madame la présidente, Mesdames et Messieurs les juges, ceci n'était pas un événement anodin. En effet, l'accusation de violation de la convention des Nations Unies sur la prévention et la répression du génocide, répétée année après année par le parquet russe, venait d'être reprise et entérinée par un des plus hauts responsables de la Fédération de Russie pour ce qui concerne les relations internationales entre la Russie et l'Ukraine. L'accusation avait désormais un caractère

²⁴ Investigative Committee of the Russian Federation, Interview by Vladimir Markin, Official Representative of the Investigative Committee of the Russian Federation, to the Online Publication *Russkaya Vesna* [«Russian Spring»] (15 September 2015), <https://sledcom.ru/press/interview/item/967207> (traduction anglaise non officielle) (dossier des juges, onglet n° 9).

²⁵ *Ibid.*

²⁶ Investigative Committee of the Russian Federation, Criminal Cases Initiated Against 20 High-Ranking Officials of the Ministry of Defense of Ukraine (11 September 2017), <https://sledcom.ru/news/item/1162812> (traduction anglaise non officielle) (dossier des juges, onglet n° 10).

²⁷ TASS, «Gryzlov: Putin's Decree on Donbass is a Response to Kiev's Failure to Comply with the Minsk Agreements» (18 November 2021), <https://tass.ru/politika/12961859> (traduction anglaise non officielle) (dossier des juges, onglet n° 11) ; RIA Novosti, «Gryzlov Called Putin's Decree on Donbass a Response to Kyiv's Actions» (18 November 2021), <https://ria.ru/20211118/donbass-1759650224.html> (traduction anglaise non officielle) (dossier des juges, onglet n° 12).

clairement international. Elle fut d'ailleurs largement relayée par les médias officiels du pouvoir russe, qui ne s'y trompèrent pas ; l'agence TASS²⁸, bien sûr, mais aussi, par exemple, RIA Novosti²⁹.

24. D'autres médias russes, comprenant clairement le message, titraient alors : «Ce que Kyiv fait dans le Donbass relève de la convention sur le génocide»³⁰.

25. Le 9 décembre 2021, le président de la Fédération de Russie soutenait devant un journaliste de Russia Today que «ce qui se passe actuellement dans le Donbass, vous et moi pouvons le voir, nous le savons. Cela s'appelle bien sûr le génocide que vous avez mentionné.»³¹ L'affirmation, cette fois du plus haut responsable de l'Etat russe, le président de la Fédération, fut évidemment reprise par tous les médias officiels de la Fédération, notamment l'agence TASS³², mais aussi dans la presse mondiale, notamment entre autres, en France, dans *Le Point*³³.

26. Le 10 décembre 2021, le vice-président du comité de la Douma pour les affaires internationales, Aleksey Chepa, faisait savoir au média officiel Russia Today qu'il adhérerait sans réserve aux propos du président de la Fédération de Russie : «Je suis tout à fait d'accord» dit-il. «Il y a une annihilation pure et simple de son propre peuple.»³⁴ L'article de Russia Today, qui rend compte de ces phrases, rappelle en outre la position de l'ambassadeur Boris Gryzlov, que j'ai mentionnée à l'instant, qui avait posé que ce que la Russie reproche à l'Ukraine «relève[] en fait de la convention des Nations Unies sur la prévention du génocide»³⁵.

27. Le 16 février 2022, durant la conférence de presse concluant une rencontre entre le président de la Fédération de Russie et le chancelier allemand Olaf Scholz, qui portait spécifiquement

²⁸ TASS, «Gryzlov: Putin's Decree on Donbass is a Response to Kiev's Failure to Comply with the Minsk Agreements» (18 November 2021), <https://tass.ru/politika/12961859> (traduction anglaise non officielle) (dossier des juges, onglet n° 11).

²⁹ RIA Novosti, «Gryzlov Called Putin's Decree on Donbass a Response to Kyiv's Actions» (18 November 2021), <https://ria.ru/20211118/donbass-1759650224.html> (traduction anglaise non officielle) (dossier des juges, onglet n° 12).

³⁰ Vesti News, «What Kiev is Doing in the Donbass Falls Under The Genocide Convention» (18 November 2021), <https://www.vesti.ru/article/2641219> (traduction anglaise non officielle) (dossier des juges, onglet n° 13).

³¹ Voir TASS, «Putin Said That What is Happening in the Donbass Resembles Genocide» (9 December 2021), <https://tass.ru/politika/13162483> (traduction anglaise non officielle) (dossier des juges, onglet n° 14).

³² *Ibid.*

³³ *Le Point*, «Ukraine : «Un premier pas vers un génocide», selon Vladimir Poutine» (9 December 2021), https://www.lepoint.fr/monde/ukraine-un-premier-pas-vers-un-genocide-selon-vladimir-poutine-09-12-2021-2456072_24.php (dossier des juges, onglet n° 15).

³⁴ Darya Uskova, «The State Duma Commented Regarding Putin's Words that the Situation in Donbass Resembles Genocide», Russia Today (10 December 2021), <https://russian.rt.com/ussr/news/937274-gosduma-genocid-donbass> (traduction anglaise non officielle) (dossier des juges, onglet n° 16).

³⁵ *Ibid.*

sur la menace d'action militaire de la Russie contre l'Ukraine, le président russe justifia d'avance une telle action en accusant l'Ukraine de génocide³⁶.

28. Le 18 février 2022, le président du Parlement de Russie, Vyacheslav Volodin, accusa à nouveau l'Ukraine de se livrer dans l'est du pays à des actes «que des accords internationaux interdisent»³⁷, précisant : «si ce n'est pas un génocide, alors qu'est-ce que c'est ?», tout en prévenant : «les auteurs vont sans aucun doute être punis»³⁸.

29. Trois jours plus tard, dans son discours du 21 février 2022 justifiant sa décision de reconnaître la souveraineté des prétendues «républiques» de Donetsk et Louhansk, le président de la Fédération de Russie accusait :

«Le monde dit civilisé, dont nos collègues occidentaux se sont proclamés les seuls représentants, préfère ne pas voir cela, comme si cette horreur et ce génocide, auxquels près de 4 millions de personnes sont confrontées, n'existaient pas. Mais ils existent»³⁹.

30. Dans son discours du 24 février 2022, reprenant une fois encore à son compte les allégations ressassées par la Russie depuis 2014 sous couvert de la convention sur la prévention et la répression du crime de génocide, le chef de l'Etat russe accuse à nouveau l'Ukraine de génocide, en posant que l'action militaire lancée ce funeste jour a pour «objectif ... de protéger les personnes qui souffrent des abus et du génocide de la part du régime de Kiev depuis huit ans»⁴⁰.

31. Le 25 février 2022, l'ambassadeur de la Fédération de Russie auprès de l'Union européenne, Vladimir Chizhov, confirmait dans un entretien à *Euractiv* que l'allégation de génocide était portée contre l'Ukraine en référence à la convention sur le génocide⁴¹.

³⁶ Tziv Joffrey, «Russia Claims Mass Civilian Graves Found in Donbas», *The Jerusalem Post* (16 February 2022), <https://www.jpost.com/international/article-69670> (dossier des juges, onglet n° 17) ; voir aussi TASS, «German Chancellor's Claims About Genocide in Donbass Unacceptable—Foreign Ministry» (19 February 2022), https://tass.com/world/1406425?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com (dossier des juges, onglet n° 69).

³⁷ TASS, «State Duma Speaker Says Kiev's Genocidal Crimes Swept Under the Rug by US, EU» (18 February 2022), <https://tass.com/world/1405755> (traduction anglaise non officielle) (dossier des juges, onglet n° 18).

³⁸ *Ibid.*

³⁹ Address by the President of the Russian Federation (21 February 2022), <http://en.kremlin.ru/events/president/transcripts/statements/67828> (dossier des juges, onglet n° 19).

⁴⁰ Adresse du président de la Fédération de Russie Vladimir Poutine (24 février 2022), https://france.mid.ru/fr/presse/adresse_president_vladimir_poutine/ (dossier des juges, onglet n° 20).

⁴¹ Georgi Gotev, «Russian Ambassador Chizov: Nordstream 2 is Not Dead, It's a Sleeping Beauty», *Euractiv* (25 February 2022), <https://www.euractiv.com/section/global-europe/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/> (dossier des juges, onglet n° 21).

32. Le 28 février 2022, le ministre des affaires étrangères de la Fédération de Russie y est revenu, accusant cette fois l'Union européenne d'avoir pris fait et cause pour : «le régime de Kyiv, qui a mis en œuvre une politique de génocide d'une partie de sa propre population»⁴².

33. Madame la présidente, Mesdames et Messieurs les juges, il est inutile d'accumuler davantage de preuves que ce que la Russie reproche à l'Ukraine, que ce qui a fondé sa décision de la punir militairement, est d'avoir prétendument commis des actes contraires à ce que réclame la convention des Nations Unies pour la prévention et la répression du génocide.

34. Ceci est-il cause d'un différend ? Comment pourrait-on en douter ? L'Ukraine est en *profond* désaccord avec cette allégation, qu'elle a toujours jugée totalement grotesque.

35. Elle l'a fait savoir à la Russie à de multiples reprises, et dès septembre 2014. Dans un entretien rapporté par la BBC, le conseiller du ministre de l'intérieur de l'Ukraine indiquait que le bureau du procureur général de l'Ukraine avait engagé des poursuites criminelles contre les agents du comité d'investigation de Russie, accusés, par l'Ukraine, d'assistance à une organisation terroriste dans le Donbass, et d'obstruction à la mise en œuvre de la loi et au travail des agents de l'Etat, précisément parce qu'ils avaient lancé des accusations de génocide dans le Donbass contre l'Ukraine. Le conseiller ajoutait que, selon l'Ukraine, les accusations de génocide lancées par les suspects avaient pour seul objet de justifier l'occupation du Donbass⁴³.

36. Je pourrais m'arrêter là, tant il est évident que lorsqu'un Etat accuse l'autre de violer la convention sur le génocide, et que l'autre engage des poursuites judiciaires contre les agents du premier au motif qu'ils profèrent de fausses allégations, un différend relatif à l'interprétation, l'application ou l'exécution de la convention sur le génocide est indubitablement établi.

37. Du reste, le rejet des accusations russes comme totalement infondées n'a pas été limité à l'Ukraine. On se souvient, car c'était il y a moins d'un mois, que le 16 février 2022 le département d'Etat américain avait dénoncé les accusations de génocide proférées par la Russie comme destinées

⁴² TASS, «EU Taking Sides with Kiev Regime by Supplying Weapons to It — Russian Foreign Ministry» (28 February 2022), <https://tass.com/politics/1413607> (dossier des juges, onglet n° 22).

⁴³ BBC, «The GPU Has Opened Proceedings Against Russian Investigators» (30 September 2014), https://www.bbc.com/ukrainian/politics/2014/09/140930_gpu_against_sk_genocide_zsh (dossier des juges, onglet n° 23).

à fabriquer de toutes pièces un prétexte à une invasion militaire de l'Ukraine⁴⁴. Quant au chancelier de l'Allemagne, il avait dénoncé l'accusation russe de génocide comme — je ne sais pas si l'on doit dire «ridicule» ou «risible» — «laughable», déclenchant l'ire du ministre des affaires étrangères de la Fédération de Russie⁴⁵.

38. Pour sa part l'Ukraine a encore marqué son désaccord avec la Russie par la voix de son ministre des affaires étrangères. Le 23 février 2022, devant l'Assemblée générale des Nations Unies, alors que l'ambassadeur de Russie à l'ONU, Vassili Nebenzya, justifiait la légalité de la reconnaissance russe de l'indépendance des oblasts de Donetsk et Louhansk en disant : «Étant donné le génocide flagrant et le piétinement du plus important des droits humains — le droit de vivre —, notre pays ne peut rester indifférent au sort des 4 millions de personnes dans le Donbass»⁴⁶, génocide *flagrant*, le ministre des affaires étrangères de l'Ukraine, M. Kuleba, répondait :

«Les accusations de la Russie à l'égard de l'Ukraine sont absurdes. L'Ukraine n'a jamais menacé ou attaqué qui que ce soit. L'Ukraine n'a jamais planifié et ne planifie pas une telle action ... Les actions et les déclarations de la Russie sont scandaleuses, horribles et vont bien au-delà de la menace contre l'Ukraine. En fait, dans son discours de cette semaine, le président russe Vladimir Poutine a ouvertement nié le droit à l'existence de l'Ukraine.»⁴⁷

39. Le 26 février 2022, le ministère des affaires étrangères de l'Ukraine réitérait avec force le rejet par l'Ukraine des accusations de violation de la convention sur le génocide comme étant sans fondement :

«L'Ukraine dément fermement les allégations de génocide de la Russie et rejette toute tentative d'utiliser ces allégations manipulatrices comme excuse pour une agression illégale. Le crime de génocide est défini dans la convention sur le génocide, et selon cette convention, les allégations de la Russie sont sans fondement et absurdes.

⁴⁴ Voir, par exemple, *France 24*, «US Accuses Moscow of Creating Ukraine Invasion Pretext with “Genocide” Claims» (16 February 2022), <https://www.france24.com/en/live-news/20220216-us-accuses-moscow-of-creating-ukraine-invasion-pretext-with-genocide-claims> (dossier des juges, onglet n° 68).

⁴⁵ TASS, «German Chancellor's Claims About Genocide in Donbass Unacceptable — Foreign Ministry» (19 February 2022), https://tass.com/world/1406425?utm_source=google.com&utm_medium=organic&utm_campaign=google.com&utm_referrer=google.com (dossier des juges, onglet n° 69).

⁴⁶ Michelle Nichols, «L'Ukraine demande l'aide de l'Onu, la Russie dénonce un «génocide»», Reuters (23 février 2022), <https://www.reuters.com/article/ukraine-crise-onu-idFRKBN2KS211> (dossier des juges, onglet n° 24).

⁴⁷ Statement by H.E. Mr. Dmytro Kuleba, Minister of Foreign Affairs of Ukraine (23 February 2022), <https://www.kmu.gov.ua/en/news/vistup-ministra-zakordonnih-sprav-ukrayini-dmitra-kuleba-na-debatah-generalnovi-asambleyi-on-situaciyi-na-timchasovo-okupovanih-teritoriyah-ukrayini-23022022> (dossier des juges, onglet n° 25).

Les allégations de génocide de la Russie pour justifier sa conduite illégale sont une insulte à la convention sur le génocide, et au travail de la communauté internationale pour prévenir et punir le crime le plus grave au monde.»⁴⁸

40. Madame la présidente, Mesdames et Messieurs les juges, ces faits parlent d'eux-mêmes. Ils attestent de l'existence, au moins *prima facie*, d'un différend entre les Parties qui se résume ainsi : la Russie accuse l'Ukraine de s'être livrée à des actes et à une politique de génocide au sens de l'article II de la convention ; l'Ukraine lui rétorque que ces allégations sont absurdes, et même odieuses car elles sont l'évident habillage juridique d'une agression armée. Ce différend entre dans les prévisions de l'article IX de la convention. Votre compétence *prima facie* pour en connaître est donc établie.

II. Le différend portant sur l'absence de base juridique dans la convention sur le génocide autorisant la Russie à conduire une guerre en vue de prévenir et réprimer le génocide allégué

41. Mais ceci n'épuise pas le sujet car, je l'ai dit, le différend comprend un deuxième volet, plus grave encore, qui porte sur les actions qu'un Etat peut ou doit prendre à l'égard d'un autre Etat partie à la convention qu'il accuse de génocide.

42. Selon la Russie, la dénonciation du prétendu génocide qu'elle impute au «régime de Kyiv» (ils disent «Kiev»), à la prétendue «junte», nazie, dirigée par le président Zelenskyy, l'autoriserait à en prévenir la continuation et à en punir les prétendus coupables par le moyen d'une guerre contre cet Etat, visant à protéger les victimes du prétendu génocide et à rechercher les prétendus coupables, et à les juger.

43. Il est vrai, Madame la présidente, Mesdames et Messieurs les juges, que la convention prévoit à son article premier que les Etats ont l'obligation de prévenir et de punir le génocide, c'est-à-dire, selon les mots de la Cour, «de mettre en œuvre tous les moyens qui sont raisonnablement à leur disposition en vue d'empêcher, dans la mesure du possible, le génocide»⁴⁹. Il est vrai, aussi, comme la Cour en a jugé, qu'à lire l'article premier de la convention, «l'obligation qu'a ... chaque

⁴⁸ Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide as a Pretext of its Unlawful Military Aggression (26 February 2022), <https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi> (dossier des juges, onglet n° 26).

⁴⁹ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro)*, arrêt, C.I.J. Recueil 2007 (I), p. 221, par. 430.

Etat de prévenir et de réprimer le crime de génocide n'est pas limitée territorialement par la convention»⁵⁰. Ce sont les mots de la Cour que je cite là.

44. Pour autant, rien dans la convention n'autorise un Etat à pénétrer par la force sur le territoire d'un autre pour empêcher, prévenir ou punir le génocide. Du reste, vous aviez jugé en 1986 dans l'affaire *Nicaragua c. Etats-Unis* que : «quand les droits de l'homme sont protégés par des conventions internationales, cette protection se traduit par des dispositions prévues dans le texte des conventions elles-mêmes et qui sont destinées à vérifier ou à assurer le respect de ces droits». Vous aviez ajouté que, si chaque Etat peut porter sa propre appréciation sur la situation des droits de l'homme dans un pays tiers : «l'emploi de la force ne saurait être la méthode appropriée pour vérifier et assurer le respect de ces droits»⁵¹.

45. Or, c'est très exactement le contraire que prétend la Russie, à travers, en particulier, mais pas seulement, son président.

46. Dans son discours du 21 février 2022, faisant référence aux événements d'Odessa de 2014, date des premières allégations de génocide, le président russe affirme :

«On frémit au souvenir de la terrible tragédie d'Odessa, où des manifestants pacifiques ont été brutalement assassinés, brûlés vifs dans la maison des syndicats. Les criminels qui ont commis cette atrocité n'ont jamais été punis, et personne ne les recherche. Mais nous connaissons leurs noms et nous ferons tout pour les punir, les retrouver et les traduire en justice.»⁵²

47. Le même dirigeant a également fait valoir, dans son discours du 24 février 2022 annonçant la prétendue «opération militaire spéciale», que :

«Son objectif est de protéger les personnes qui souffrent des abus et du génocide de la part du régime de Kiev depuis huit ans. Et à cette fin, nous nous efforcerons de démilitariser et de dénazifier l'Ukraine, et de poursuivre en justice ceux qui ont commis des crimes nombreux et sanglants contre des civils, y compris des citoyens de la Fédération de Russie.»⁵³

⁵⁰ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Yougoslavie), exceptions préliminaires, arrêt, C.I.J. Recueil 1996 (II), p. 616, par. 31.*

⁵¹ *Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. Etats-Unis d'Amérique), fond, arrêt, C.I.J. Recueil 1986, p. 134, par. 267-268.*

⁵² Address by the President of the Russian Federation (21 February 2022), <http://en.kremlin.ru/events/president/transcripts/statements/67828> (dossier des juges, onglet n° 19).

⁵³ Adresse du président de la Fédération de Russie Vladimir Poutine (24 février 2022), https://france.mid.ru/fr/presse/adresse_president_vladimir_poutine/ (dossier des juges, onglet n° 20).

48. Autrement dit, selon la Russie, et il n'y a aucune autre rationalité possible aux justifications avancées par son président au moment même où il ordonnait le lancement de l'invasion de l'Ukraine, la convention sur la prévention et la punition du génocide lui donne le droit, peut-être même le devoir, ou la responsabilité, de prévenir, en «dénazifiant», et de punir, en pourchassant et en traduisant en justice, le prétendu génocide perpétré en Ukraine, au moyen d'une «opération militaire spéciale».

49. Madame la présidente, Mesdames et Messieurs les juges, l'Ukraine est en profond désaccord avec l'interprétation, l'application ou l'exécution de la convention par la Russie. Quant à la Russie, elle «ne pouvait pas ne pas avoir connaissance, de ce que ses vues se heurtaient à l'«opposition manifeste» de l'Ukraine⁵⁴.

50. Ce que la Russie pouvait faire, en application de l'article VIII, était de saisir les organes des Nations Unies. Ce que la Russie pouvait faire, en application de l'article IX, était de saisir votre Cour d'une requête contre l'Ukraine. L'Ukraine affirme que la Russie n'avait en revanche strictement aucun droit, en vertu de la convention, d'engager l'action militaire débutée le 24 février 2022. Car, contrairement à la Russie, l'Ukraine considère, comme votre Cour dans l'affaire du génocide en Bosnie-Herzégovine, que, sur la base de la convention : «il est clair que chaque Etat ne peut déployer son action que dans les limites de ce que lui permet la légalité internationale»⁵⁵.

51. L'Ukraine résiste. Les Ukrainiennes et les Ukrainiens souffrent. Les Ukrainiennes et les Ukrainiens meurent. Ils ne sauraient dire leur différend avec la Russie avec plus de force.

52. Madame la présidente, Mesdames et Messieurs les juges, le différend sur l'interprétation, l'application, ou l'exécution de la convention de 1948 sur le génocide qui oppose l'Ukraine à la Russie n'est pas fait que d'échanges de mots. Il est forgé, aussi, dans le fer, le feu, le sang, les cris et les larmes. Votre compétence *prima facie* pour en connaître ne fait l'ombre d'aucun doute. L'Ukraine vous demande de l'exercer pour indiquer les mesures conservatoires qu'elle vous demande

⁵⁴ *Obligations relatives à des négociations concernant la cessation de la course aux armes nucléaires et le désarmement nucléaire (Iles Marshall c. Royaume-Uni), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (II), p. 850, par. 41, citant Violations alléguées de droits souverains et d'espaces maritimes dans la mer des Caraïbes (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I), p. 26, par. 50 ; Application de la convention internationale sur l'élimination de toutes les formes de discrimination raciale (Géorgie c. Fédération de Russie), exceptions préliminaires, arrêt, C.I.J. Recueil 2011 (I), p. 99, par. 61, p. 109-110, par. 87, p. 117, par. 104.*

⁵⁵ *Application de la convention pour la prévention et la répression du crime de génocide (Bosnie-Herzégovine c. Serbie-et-Monténégro), arrêt, C.I.J. Recueil 2007 (I), p. 221, par. 430.*

d'ordonner. Elle vous demande de donner corps à la conviction, partagée par nombre de ceux qui apparaissent à cette barre, que le droit international n'est pas qu'une vaine promesse.

53. Ceci conclut mon propos. Je vous remercie de votre patiente attention, comme toujours, et, Madame la présidente, je vous prie de bien vouloir appeler à la barre M^e David Zions.

The PRESIDENT: I thank Professor Thouvenin and I now give the floor to Mr. David Zions. You have the floor, Sir.

Mr. ZIONS:

FACTUAL CONTEXT OF THE DISPUTE AND RUSSIA'S FALSE CLAIM

I. Introduction

1. Madam President, Members of the Court, I am honoured to appear before you on behalf of Ukraine.

2. Ukraine comes to this Court because of a grotesque lie, and to seek protection from the devastating consequences of that lie. The lie is the Russian Federation's claim of genocide in Ukraine. The consequences are unprovoked aggression, cities under siege, civilians under fire, humanitarian catastrophe and refugees fleeing for their lives.

3. You have just heard why Russia's claim of genocide, opposed by Ukraine, creates a dispute under the Genocide Convention over which the Court has jurisdiction, certainly on a prima facie basis. I will now step back to explain the factual context of Russia's allegation, so that the Court can understand its falsity and the lack of any hint of plausibility. Russia would have the world believe that Ukraine launched a genocidal war on its own people in the Donbas. Even a basic understanding of the facts shows this to be false.

4. In addressing the facts, two points should be stressed.

5. First, the full history of Russia's mistreatment of Ukraine is not before the Court. This case is about false claims of genocide and the war Russia launched to purportedly prevent and punish alleged acts of genocide. I will focus on only the background that will be most helpful to the Court in appreciating the falsity of Russia's allegations.

6. Second, in political forums, Russia presents a narrative based on forgeries, fakes and distortions. In this legal forum, I will not present one country's narrative against another's. I will present the facts as documented by United Nations human rights bodies and officials, and similarly credible neutral observers.

II. Origins of the conflict in eastern Ukraine

7. Madam President, in February 2014, the Ukrainian people rose up in a "Revolution of Dignity". Russia responded with aggression, invading and occupying the Autonomous Republic of Crimea and the city of Sevastopol. Then, as now, Russia's aggression was based on lies. Russia first denied that it had used its military, then President Putin admitted it⁵⁶. Then he claimed, without basis, that "the Russian speaking population was threatened"⁵⁷. The international community rejected Russia's actions and the United Nations General Assembly passed resolution 68/262, overwhelmingly reaffirming the territorial integrity of Ukraine, including Crimea⁵⁸.

8. With Crimea occupied, Russia tried to apply the same tactics to the Donbas region of eastern Ukraine, spanning the Donetsk and Luhansk oblasts. But Russia did not find support. So instead, it looked to illegal armed groups to advance its agenda. These groups called themselves the "Donetsk People's Republic" (DPR) and the "Luhansk People's Republic" (LPR).

9. This is how the United Nations Human Rights Monitoring Mission in Ukraine described DPR and LPR in May of 2014, the earliest days of the conflict:

"[The Mission] is concerned with the undermining of human rights protection and guarantees of fundamental freedoms for the population of the town where buildings are occupied by armed persons, as well as the broader population of eastern Ukraine. Specifically, the [United Nations mission] is concerned about the rise in the number of reported cases of intimidation, harassment and killings, as well as the wave of abductions and unlawful detentions of journalists, activists, local politicians, representatives of international organizations and members of the military."⁵⁹

10. One month later, the United Nations human rights mission reported as follows:

⁵⁶ BBC, "Putin Reveals Secrets of Russia's Crimea Takeover Plot", 9 March 2015, available at <https://www.bbc.com/news/world-europe-31796226>.

⁵⁷ Direct line with Vladimir Putin, President of Russia, 17 April 2014.

⁵⁸ United Nations, General Assembly, resolution 68/262, doc. A/RES/68/262, Territorial Integrity of Ukraine, 27 March 2014.

⁵⁹ Office of the United Nations High Commissioner for Human Rights (OHCHR), Report on the Human Rights Situation in Ukraine, 15 May 2014, para. 94 (judges' folder, tab 27).

“Violence and lawlessness have spread in the regions of Donetsk and Luhansk. Having gained access to deposits of weapons, . . . the armed groups increasingly started spreading violence. . . . Increasingly, attacks target ordinary people, who take no part in the fighting.”⁶⁰

11. And here is the United Nations human rights mission one month after that, in July 2014: Grave human rights abuses have been committed by those armed groups. And it must be remembered that these groups have taken control of Ukrainian territory and inflicted on the populations a reign of intimidation and terror to maintain their position⁶¹.

III. Ukraine’s response and the indiscriminate violence it faced

12. Ukraine was therefore faced with illegal armed groups controlling territory, murdering civilians and waging a campaign of terror. Any responsible government in this situation would work to restore law, order and respect for human rights, and that is what Ukraine did. The early history of Ukraine’s operation is documented, again by the United Nations monitoring mission. It reports on Ukraine’s efforts to limit the operation, calling an early stop to it in observance of Easter⁶². But Ukraine was compelled to resume the operation “[f]ollowing the discovery of the bodies (with alleged signs of torture) of Volodymyr Rybak, Horlivka city councillor, and Yuriy Popravko, a student and Maidan activist from Kyiv, in a river near Slovyansk on 19 April”⁶³. This refers to a well-known incident, discussed at the United Nations Security Council, in which Mr. Rybak was kidnapped, tortured and assassinated by the DPR for the crime of raising the Ukrainian flag⁶⁴. Ukraine resolved to secure its territory and protect its people.

13. On their own, and without meaningful popular support, it is difficult to imagine the DPR and LPR maintaining any territory for long. But these illegal armed groups found eager sponsors in Russia. In December 2014, the United Nations human rights monitoring mission reported that “[t]he total breakdown in law and order and the violence and fighting in the eastern regions” was “fuelled by the cross-border inflow of heavy and sophisticated weaponry as well as foreign fighters, including

⁶⁰ OHCHR, Report on the Human Rights Situation in Ukraine, 15 June 2014, para. 154 (judges’ folder, tab 28).

⁶¹ OHCHR, Report on the Human Rights Situation in Ukraine, 15 July 2014, para. 26 (judges’ folder, tab 29).

⁶² Human Rights Council, Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Ukraine, UN doc. A/HRC/27/75, 19 September 2014, para. 95.

⁶³ *Ibid.*

⁶⁴ United Nations, Security Council, Records of 7165th meeting, doc. S/PV.7165, 29 April 2014, p. 8.

from the Russian Federation”⁶⁵. The ICC Office of the Prosecutor has likewise tied the “increased intensity of fighting” to “influxes of troops, vehicles and weaponry from the Russian Federation”⁶⁶. Over time, Russia’s influence and control and overt role in the conflict grew, and in 2018 Ukrainian legislation declared the Donbas occupied territory.

14. Fuelled by Russia, the carnage in eastern Ukraine grew. I will highlight only one example: the shelling of a residential district in Mariupol on 24 January 2015. Thirty civilians died in the attack. According to the United Nations Secretary-General, the attackers fired “indiscriminately into civilian areas”⁶⁷. The Under-Secretary-General for Political Affairs elaborated that they “knowingly targeted a civilian population”⁶⁸.

15. I should add that Mariupol is a Russian-speaking city. Russia’s claim to be the protectors of Russian-speaking people in Ukraine did not protect Mariupol from a barrage of Russian rockets in 2015. Just as it is not protecting Mariupol today from a Russian siege army that is bombarding the city and cutting off its power, water and heat.

IV. The lack of any plausible evidence of genocide in Ukraine

16. Madam President, Members of the Court, these are the circumstances in which Russia claims that Ukraine has been committing genocide against its own people. It would be an understatement to say that Russia has provided no evidence for acts of genocide in the course of this conflict. The closest President Putin has come to even explaining his allegation of genocide is to assert, as he did on 21 February of this year, that “not a single day goes by without Donbass communities coming under shelling attacks”⁶⁹.

⁶⁵ OHCHR, Report on the Human Rights Situation in Ukraine, 15 December 2014, para. 1 (judges’ folder, tab 30).

⁶⁶ International Criminal Court, Preliminary Examination: Ukraine, para. 92, available at https://www.icc-cpi.int/itemsDocuments/2017-PE-rep/2017-otp-rep-PE-Ukraine_ENG.pdf.

⁶⁷ United Nations Secretary-General, Statement attributable to the Spokesman for the Secretary-General on Ukraine, 24 January 2015 (judges’ folder, tab 31).

⁶⁸ United Nations, Security Council, Official Record, 7368th meeting, doc. S/PV.7368, 26 January 2015, p. 2 (judges’ folder, tab 32).

⁶⁹ Address by the President of the Russian Federation, 21 Feb. 2022, available at <http://en.kremlin.ru/events/president/transcripts/statements/67828> (judges’ folder, tab 19).

17. This is another flagrant lie, for which Russia has offered no support. Shortly, Ms Cheek will apply the definition of genocide under Article II of the Convention and show that no such acts have been committed. For now, I will make three factual points.

18. First, Ukrainian civilians on both sides of the contact line have suffered from a conflict which Russia has funded and fuelled, and increasingly waged itself. Tragically, Ukraine's adversaries have had no regard to the lives of civilians on "their" side of the line. This is not Ukraine's position alone. It is a fact documented by the United Nations human rights monitoring mission: "The armed groups are locating their military assets in and conducting attacks from densely populated areas thereby putting the whole civilian population at risk"⁷⁰. The civilians on both sides of the line are Ukrainian and Ukraine regards every civilian death in this conflict as a tragedy. But to claim that Ukraine targets civilians is to distort facts. As I noted a moment ago, in the course of this conflict top United Nations officials condemned the DPR for knowingly targeting a residential area. You will not find anything that comes close to that about Ukraine.

19. Second, if there were attacks on civilians rising to the level of genocide, allegedly warranting an armed invasion, one would think there must have been a massive recent escalation in civilian casualties, at the least. Yet that is transparently not the case. United Nations human rights monitors have tracked the year-over-year civilian casualties in the conflict. The United Nations statistics on your screen show a dramatic *decrease*⁷¹. These figures, moreover, cover both sides and do not reflect any conclusion of civilians being targeted. To be clear, Ukraine regards as tragic each of the 15 deaths recorded as of the date of the most recent report in 2021. But Russia's claim that Ukraine is targeting civilians is a clear fabrication.

20. Indeed, as recently as 22 December 2021, the OSCE announced a renewed ceasefire agreement⁷². As further explained in a recent report by *The Guardian*:

"The OSCE logs regular firing between Moscow-armed separatists and Ukrainian soldiers. In recent months this low-level conflict has been relatively calm as Russia has

⁷⁰ OHCHR, Report on the human rights situation in Ukraine, 15 July 2014, para. 31 (judges' folder, tab 29).

⁷¹ OHCHR, Report on the human rights situation in Ukraine, 23 Sept. 2021, paras. 25-26 (judges' folder, tab 34).

⁷² Organization for Security and Co-operation in Europe (OSCE), press statement of Special Representative Kinnunen after the regular meeting of Trilateral Contact Group on 22 December 2021, available at <https://www.osce.org/chairmanship/509006>.

moved 150,000 troops to Ukraine's borders, and Ukrainian soldiers have been under instruction not to return fire."⁷³

21. Third, if one point should be clear from my presentation, it is that United Nations human rights monitors have been meticulously tracking the conflict in Donetsk and Luhansk from its inception to the present. In eight years of reporting, there is not a single hint of any act of genocide. The OSCE has logged every ceasefire violation and you will not find in its reports any evidence of genocide. Ukraine has recognized the jurisdiction of the International Criminal Court, whose jurisdiction includes the crime of genocide. The Office of the Prosecutor has been examining the situation for seven years and found evidence of crimes — but has never said a word about genocide⁷⁴. In short, Russia's claim is that a genocide has occurred under the noses of diligent United Nations fact-finders, OSCE monitors and ICC prosecutors. It defies credulity.

V. Russia's unprovoked military build-up and resort to claims of genocide as a pretext for aggression

22. I turn finally to the present. For months, the world watched Russia mass its forces along Ukraine's borders. Yet as recently as 31 January 2022, at a meeting of the United Nations Security Council, the Permanent Representative of Russia reacted angrily to suggestions that Russia planned to invade. He mockingly called on the United States to "show us at least some evidence apart from bogus narratives fabricated in their own heads that Russia intends to attack Ukraine"⁷⁵. That was a lie. Little more than three weeks later, Russia did attack Ukraine. The same Permanent Representative would justify his country's invasion based on claims of genocide⁷⁶. Another lie.

23. To the end, Russia appeared desperate to manufacture a *casus belli*. But plans to stage false flag attacks were exposed. Shelling was intensified along the contact line to provoke retaliation, but Ukraine would not oblige. On 17 February, a horrific act of violence did occur in Luhansk oblast,

⁷³ *The Guardian*, "Shelling by Russian-Backed Separatists Hits School in East Ukraine", 17 Feb. 2022, available at <https://www.theguardian.com/world/2022/feb/17/shelling-by-russian-backed-separatists-hits-school-in-east-ukraine> (judges' folder, tab 35).

⁷⁴ ICC, Report on preliminary examination activities 2020, pp. 68-72 (judges' folder, tab 36).

⁷⁵ United Nations, Security Council, Official Record, 8960th meeting, doc. S/PV.8960, 31 Jan. 2022, p. 12 (judges' folder, tab 37).

⁷⁶ Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine, 23 Feb. 2022, available at <https://russiaun.ru/en/news/230222un> (judges' folder, tab 38).

when a kindergarten was attacked. The OSCE called this “indiscriminate shelling”⁷⁷. Yet the kindergarten was in government-controlled territory. As Human Rights Watch reported from the ground, the attack appeared to have been committed “by Russia-backed armed groups”⁷⁸.

24. Russia thus found itself eager to invade Ukraine, but lacking any conceivable justification. So Russia settled on its lie. President Putin would dramatically trumpet his accusation of genocide. Russia would recognize the DPR and LPR as independent states on the basis of the genocide they allegedly faced. And Russia would invade Ukraine for the express purpose of protecting the people of Donbas from this fabricated genocide and to punish the supposed *génocidaires*. With the groundwork laid, and the claim of genocide invoked, Russia proceeded to unleash the military aggression that is now horrifying the world.

VI. Conclusion

25. Madam President, Members of the Court, as we speak, Russian-speakers in Ukraine are indeed under attack. Ukrainians are under attack regardless of what language they speak. They are under attack from Russia. Medecins sans Frontieres reported two days ago that “[t]he humanitarian situation in Mariupol is catastrophic”⁷⁹. The predominantly Russian-speaking city of Kharkiv is under barbaric attack, with cluster munitions being launched indiscriminately at residential areas⁸⁰.

26. According to a United Nations report, in the *first six days* of Russia’s war, there were nearly as many civilian casualties as in the *last five years* of the Donbas conflict — and that is just confirmed casualties, with the United Nations recognizing that the real number is much higher and climbing every day⁸¹.

27. Yet Russia has the gall to massacre Ukrainians and call it “protection”. Russia has the gall to attempt to overthrow a democratically elected government and call it punishment of Nazis. Russia

⁷⁷ OSCE, “OSCE Chairman-in-Office calls for restraint and protection of civilian population following shelling in the area of Stanytsia Luhanska”, 17 Feb. 2022, available at <https://www.osce.org/chairmanship/512494>.

⁷⁸ Human Rights Watch, “Ukraine: Shelling Residential Areas Puts Civilians at Risk”, 18 Feb. 2022, available at <https://www.hrw.org/news/2022/02/19/ukraine-shelling-residential-areas-puts-civilians-risk>.

⁷⁹ Medecins Sans Frontieres, “‘We Are Calling for Respect for Human Life’ in Ukraine”, 5 Mar. 2022, available at <https://www.msf.org/human-dignity-and-life-must-be-respected-besieged-mariupol-ukraine?fbclid=IwAR1KxHLb6Pl7wVPCImJaTYCIRuM0xddWygB6KdVMqCN41IS--yE6zije13w> (judges’ folder, tab 33).

⁸⁰ Human Rights Watch, “Ukraine: Shelling Residential Areas Puts Civilians at Risk”, 18 Feb. 2022, available at <https://www.hrw.org/news/2022/02/19/ukraine-shelling-residential-areas-puts-civilians-risk>.

⁸¹ OHCHR, Civilian casualty report, 3 Mar. 2022, available at <https://ukraine.un.org/sites/default/files/2022-03/Civilian%20casualties%20as%20of%2024.00%202%20March%202022%20ENG.pdf> (judges’ folder, tab 39).

has the gall to accuse Ukraine of a fake “genocide” and to rain very real destruction and terror on the 44 million inhabitants of a sovereign State.

28. Madam President, the facts are undeniable. Russia’s allegations of genocide are false and outrageous. I respectfully ask that you call on Ms Marney Cheek, who will explain the plausibility of the rights Ukraine asserts under the Genocide Convention.

The PRESIDENT: I thank Mr. Zions and I now invite Ms Marney Cheek to take the floor. You have the floor, Ms Cheek.

Ms CHEEK:

I. THE RIGHTS UKRAINE SEEKS TO PRESERVE

I. Introduction

1. Madam President, distinguished Members of the Court, it is an honour to appear before you again on behalf of Ukraine.

2. I will discuss the rights that Ukraine seeks to preserve through its request for provisional measures. As stated in this Court’s Order on provisional measures in *The Gambia v. Myanmar*, and here I substitute Ukraine for The Gambia,

“[a]t this stage of the proceedings . . . the Court is not called upon to determine definitively whether the rights which [Ukraine] wishes to see protected exist; it need only decide whether the rights claimed by [Ukraine] on the merits, and for which it is seeking protection, are plausible”⁸².

In this case, the rights asserted by Ukraine are plausible, as they are, to again quote the Court in *Belgium v. Senegal*, “grounded in a possible interpretation of the Convention”⁸³. Indeed, the rights that Ukraine asserts are grounded in a *good faith* interpretation of the Convention, while Russia’s use

⁸² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)* (hereinafter “*The Gambia v. Myanmar*”), *Provisional Measures, Order of 23 January 2020*, I.C.J. Reports 2020, p. 18, para. 44 (judges’ folder, tab 40); see also *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, I.C.J. Reports 2009, p. 151, para. 57, p. 152, para. 60; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, *Provisional Measures, Order of 7 December 2016*, p. 19, para. 78; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand)* (*Cambodia v. Thailand*), *Provisional Measures, Order of 18 July 2011*, I.C.J. Reports 2011 (II), p. 545, para. 33

⁸³ See *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, *Provisional Measures, Order of 28 May 2009*, I.C.J. Reports 2009, p. 152, para. 60.

of the Genocide Convention to try to mask its unlawful invasion of Ukraine can only be described as proceeding in bad faith in violation of the Convention.

3. This morning, I will first describe the rights and obligations that exist under the Genocide Convention. Second, I will explain that there is no plausible evidence of genocide in the Donbas region of Ukraine. Third and finally, I will elaborate on Ukraine's right to demand good faith performance and to not be subjected to abuse or misuse of the Genocide Convention.

II. Rights and obligations under the Genocide Convention

4. So let me first describe generally the rights and obligations under the Genocide Convention. Article I of the Genocide Convention confirms that genocide is a crime under international law, which the Contracting Parties "undertake to prevent and to punish"⁸⁴. This Court has interpreted Article I, observing in the *Bosnia Genocide* case that while the Genocide Convention "does not *expressis verbis* require States to refrain from themselves committing genocide", that is precisely what the duty to prevent genocide "necessarily implies"⁸⁵. The Court went on to further explain the obligation to prevent genocide as follows:

*"a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent (dolus specialis), it is under a duty to make such use of these means as the circumstances permit."*⁸⁶

5. Thus, consistent with the object and purpose of the Genocide Convention to liberate mankind from the odious scourge of genocide, Article I includes both an obligation not to commit genocide, as well as a duty to act to prevent and punish genocide. With regard to the duty to act, where there is a serious risk of genocide, States should take preventative measures likely to have a deterrent effect⁸⁷. Further, under Article IV of the Convention, "[p]ersons committing genocide or

⁸⁴ Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention"), Art. I (judges' folder, tab 2).

⁸⁵ *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 (hereinafter "*Bosnia Genocide*"), p. 113, para. 166 (judges' folder, tab 41).

⁸⁶ *Ibid.* p. 222, para. 431 (emphasis added).

⁸⁷ *Ibid.*

any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals”.

6. Russia has acted inconsistently with these obligations and duties. It has fabricated a claim of genocide in the Donbas region of eastern Ukraine. It has then justified its military invasion of the entire country as the prevention of that fabricated genocide and as punishment of the alleged perpetrators of genocide through so-called “de-Nazification”. It has not taken preventive measures likely to have a deterrent effect. As this Court explained in its 1951 Advisory Opinion on *Reservations to the Convention on Genocide*:

“The Convention was manifestly adopted for a purely *humanitarian and civilizing purpose*. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. *In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d’être of the convention.* Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. *The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions.*”⁸⁸

7. The Russian Federation has flouted these ideals. It does not act with “high purposes”. It does not act with “common interest” with the other parties to the Convention. Instead, Russia has invoked the rights and duties recognized by the Convention in bad faith, it has abused and misused them, unilaterally invoking genocide as a legal shield for its unlawful aggression against Ukraine. As Ukraine’s cities are destroyed and its people killed in the name of preventing and punishing genocide, the Convention’s “humanitarian and civilizing purpose” is being turned inside out. The object and purpose of the Convention is being defeated.

III. There is no plausible evidence of genocide under the Convention in the Donbas region of Ukraine

8. Let me now explain, for the avoidance of doubt, that there is no plausible genocide in the Donbas region of Ukraine. The duty to prevent and punish genocide only arises when there is an actual genocide or a serious risk of it. Contrary to Russia’s claims, there is no genocide (or serious

⁸⁸ *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23, emphasis added (judges’ folder, tab 42).

risk of it) in the Donbas region. Genocide is defined in Article II of the treaty as “acts committed with intent to destroy . . . a national, ethnical, racial or religious group”, including (a) killings, (b) causing serious bodily injury or mental harm, and (c) deliberately inflicting conditions of life calculated to bring about physical destruction⁸⁹.

9. There is simply no plausible evidence that Ukraine perpetrated such acts, in the Donbas region of Ukraine or anywhere else. There is certainly no plausible evidence of the required *dolus specialis*, or “specific intent”, which this Court has explained sets a high bar for proving the extraordinarily serious allegation of genocide.

10. As Mr. Zions explained, there has been fighting in eastern Ukraine for the last eight years. This has tragically led to civilian deaths. But civilian deaths in an armed conflict are not per se genocide. First of all, the requisite *actus reus* must be satisfied. In *Croatian Genocide*, your Court explained: “[I]f one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention.”⁹⁰ That is the situation in Donetsk and Luhansk — at least as regards to the actions of Ukraine. There is no plausible evidence that the civilian casualties in the Donbas region were caused deliberately by Ukraine. There is thus no plausible evidence that Ukraine committed “killings” within the meaning of Article II. Nor is there any plausible evidence that Ukraine committed any of the various other Article II acts against civilians in the Donbas region.

11. Without satisfying the *actus reus* under Article II, there is no genocide under the Convention. But it is worth mentioning that there is also no evidence of the required *mens rea* of genocide — no evidence that Ukraine acted with the specific intent of destroying a particular national, ethnic, racial, or religious group.

12. Russia has seemed to suggest that its invasion is to liberate the Russian-speakers in the Donbas region. But there are many cities in Ukraine, including in the Donbas region, that are predominantly Russian-speaking, yet do not welcome Russia’s actions. To give just one example,

⁸⁹ Genocide Convention, Art. II (judges’ folder, tab 2).

⁹⁰ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 138, para. 474; emphasis added (judges’ folder, tab 43).

Mariupol, a major port city in south-eastern Ukraine — it is predominantly Russian-speaking. Yet there are no signs of Ukrainian human rights violations in Mariupol. Today, Mariupol is suffering a humanitarian crisis inflicted upon it by the *Russian* military, which will not allow safe passage for civilians, as the *Ukrainian* Government seeks to protect its citizens there.

13. Quite simply, Russia’s sweeping claim of a genocide “which almost 4 million people are facing”⁹¹, has no plausible basis in fact.

The PRESIDENT: Ms Cheek, may I kindly interrupt you before you begin the next section of your presentation, as it appears that this would be a good time for a coffee break of 10 minutes.

Ms. CHEEK: Yes, thank you.

The PRESIDENT: The sitting is adjourned.

The Court adjourned from 11.35 a.m. to 11.55 a.m.

The PRESIDENT: Please be seated. The sitting is resumed. And I shall now give the floor back to Ms Cheek to continue with her presentation. You have the floor.

Ms CHEEK:

IV. Ukraine’s right to demand good faith performance and to not be subjected to an abuse or misuse of the Genocide Convention

14. Madam President, Members of the Court, I will now elaborate on Ukraine’s right to demand good faith performance of the Genocide Convention and to not be subjected to an abuse or misuse of the Genocide Convention. Without a plausible predicate act of genocide or a serious risk of it, Russia had no duty to prevent or punish under the Genocide Convention. Indeed, in order to act consistently with the object and purpose of the Convention, Russia has a duty *not to act* in the name of preventing and punishing genocide since no genocide exists. Simply alleging genocide cannot give a State a right under the Convention to carry out a unilateral military operation against another

⁹¹ Address by the President of the Russian Federation of 21 February 2022, <http://en.kremlin.ru/events/president/transcripts/statements/67828> (judges’ folder, tab 19).

State in order to prevent and punish the alleged genocide. As held by your Court in *Military and Paramilitary Activities in and against Nicaragua*,

“where human rights are protected by international conventions, that protection takes the form of such arrangements for monitoring or ensuring respect for human rights as are provided for in the conventions themselves.

.....

In any event, while the United States might form its own appraisal of the situation as to respect for human rights in Nicaragua, the use of force could not be the appropriate method to monitor or ensure such respect.⁹²”

15. Ukraine has a right to demand good faith performance of the Genocide Convention, consistent with the Convention’s object and purpose. Article 26 of the Vienna Convention on the Law of Treaties sets forth the well-established principle of *pacta sunt servanda*: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁹³ The International Law Commission’s commentaries on the draft articles that became the Vienna Convention explain that, when drafting Article 26,

“[s]ome members felt that there would be advantage in also stating that a party must abstain from acts calculated to frustrate the object and purpose of the treaty. The Commission, however, considered that this was clearly implicit in the obligation to perform the treaty in good faith and preferred to state the *pacta sunt servanda* rule in as simple a form as possible.⁹⁴”

16. Ukraine stands before you today because Russia has violated the principle of *pacta sunt servanda* in the performance of its rights and obligations under the Genocide Convention. The Russian Federation has not implemented or fulfilled its obligations under the Genocide Convention in good faith. Rather, it has used a baseless accusation of genocide to justify a so-called “special military operation” in Ukraine, commenced on 24 February 2022.

17. This conduct by the Russian Federation turns the Genocide Convention on its head. Asserting a right to commit aggression under the guise of a duty to prevent and punish a non-existent genocide is not good faith performance of Articles I and IV of the Genocide Convention. Indeed, it

⁹² *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 134, paras. 267-268 (judges’ folder, tab 44).

⁹³ Vienna Convention on the Law of Treaties, Art. 26.

⁹⁴ Report of the International Law Commission on the Work of Its Eighteenth Session, Draft Articles on the Law of Treaties, with commentaries, 23rd. Sess., UN doc. A/CN.4/191 (4 May–19 July 1966), Art. 26 & commentary, p. 211, para. 4, reproduced in *Yearbook of the International Law Commission (YILC)*, 1996, Vol. II (judges’ folder, tab 45).

is an abuse of the rights granted, through the Convention, by each State party to all other State parties. Russia has taken a fundamental, peremptory norm of international law, codified in one of the most important human rights treaties that emerged from World War II, and turned it into a charade.

18. The conclusion that Russia's actions violate the treaty gains further support from the decision of your predecessor Court in the case of *Certain German Interests in Polish Upper Silesia*. There the Court recognized that the "misuse" of a right was an act "with the character of a breach of the Treaty"⁹⁵. Here, Russia is misusing its right — or, in this case, misusing its duty — to prevent and punish genocide. Russia's abuse of its obligations under the Genocide Convention has the character of a breach of the Convention.

19. In *The Gambia v. Myanmar*, your Court decided that The Gambia could invoke the responsibility of Myanmar under the Genocide Convention, concluding that all States have a common legal interest in the protection of rights under the Convention. Your Court specifically referred to "the right of any State party to seek compliance [with the Convention] by another State party"⁹⁶. The Contracting Parties also have a common legal interest in ensuring that actions taken to implement Articles I and IV of the Convention are taken in good faith, without abuse or misuse, consistent with the Genocide Convention's object and purpose. Otherwise, the Genocide Convention would lose the humanitarian character that this Court has said is at the core of the treaty. Instead, the Genocide Convention could become a cynical tool enabling violations of sovereignty and human rights. Every Contracting Party has a right and interest in not seeing the Genocide Convention devalued in this manner.

20. But today, Ukraine stands before you as not just another Contracting Party to the Convention, but as a Party suffering direct harm as a result of Russia's abuse of its rights and duties under the Convention. Ukraine has a right not to suffer grave harm at the hands of a Contracting Party that disregards the object and purpose of the Convention by falsely cloaking a military invasion as an operation to prevent and punish genocide.

⁹⁵ *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A*, p. 30 (judges' folder, tab 46).

⁹⁶ *The Gambia v. Myanmar*, p. 20, para. 52 (judges' folder, tab 40).

21. As the Court recalled in *Gabčíkovo-Nagymaros*, the principle of *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention,

“combines two elements, which are of equal importance. It provides that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith.’ This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. *The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.*”⁹⁷

22. Applying the principle of good faith performance to this case, a Contracting Party to the Genocide Convention must abstain from acts that frustrate the object and purpose of the treaty. Certainly, unilateral military action against Ukraine, in reliance on a fake allegation of genocide, is inconsistent with the treaty’s object and purpose.

23. This is apparent if one looks to the preamble of the treaty. Instead of “international co-operation”, there is unilateral action. Instead of working “to liberate mankind”⁹⁸ from genocide, there are Russian attacks on civilian apartment buildings, schools, and power plants. Instead of reflecting on genocide as having “inflicted great losses on humanity”⁹⁹, Russia wields the word genocide as a sword to inflict great losses on the people of Kharkiv, Chernihiv, Mariupol, Kherson, Gostomel, Volnovakha, and many others.

24. Quite simply, Russia has not performed its solemn right and duty to prevent and punish genocide in good faith. To the contrary, it has abused its treaty rights to inflict great loss on the people of Ukraine. It is a violation of the Convention for the Russian Federation to act to prevent a genocide that does not exist. It is also a violation of the Convention for the Russian Federation to carry out a military action against Ukraine to punish it for a non-existent genocide.

25. Ukraine has a right under the Convention not to suffer from Russia’s misuse and abuse of the treaty. Specifically, Ukraine has a right under the Convention not to suffer aggression, war crimes and crimes against humanity undertaken by the Russian Federation in order to prevent and punish a non-existent genocide. Certainly, in light of the Convention’s object and purpose and the Russian Federation’s obligation to perform the treaty in good faith, Ukraine’s rights are at least plausible and

⁹⁷ *Gabčíkovo-Nagymaros Project, Hungary /Slovakia, I.C.J. Reports 1997*, pp. 78-79, para. 142, emphasis added (judges’ folder, tab 47).

⁹⁸ Genocide Convention, preamble (judges’ folder, tab 2).

⁹⁹ *Ibid.*

grounded in “a possible interpretation” of the Convention, which is all that the Court must find at this stage for provisional measures to be appropriate.

26. If Russia had performed its obligations under the Convention in good faith and done its due diligence to assess whether a genocide or serious risk of genocide actually existed *in concreto*, Russia would have found no basis to act. As this Court observed in *Bosnia Genocide*, “the notion of ‘due diligence’ . . . is of critical importance”¹⁰⁰.

27. This due diligence was not undertaken. Instead, on 24 February 2022, a mere 11 days ago, President Putin announced a so-called “special military operation” and stated that “[t]he purpose of this operation is to protect people who, for eight years now, have been facing humiliation and genocide perpetrated by the Kiev regime”¹⁰¹. On that same day, the Permanent Representative of the Russian Federation to the United Nations stated in an emergency session of the United Nations Security Council that “[t]he goal of this special operation is protection of people who have been victimized and exposed to genocide by the Kiev regime”¹⁰². The next day, Russia’s Ambassador to the European Union justified the invasion by saying “we can turn to the official term . . . genocide as coined in international law”¹⁰³. And, of course, as we know, it is the Genocide Convention that defines genocide under international law.

28. As Professor Thouvenin noted, the Russian Investigative Committee has for years claimed “that the 1948 Convention on the Prevention and Punishment of the Crime of Genocide . . . has been systematically violated in eastern Ukraine”¹⁰⁴. In November 2021, as yet another example, the Russian Ambassador to the Contact Group for Eastern Ukraine, Boris Gryzlov, described certain actions taken by the President of Russia as “a forced response to the actions of Kyiv, which are aimed at escalating the conflict and actually fall under the United Nations Convention on the Prevention of

¹⁰⁰ *Bosnia Genocide*, p. 221, para. 430 (judges’ folder, tab 41).

¹⁰¹ Address by the President of the Russian Federation of 24 February 2022, available at <http://en.kremlin.ru/events/president/transcripts/statements/67843> (judges’ folder, tab 20).

¹⁰² Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine, 23 Feb. 2022, available at <https://russiaun.ru/en/news/230222un> (judges’ folder, tab 38).

¹⁰³ Georgi Gotev, EURACTIV, *Russian ambassador Chizhov: Nord Stream 2 is not dead, it’s a sleeping beauty*, 25 Feb. 2022, available at <https://www.euractiv.com/section/global-europe/interview/russian-ambassador-chizhov-nord-stream-2-is-not-dead-its-a-sleeping-beauty/> (judges’ folder, tab 21).

¹⁰⁴ Investigative Committee of the Russian Federation, *The Investigative Committee Opened a Criminal Investigation Concerning the Genocide of Russian-Speaking Population in the South-East of Ukraine*, 29 Sept. 2014, available at <https://sledcom.ru/news/item/523738/> (judges’ folder, tab 5).

Genocide”¹⁰⁵. Russia has now acted on this fundamentally flawed legal basis, brandishing the language of human rights, and claiming a duty to prevent and punish genocide grounded in the Convention.

29. The world is watching a military invasion that Russia launched under the guise of a duty to protect the Ukrainians of the Donbas region from genocide. It was launched to purportedly punish the alleged perpetrators of Kyiv, who are, implausibly, accused of being “Nazis”. There is a sad and tragic irony here, as Russia’s abuse and misuse of the Genocide Convention, and Russia’s failure to perform its obligations under the Convention in good faith, has led to a very real human rights tragedy, as my colleague Mr. Gimblett will explain in greater detail.

30. Under the pretext of acting to prevent and punish genocide in eastern Ukraine, the Russian Federation has sent tens of thousands of troops across Ukraine’s northern border with Belarus. Bombs have rained down on the city of Chernihiv in the north. Russian troops are approaching Odesa from the Black Sea in the south. Bombs are raining down on the capital of Kyiv, in central Ukraine. Russia’s military onslaught is in no way limited to eastern Ukraine and belies its justification for its actions.

31. Your Court explained in *Bosnia Genocide*:

“It would be paradoxical if States were thus under an obligation to prevent, so far as within their power, commission of genocide by persons over whom they have a certain influence, but were not forbidden to commit such acts through their own organs . . . In short, the obligation to prevent genocide necessarily implies the prohibition of the commission of genocide.”¹⁰⁶

32. The case before you presents a further paradox. It is paradoxical for a State to invoke a breach of the Genocide Convention as a justification for military invasion, to punish Ukraine, its democratically elected leaders and its people, despite the fact that there is no plausible evidence of genocide at all. I believe Mr. Zions said that Russia lies. Professor Thouvenin pointed to Russia’s complete disregard for international law. Both of those statements are true. And when Russia acts to prevent and punish genocide without basis, it offends the humanitarian principles enshrined in the Genocide Convention.

¹⁰⁵ Ria Novosti, *Gryzlov Called Putin’s Decree on Donbass a Response to Kyiv’s Actions*, 18 Nov. 2021 (judges’ folder, tab 12).

¹⁰⁶ *Bosnia Genocide*, p. 113, para. 166 (judges’ folder, tab 41).

33. The text of Article I of the Genocide Convention speaks of the duty to protect and punish. Other provisions of the Genocide Convention give further content to the scope of that duty. Article IV, as previously mentioned, focuses on the punishment of those who commit genocide. Article V points to legislation to provide effective penalties for those found guilty of genocide. Article VI speaks to the prosecution of those accused of committing genocide, and Article VII speaks of extradition. Article VIII states that a Contracting Party “may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations . . . for the prevention and suppression of acts of genocide”¹⁰⁷. But Russia is not focused on any of these things. Instead, it has chosen to wage a war.

34. As the Court recognized in the *Bosnia Genocide* case with regard to the duty to prevent genocide under the Convention, “it is clear that every State may only act within the limits permitted by international law”¹⁰⁸. In this regard, Article VIII of the Convention provides useful context regarding the limits on the duty to prevent and punish under Article I. Article VIII expressly refers to the Charter of the United Nations and “appropriate” actions for the prevention and suppression of acts of genocide. Article VIII thereby anchors the duty to prevent and punish genocide in the principles of international law reflected in the Charter of the United Nations. Madam President, Members of the Court, Russia’s military action against Ukraine, based on a manifestly *false* claim of genocide, is inconsistent with the Genocide Convention and exceeds the limits permitted by international law.

35. After you hear about the urgency of the situation and irreparable harm from my colleague Mr. Jonathan Gimblett, Professor Harold Hongju Koh will address the provisional measures requested by Ukraine, including their link to these rights Ukraine seeks to preserve until the merits of the case can be decided.

36. Madam President, I would now ask you to call upon Mr. Jonathan Gimblett. Thank you.

The PRESIDENT: Thank you for your statement, Ms Cheek. I now give the floor to Mr. Jonathan Gimblett. You have the floor, Sir.

¹⁰⁷ Genocide Convention, Art. VIII (judges’ folder, tab 2).

¹⁰⁸ *Bosnia Genocide*, p. 221, para. 430 (judges’ folder, tab 41).

Mr. GIMBLETT:

IRREPARABLE HARM AND URGENCY

1. Madam President, distinguished Members of the Court, it is an honour to appear before you today on behalf of Ukraine.

2. I will explain why the conditions of irreparable harm and urgency are amply satisfied in the circumstances of this case and require the indication of provisional measures with the minimum delay possible.

I. Legal standard

3. The Court has repeatedly interpreted its power to indicate provisional measures as arising “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”¹⁰⁹. The Court has also frequently stated that it will exercise that power “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”¹¹⁰.

4. In assessing whether this condition is satisfied, the Court looks at a variety of factors, depending on the facts of the case. For example, in cases involving ongoing conflict, the Court typically considers whether the population at risk is particularly vulnerable¹¹¹. Other relevant factors are the fragility of the overall situation, including the likelihood of aggravation of the dispute¹¹² and the risk of recurrence of harm¹¹³.

¹⁰⁹ See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, para. 69 (judges’ folder, tab 48).

¹¹⁰ *Ibid.*, para. 70.

¹¹¹ See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, pp. 26-27, para. 72 (judges’ folder, tab 40); *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 396, para. 143.

¹¹² See e.g. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 549, para. 49 (judges’ folder, tab 63).

¹¹³ See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, para. 84 (judges’ folder, tab 48) (quoting *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 552, para. 61; *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 396, para. 143).

5. All of these factors point unambiguously to the existence of an urgent situation in Ukraine requiring provisional measures. As Ms Cheek has explained, Ukraine has a right not to suffer detriment as a result of the bad faith implementation of the Genocide Convention by another Contracting Party. Since 24 February 2022, the Russian Federation has been engaged in widespread military operations on Ukrainian territory based on its false allegation of an ongoing genocide in Donbas which it says requires that it intervenes to protect the population of that region. As I will explain next, those military operations have triggered a military, humanitarian and environmental crisis of a like not seen in Europe since 1945. I will conclude by showing that all of the factors indicating urgency that I outlined earlier are engaged in this crisis.

II. The crisis unleashed by Russia's military intervention in Ukraine

6. Anyone who has watched the television news outside Russia in the past 11 days knows that President Putin's so-called special military operation for the purpose of preventing genocide is far from the surgical, limited action implied by that euphemism. In reality, Russia has been engaged in a full-scale invasion of Ukraine, attacking simultaneously from the north, the east and the south with the objective of capturing the major population centres. It is equally obvious that this invasion has caused, is causing, and will continue to cause huge human suffering, including through the widespread commission of war crimes, the displacement of literally millions of civilians, and the privations imposed on many millions more who are trapped in cities facing savage and indiscriminate bombardment by the Russian armed forces. After describing those human impacts, I will speak briefly about the catastrophic environmental consequences of Russia's actions.

A. War Crimes

7. It has been obvious since the earliest days of Russia's invasion that war crimes are being committed. As early as 28 February, four days into the operation, the ICC Prosecutor announced that he was seeking authorization to open an investigation into Russia's conduct¹¹⁴, while noting that a referral from an ICC State party would allow his team to get to work immediately. Referrals from a

¹¹⁴ International Criminal Court, "Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation", 2 Mar. 2022, available at <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> (judges' folder, tab 49).

record 39 States parties were promptly received, allowing the investigation to be formally opened two days later, on 2 March¹¹⁵.

8. As the Prosecutor General of Ukraine explained in a communication to the Office of the Prosecutor of the International Criminal Court on 28 February¹¹⁶, which you will find at tab 50 in your folder, these crimes include:

- Wilful killing of civilians: like the civilian shot in the head by a Russian soldier when he started filming a column of military vehicles on his mobile phone¹¹⁷.
- Intentionally directing attacks against civilian objects: such as the civilian bus that was fired upon by Russian forces near the village of Volokhyi Yar in Kharkiv region on 26 February, killing the driver and two passengers and injuring 18 more¹¹⁸.
- Attacking or bombarding towns, villages, dwellings or buildings that are undefended non-military objectives: for example, the attack on Kharkiv Regional Clinical Children's Hospital No. 1 on 25 February, which was left without electricity after being hit 20 times by Russian shells, forcing staff to ventilate numerous vulnerable patients manually¹¹⁹.
- And intentionally directing attacks against buildings dedicated to religion, education, as well as against places where the sick and the wounded are collected: such as the shelling of an ambulance transporting a wounded Ukrainian serviceman in Kherson region on 26 February¹²⁰.

9. All of these acts documented by the Prosecutor General are expressly prohibited by the Rome Statute. They all occurred in the opening days of Russia's so-called special military operation, before Russian forces had closed in on densely populated civilian areas. Similar war crimes from this

¹¹⁵ International Criminal Court, "Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation", 2 Mar. 2022, available at <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> (judges' folder, tab 49).

¹¹⁶ Prosecutor General's Office of Ukraine, "Communication to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute", 28 Feb. 2022 (judges' folder, tab 50).

¹¹⁷ *Ibid.*, para. 10.

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

initial period of the conflict have also been reported by NGOs active in the field, including New Direction, whose report you will find at tab 51 of your folder¹²¹.

10. I am afraid, though, that much, much worse has happened since these incidents and is yet to come. Having failed to secure their military objectives in the first week of their invasion, Russia today is resorting to tactics reminiscent of medieval siege warfare — encircling cities, cutting off escape routes and pounding the civilian population with heavy ordnance. Today, that is the fate of Mariupol¹²² as reflected in this photograph. According to the town council there: “The situation is dire. Mariupol continues to live without electricity, water, and heating due to constant shelling by the Russian occupiers.”¹²³ Twice in the last two days, Russia has agreed to open a humanitarian corridor out of Mariupol only to resume shelling so that civilians could not use it.

11. Today, Mariupol. Tomorrow or the day after, it may be the turn of Kharkiv and Kyiv. These next two photographs, for example, show the damage already inflicted by Russian artillery on residential apartments in Kharkiv¹²⁴ and in Borodyanka¹²⁵, a town on the approach road to the Ukrainian capital.

12. The inevitability of further war crimes if this carnage continues is guaranteed by the indiscriminate nature of the weapons Russia is already using, and others it has deployed to the battlefield but whose use has not yet been confirmed. Grad multi-launch rocket systems have been implicated in numerous attacks on civilian targets across Ukraine¹²⁶. The use of cluster bombs by

¹²¹ New Direction, “Briefing: Crimes in Ukraine Committed by The Russian Federation” (2022), available at https://newdirection.online/ukraine-monitoring/article/crimes_in_ukraine_committed_by_the_russian_federation (judges’ folder, tab 51).

¹²² News WWC, “How Russia is Moving Across Ukraine as Kharkiv is ‘Pounded’ and Kyiv’s Schools Demolished”, 3 Mar. 2022, available at <https://www.newswwc.com/world/united-kingdom/how-russia-is-moving-across-ukraine-as-kharkiv-is-pounded-and-kyivs-schools-demolished/>.

¹²³ Ukrinform, “Mariupol Cut Off From Electricity and Water Supply Over 200 Residents Injured”, 3 Mar. 2022, available at <https://www.ukrinform.net/rubric-ato/3419402-mariupol-cut-off-from-electricity-and-water-supply-over-200-residents-injured.html>.

¹²⁴ News WWC, “How Russia is Moving Across Ukraine as Kharkiv is ‘Pounded’ and Kyiv’s Schools Demolished”, 3 Mar. 2022, available at <https://www.newswwc.com/world/united-kingdom/how-russia-is-moving-across-ukraine-as-kharkiv-is-pounded-and-kyivs-schools-demolished/>.

¹²⁵ Reuters, “Ukraine to Seek Humanitarian Corridors in Talks With Russia”, 3 Mar. 2022, available at <https://www.reuters.com/markets/europe/top-wrap-2-russian-troops-strategic-black-sea-port-city-kherson-mayor-says-2022-03-03/>.

¹²⁶ See e.g. Prosecutor General’s Office of Ukraine, “Communication to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute”, 28 Feb. 2022; New Direction, “Briefing: Crimes in Ukraine Committed by The Russian Federation” (2022), available at https://newdirection.online/ukraine-monitoring/article/crimes_in_ukraine_committed_by_the_russian_federation.

Russian forces has also been reliably documented¹²⁷. Perhaps equally concerning though as the use of these barbaric weapons is the fact that Russia is reported to have deployed its TOS-1 platform to Ukraine¹²⁸. The thermobaric rockets fired by this platform — also known as vacuum bombs — literally suck the oxygen out of the air to produce a longer blast wave than conventional bombs¹²⁹.

B. Humanitarian impacts

13. Inevitably, this level of violence unleashed by the Russian Federation has created a massive humanitarian crisis. As Michelle Bachelet, the United Nations High Commissioner for Human Rights, reported to the Human Rights Council on 3 March:

“Over two million people have been forced to flee their homes. One million, according to UNHCR estimates, are internally displaced. A further 1,040,000 refugees have sought safety in neighbouring countries in the past seven days — often after travelling for days by bicycle or on foot, in freezing conditions. UNHCR has estimated that up to four million people could leave the country in the coming weeks if the conflict continues.”¹³⁰

14. The scale and speed of this refugee crisis is unprecedented in recent European history. As the High Commissioner for Refugees, Filippo Grandi, said in a statement the same day, 3 March: “In just seven days, one million people have fled Ukraine, uprooted by this senseless war. I have worked in refugee emergencies for almost 40 years, and rarely have I seen an exodus as rapid as this one.”¹³¹ Indeed, so fast-moving is this crisis that by 5 March, just two days later, the UNHCR website was recording that more than 1.5 million Ukrainians had sought refuge in neighbouring countries¹³².

15. These raw statistics do not tell the full story of human misery involved in the refugee crisis, with families separated and homes abandoned, perhaps never to be seen again. The TV footage of

¹²⁷ See e.g. Prosecutor General’s Office of Ukraine, “Communication to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute”, 28 Feb. 2022; New Direction, “Briefing: Crimes in Ukraine Committed by The Russian Federation” (2022), available at https://newdirection.online/ukraine-monitoring/article/crimes_in_ukraine_committed_by_the_russian_federation.

¹²⁸ See Radio Free Europe, “U.K. Accuses Russia of Deploying Destructive ‘Vacuum Bombs’ in Ukraine”, 3 Mar. 2022, available at <https://www.rferl.org/a/russia-using-thermobaric-weapons/31734007.html>.

¹²⁹ Jack Detsch, “‘It is Horrendous’: Russia Prepares Vacuum Bombs to Blitz Ukraine”, Foreign Policy, 1 Mar. 2022, available at <https://foreignpolicy.com/2022/03/01/russia-thermobaric-weapons-ukraine/>.

¹³⁰ OHCHR, 49th Session of the Human Rights Council, “Urgent Debate on the Situation of Human Rights in Ukraine Stemming from the Russian Aggression, Statement by Michelle Bachelet, UN High Commissioner for Human Rights”, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28191&LangID=E>.

¹³¹ UNHCR, “News Comment: 1 Million Refugees Have Fled Ukraine in a Week”, 3 Mar. 2022, available at <https://www.unhcr.org/en-us/news/press/2022/3/62206a824/news-comment-1-million-refugees-fled-ukraine-week.html>.

¹³² OHCHR, Operation Data Portal, Ukraine Refugee Situation (updated 5 Mar. 2022), available at <https://data2.unhcr.org/en/situations/ukraine>.

fathers waving goodbye to their wives and children after putting them on packed trains to western Ukraine, while they stay behind to fight the Russian army is nothing less than heartrending¹³³.

16. But the impact on internally displaced people, though massive, is only part of the story. Less visible but potentially far more deadly is the humanitarian crisis now developing in the numerous Ukrainian towns and cities ringed by Russian forces. For this much larger number, the present is grim, exposed to the indiscriminate firepower of Russian artillery, with food running short and, in some cases, water and electricity turned off by their assailants. A glimpse of the misery suffered by this group is provided by this photograph of children sheltering under a now-destroyed traffic flyover from the shelling in Irpin, Kyiv region. We will all have seen the television footage last night of people scrambling to get out of Irpin, with civilians losing their lives to Russian shells in the process. Bad as things are today, however, they can only get worse with every day that the Russian military campaign continues.

C. Environmental impacts

17. As if all this human suffering was not enough, Russia's military action also poses grave environmental risks, not only to Ukraine but also for the wider region. This is especially relevant given the Court's statement in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* that the obligation on States to ensure that activities within their jurisdiction or control do not adversely affect the environment of other States applies in the context of armed conflict¹³⁴.

18. A full-scale military invasion like that we are witnessing today involves countless environmental harms, many irreversible, a full description of which would fill a library. In the interests of time, I will mention two only.

19. First, the world has witnessed with growing unease the Russian armed forces' recklessness with regards to the impact of its actions on Ukraine's civil nuclear industry. In the opening days of the invasion, Russian vehicles swept into the Chernobyl protected zone, tearing up radioactive soil

¹³³ Liam Coleman and *The Sun* (United Kingdom), "Father's Tearful Goodbye to his Family Before Staying to Defend Ukraine", 25 Feb. 2022, available at <https://www.news.com.au/world/europe/fathers-tearful-goodbye-to-his-family-before-staying-to-defend-ukraine/news-story/8e8150c8aaf5a964953f110f890f2db4>.

¹³⁴ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 242, para. 30.

and increasing the background level of radiation in the area twentyfold¹³⁵. Fortunately, the New Safe Confinement structure — which you can see in this image — completed in 2016 to seal off the remains of Chernobyl's damaged reactor number 4 appears not to have been damaged in Russia's military operation to date¹³⁶.

20. Concerns over Russia's disregard for nuclear safety reached new highs in the early hours of 4 March when Russian forces shelled the nuclear power station at Zaporizhzhia, the largest nuclear facility in Europe. You will find at tab 55 in your folder a statement of 4 March by International Atomic Energy Agency (IAEA) Director General, Rafael Mariano Grossi, reflecting the seriousness of the situation that morning. Again, the world was fortunate that the resulting damage affected only a training facility and none of the six reactors located nearby¹³⁷.

21. These were near misses, to be sure. In both cases, Russia's military aggression could have resulted in a new nuclear catastrophe affecting not only Ukraine or Russia but potentially a vast surrounding area. And with the IAEA now expressing concern about the Ukrainian nuclear authorities' inability to communicate with the staff operating these facilities, the danger is far from over.

22. Second, in an attempt to deprive Ukraine of fuel, Russia has attacked numerous fuel depots, releasing vast clouds of toxic smoke into the atmosphere. For example, this photograph shows the aftermath of a Russian missile attack on a petroleum storage depot in Vasylkiv, near Kyiv¹³⁸. There have been numerous other attacks of this kind since Russian operations began on 24 February¹³⁹. Yet, in another indication of how Russia turns truth on its head, Ukraine has information that Russia

¹³⁵ Victoria Gill, "Chernobyl: Why Radiation Levels Spiked at Nuclear Plant", BBC, 25 Feb. 2022, available at <https://www.bbc.co.uk/news/science-environment-60528828#:~:text=Invading%20Russian%20troops%20took%20control,there%20is%20%22extremely%20unlikely%22>.

¹³⁶ See Daily Sabah, "Chernobyl's Critical Infrastructure Undamaged, EBRD Says Amid Conflict", 25 Feb. 2022, available at <https://www.dailysabah.com/business/energy/chernobyls-critical-infrastructure-undamaged-ebrd-says-amid-conflict>.

¹³⁷ Margaret Besheer, "IAEA Chief: Ukraine's Zaporizhzhia Nuclear Plant Safe After Russian Strike", VOA, 4 Mar. 2022, available at <https://www.voanews.com/a/iaea-chief-ukraine-s-zaporizhzhia-nuclear-plant-safe-after-russian-strike-/6470760.html>.

¹³⁸ Al Jazeera, "Russia Hits Ukrainian Oil and Gas Facilities in Wave of Attacks", 27 Feb. 2022, available at https://www.aljazeera.com/wp-content/uploads/2022/02/h_57509949.jpg?resize=770%2C513.

¹³⁹ Al Jazeera, "Russia Hits Ukrainian Oil and Gas Facilities in Wave of Attacks", 27 Feb. 2022, available at <https://www.aljazeera.com/news/2022/2/27/russia-ukraine-oil-gas-fuel-airport-attacks>; Reuters, "Ukraine Says Russian Troops Blow Up Gas Pipeline in Kharkiv", 27 Feb. 2022, available at <https://www.reuters.com/world/europe/ukraine-says-russian-troops-blow-up-gas-pipeline-kharkiv-2022-02-27/>.

is handing out gas masks to local militants and the Russian military in Donetsk in preparation for a false flag operation involving the blowing up of industrial tanks with chemicals. You will find a diplomatic Note from the Ukrainian Permanent Representative to the Organisation for the Prohibition of Chemical Weapons (OPCW) describing this plan in more detail at tab 56 of your folder¹⁴⁰.

23. These incidents demonstrate the utter disregard of the Russian military for the environmental consequences of their actions. The longer their operations continue, the more likely it becomes that this disregard will translate into an environmental disaster of epic proportions, with severe and enduring results.

III. Each of the urgency factors is satisfied

24. In my remaining time, I will show how the appalling human and environmental consequences of Russia's invasion of Ukraine satisfy the conditions of irreparable harm and urgency to which the Court looks when considering the appropriateness of provisional measures.

A. Irreparable harm

25. First, there can be no doubt that much of the harm currently being inflicted on Ukraine based on false allegations of genocide will be irreparable.

26. The Court has frequently stated that loss of life constitutes an irreparable harm¹⁴¹. Thousands of people have already been killed in this conflict. Ukraine regrets the unnecessary loss of lives on both sides. While neither the Ukrainian military nor civilian population provoked this conflict, and while they will do everything in their power to repel the invasion now directed against them, it is equally true that many Russian soldiers had no idea what mission their deluded leadership was sending them into. The sad fact, however, is that with every day that passes, more lives will be lost and probably at an accelerating rate.

27. Alongside the loss of life, for millions of Ukrainian civilians, life will never be the same again. For the million who have fled to neighbouring countries, there can be no certainty that they

¹⁴⁰ Letter from Permanent Representative of Ukraine to the Organisation for the Prohibition of Chemical Weapons to the Technical Secretariat of the Organisation for the Prohibition of Chemical Weapons, 27 Feb. 2022 (judges' folder, tab 56).

¹⁴¹ See e.g. *Case concerning Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 396, para. 142; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, pp. 26-28, paras. 70-75.

will ever return to their homes or, if they do, that those homes will still be standing. Those who have been separated from family members left behind in Ukraine, cannot know if they will ever see those relatives safe and well again. For both the refugees and those unfortunate enough to be trapped in Ukrainian cities awaiting a Russian military onslaught, the future promises lasting psychological trauma.

28. Finally, much of the environmental damage inflicted on Ukraine by the Russian invasion will likely prove irreparable in the near to medium term. The Chernobyl disaster of 1986 teaches us that the effects of nuclear accidents endure for hundreds and even thousands of years. The CO² being released as a result of Russia's scorched-earth tactics will likewise linger in the atmosphere for the long term, compounding the effects on climate of the greenhouse gases already to be found there.

B. Extremely vulnerable population

29. In addition to threatened irreparable harm, each of the indicators of urgency to which I referred earlier in my remarks is amply satisfied here. In short, there is no doubt that, unless this Court acts now, irreparable prejudice will be caused to Ukrainian rights before the Court gives its final decision. Indeed, that irreparable prejudice is happening now and only grows with every day that passes.

30. First, it almost goes without saying that the population of Ukraine is extremely vulnerable to the violence being inflicted on it by the Russian Federation. Millions are trapped in cities that are being ruthlessly bombarded and lack food, electricity and water. According to Ms Bachelet, who I quoted earlier, a million more are internally displaced within Ukraine and the UNHCR's latest figures show that a million and a half more are now living as refugees in neighbouring countries. It is hard to conceive of circumstances in which a civilian population could be more vulnerable than this.

C. Fragile situation with risk of aggravation

31. Second, the overall situation is extremely fragile and the risk of aggravation of the crisis is acute. Ukraine stands on the verge of a slaughter of more innocent civilians. As we have seen in Mariupol in recent days — just as we did in Aleppo in a not so distant past — Russia has no compunction, once it has surrounded a city, in simply bombing it into oblivion. Kyiv, Kharkiv and

maybe Odesa are next on the list for similar treatment and have vastly greater populations, most of which are still sheltering within those cities.

32. Bad enough as that is, the fragility of the situation reaches beyond Ukraine, into Europe and across the world. Neighbouring countries may well be destabilized by the resulting humanitarian crisis as the conflict enters its next stage. A nuclear or other environmental accident triggered by Russian military action would have consequences across the region. And, hard as it is to believe, President Putin's brinksmanship in raising the alert state of Russia's nuclear forces¹⁴² has placed the entire world at jeopardy of strategic miscalculation by an increasingly out-of-touch Russian leadership.

D. Recurrence of harm

33. Finally, the harms already suffered by the Ukrainian people will recur on a daily basis until Russia's invasion stops. Unless the Court acts now, the human and environmental impacts I described earlier will intensify and continue until Russia has achieved its ultimate goal — whatever that may be.

IV. Conclusion

34. In conclusion, Madam President, distinguished Members of the Court, Ukraine submits that this is an urgent case and that the Court should act immediately to prevent foreseeable irreparable harm by indicating provisional measures. My colleague, Professor Harold Hongju Koh, will explain why the provisional measures we request are appropriate under these urgent circumstances, and I ask you, Madam President, to give him the floor next.

The PRESIDENT: Thank you for your statement, Mr. Gimmlett. I now give the floor to Professor Harold Hongju Koh. You have the floor, Professor.

¹⁴² See e.g. Patrick Smith, *Putin Puts Nuclear Deterrent Forces on 'High Alert' Amid Spiraling Tension Over Ukraine*, 27 Feb. 2022) available at NBC News, <https://www.nbcnews.com/news/world/putin-orders-nuclear-deterrent-forces-high-alert-tensions-build-ukrain-rcna17853>.

Mr. KOH:

II. THE PROVISIONAL MEASURES REQUESTED BY UKRAINE

I. Introduction

1. Madam President, distinguished Members of the Court, I am honoured to present Ukraine's prayer for provisional relief.

2. This Court is no stranger to tragedy. But it is rare when you confront a case that combines such callous brutality with such brazen illegality.

3. As you have heard, this case is fundamentally about Russia's lies. Russia lies about the facts, when it claims that Ukraine is committing genocide. Russia lies about the law, when it claims that its obligation to prevent genocide entitles it to launch a punitive "special military operation" against so-called "neo-Nazis" that we all recognize as an offensive war of aggression and atrocity against Ukraine's peaceful people.

4. Our presentations have provided an anatomy of those lies. As Professor Thouvenin explained, Ukraine contests both Russia's factual lie and its legal lie, thus creating the "dispute relating to the interpretation, application or fulfilment of the [Genocide] Convention" that vests this Court with *prima facie* jurisdiction.

5. You have heard from our Agent, Mr. Korynevych, and Mr. Zions about Russia's reign of terror throughout Ukraine while the whole world watches: the effort to disguise that illegality by the illegal recognition of the LPR and the DPR, and the absurd lie that it is Ukraine that is committing genocide against its own people.

6. In our other ongoing contentious action, we presented to you the precursors to these horrors. But the world's failure to set limits on Russia's past adventurism has only emboldened President Putin to move beyond the financing of terrorism in the Donbas and pervasive racial discrimination in Crimea, to commit even more flagrant, brutal violations of international law throughout Ukraine.

7. Ms Cheek's presentation identified Russia's bad faith abuse of the Genocide Convention and the plausible rights that will be the subject of the proceedings on the merits.

8. And Mr. Gimblett just explained why the situation on the ground is so urgent and the harm to Ukraine and its people, so devastating and so irreparable.

9. So all three prerequisites for the indication of provisional measure under Article 41 are satisfied: prima facie jurisdiction, plausible rights, and irreparable harm.

II. The power and role of the Court

10. Which brings us to the language of Article 41, which grants this Court power to indicate such provisional measures as are appropriate “if it considers that circumstances so require”.

11. To decide what measures are appropriate under these circumstances, you should treat this as a singular case which until now, most of us have contemplated only in the hypothetical: *a Permanent Member of the United Nations Security Council decides, with planned premeditation, to commit naked aggression and war crimes by launching a broad and brutal military campaign against an innocent neighbour and its civilian population, based on the false pretext that the target State is committing genocide*. When confronted by such open illegality, is this Court utterly powerless to stop it? And can that P-5 Member stubbornly continue that abuse, paralyse the United Nations system, and immunize its actions from international law?

12. The answer to these questions must be no. But in the face of Russia’s concerted and shameless aggression, what can and should this Court do? Obviously, you should act immediately to prevent irreparable prejudice to the rights of the Ukrainian people and of Ukraine. You should order the Parties to prevent the aggravation and extension of their dispute under the Genocide Convention. But the Court’s provisional measures have a broader purpose as well: to prevent nullification of the legal issues in the case by prohibiting the respondent State from creating a *fait accompli*, before you can decide on the merits of the claim.

13. This Court is uniquely positioned to issue the direct measures that would stop the carnage and preserve the legal position pending a hearing on the merits. In so doing, as Judge Lachs wrote in the *Lockerbie* case, “[i]n fact, the Court is the guardian of legality for the international community as a whole, both within and without the United Nations”¹⁴³.

14. As the Supreme Court of the United States announced more than 200 years ago in the landmark case *Marbury v. Madison*, “it is emphatically the province and duty of the judicial

¹⁴³ *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom), Provisional Measures, I.C.J. Reports 1992*, separate opinion of Judge Lachs, p. 26 (judges’ folder, tab 57).

department to say what the law is”¹⁴⁴. Faced with a powerful political actor defiant toward its authority, that Court clearly declared that the legal instrument at issue provided no legal authority for flouting bedrock constitutional norms. Similarly, as the principal judicial organ of the United Nations, your duty here is to make the prima facie determinations under the Genocide Convention that announce that the Court will not abide Russia’s flouting of that treaty’s bedrock norms.

15. Since the Genocide Convention entered into force, we have come a long way in building a network of international and transnational law. The Court may take judicial notice that within days of Russia’s invasion, related matters have already come before many other international organizations:

- the United Nations General Assembly, which has adopted a resolution calling for the immediate withdrawal of Russian forces from Ukraine¹⁴⁵;
- the International Criminal Court, which, as you have heard, has received referrals of the situation from 39 States¹⁴⁶;
- the United Nations Human Rights Council, which has established an international commission of inquiry for Ukraine¹⁴⁷;
- the European Court of Human Rights, which has issued an interim order requiring that Russia refrain from military attacks against civilians and civilian objects¹⁴⁸;

¹⁴⁴ *Marbury v. Madison*, 5 US (1 Cranch) 137, 177 (1803) (judges’ folder, tab 58).

¹⁴⁵ Julian Borger, “UN Votes to Condemn Russia’s Invasion of Ukraine and Calls for Withdrawal”, *The Guardian*, 2 March 2022, available at <https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote> (judges’ folder, tab 59).

¹⁴⁶ International Criminal Court, “Statement of ICC Prosecutor, Karim A.A. Khan QC, on the Situation in Ukraine: Receipt of Referrals from 39 States Parties and the Opening of an Investigation”, 2 Mar. 2022, available at <https://www.icc-cpi.int/Pages/item.aspx?name=2022-prosecutor-statement-referrals-ukraine> (judges’ folder, tab 49).

¹⁴⁷ UN News, “Human Rights Council to establish Commission of Inquiry on Ukraine”, 4 Mar. 2022, available at <https://news.un.org/en/story/2022/03/1113292#:~:text=In%20a%20resolution%20adopted%20on,which%20was%20presented%20by%20Ukraine> (judges’ folder, tab 59).

¹⁴⁸ Press release, “The European Court Grants Urgent Interim Measures in Application Concerning Russian Military Operations on Ukrainian territory”, 1 Mar. 2022, available at <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf> (judges’ folder, tab 59).

- regional organizations and nation-States, which are imposing a vast web of rigorous sanctions on Putin and his accomplices based on their illegal activities¹⁴⁹; and
- national prosecutors, who have already begun to launch investigations into whether Russia's leaders have committed the crime of aggression¹⁵⁰.

16. Within its own legal mandate, each of these bodies must do its own job. So if you speak clearly and decisively now, you will not act alone. Other parts of the international legal system will act in concert with you, focusing on other aspects of Russia's aggression. But amid this broad network of legal activity, your order is the essential spark that will inspire other competent international organs and agencies to take the further steps necessary to protect peace, security, accountability and human rights in this rapidly deepening crisis.

III. Appropriate measures

17. For that reason, we ask you clearly to declare *prima facie* that there is a “dispute” between Ukraine and the Russian Federation relating to the interpretation, application and fulfilment of the Genocide Convention: in particular, Article I, which addresses obligations of States to prevent and punish genocide, and Article IV, which addresses punishment of those who commit genocide. Ukraine further disputes that Russia has any lawful basis whatever to take its military action in and against Ukraine for the claimed purpose of preventing and punishing genocide. Whether or not Russia chooses to appear, declaring the existence of a *prima facie* dispute between these two countries is warranted in this case.

18. Ukraine further asks that you find no plausible evidence that Ukraine has committed the non-existent “genocide” for which it has been accused, in particular:

- First, that no acts of “genocide”, as defined by the Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.

¹⁴⁹ European Council, “EU Restrictive Measures in Response to the Crisis in Ukraine”, 4 Mar. 2022, available at <https://www.consilium.europa.eu/en/policies/sanctions/restrictive-measures-ukraine-crisis/> (judges' folder, tab 59); Michelle Toh et al., “The List of Global Sanctions on Russia for the War in Ukraine”, CNN Business, 28 Feb. 2022, available at <https://www.cnn.com/2022/02/25/business/list-global-sanctions-russia-ukraine-war-intl-hnk/index.html> (judges' folder, tab 59).

¹⁵⁰ See generally City Law Forum, “Russian Invasion of Ukraine – Legal Developments and Sources”, 2 Mar. 2022, available at <https://blogs.city.ac.uk/citylawforum/2022/03/02/russian-invasion-of-ukraine-legal-developments-and-sources/>.

- Second, that it is plausible that the “special military operation” declared and being currently carried out by the Russian Federation is based on a false and fabricated claim of genocide that has no basis in the Convention. Not only is there “no serious risk that genocide will be committed” by Ukraine¹⁵¹, there is no risk whatsoever.
- Third, that, lawfully, the Russian Federation cannot take any action under the Genocide Convention, military or otherwise, in or against Ukraine for punishing or preventing an implausible alleged genocide, based on its false claims of genocide in Luhansk and Donetsk. In so indicating, the Court should make clear that, under the Convention, the targeting of Ukrainian civilians and civilian infrastructure can never, under any circumstance, be a lawful exercise of a country’s obligation to prevent genocide. And even if Russia scrupulously complied with the law of armed conflict — which, of course, it is most assuredly *not* doing — acts of aggression against Ukraine’s defenders can never be a lawful exercise of a country’s obligation to prevent and punish genocide.
- Fourth, that the Russian Federation may not invoke a false claim of genocide committed by Ukraine as a legal basis to justify the actions of the Russian Federation in recognizing the independence of the so-called DPR and LPR.

19. Now, within this broader factual context, other international bodies — including the International Criminal Court and the European Court of Human Rights — are exploring the scope of accountability for particular actions by Russia, its leaders and its proxies. But given this Court’s special, unique status in international law, the whole world is looking to you for guidance and leadership. Once you have fulfilled your role, these other bodies can fulfil theirs.

IV. The specific provisional measures requested

20. A recognition that Russia has no colourable legal basis in the Genocide Convention for its brutal actions in Ukraine would provide ample legal grounds for the first two specific provisional measures we request. These measures are clearly linked to the rights asserted by Ukraine regarding Russia’s bad faith invocation of the Convention and Russia’s abuse of its rights under Articles I and IV of the Convention.

¹⁵¹ *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, p. 222, para. 431 (judges’ folder, tab 41).

A. First provisional measure

21. Under the first provisional measure requested, the Russian Federation shall 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 Luhansk and Donetsk. Far from being unprecedented, this Court has ordered similar provisional measures before against an ongoing military operation being committed by a Permanent Member of the United Nations Security Council. As you well recall, in *Nicaragua v. United States*, this Court declared that the United States of America “should immediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines” in the Port of Corinto¹⁵².

22. That Order added, as yours could as well, that

“[t]he right to sovereignty and to political independence possessed by [Ukraine], like any other State of the region or of the world, should be fully respected and should not in any way be jeopardized by any military and paramilitary activities which are prohibited by the principles of international law, in particular the principle that States should refrain in their international relations from the threat or use of force against the territorial integrity or the political independence of any State, and the principle concerning the duty not to intervene in matters within the domestic jurisdiction of a State, principles embodied in the United Nations Charter¹⁵³”.

23. In October 2008, this Court ordered both Russia and Georgia, as parties to the armed conflict in South Ossetia, to “do all in their power to ensure that public authorities and public institutions under their control or influence do not engage in acts of racial discrimination”¹⁵⁴. And the Court ordered similar relief when indicating provisional measures in *Congo v. Uganda*, declaring that “[b]oth Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter”¹⁵⁵.

B. Second provisional measure

24. Second, Ukraine requests that the Russian Federation shall immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any

¹⁵² *Military and Paramilitary Activities in and against Nicaragua, (Nicaragua v. United States), Provisional Measures, Order of 10 May 1984, I.C.J. Reports 1984, p. 187, para. 41 (judges’ folder, tab 60).*

¹⁵³ *Ibid.*

¹⁵⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, I.C.J. Reports 2008, p. 398, para. 149 (judges’ folder, tab 61).*

¹⁵⁵ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 129, para. 47 (judges’ folder, tab 62).*

organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operation which have as their stated purpose and objective preventing and punishing Ukraine for committing genocide. Recently, in *The Gambia v. Myanmar*, the Court's provisional measures Order similarly extended not just to members of the respondent's State's military, but also to the same group of other actors: "any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence"¹⁵⁶.

25. In issuing this provisional second measure, the Court should take into account that no purported "obligation to prevent" genocide or any other manufactured legal justification could justify either the deliberate targeting of Ukraine's democratically elected political leaders or Russia's failure to take all necessary precautions in attack, resulting in *de facto* targeting of those leaders. And there should also be no doubt that *no act in this war* is lawful or authorized by the Genocide Convention, so that the only way to preserve the status quo and protect Ukraine's rights is to order a complete suspension of Russia's military operations.

26. Again, this is not unprecedented. The Court has regularly given direction to parties regarding the movements of armed forces and personnel in ongoing military operations. In *Cambodia v. Thailand* (the *Preah Vihear* case), in 2011, the Court issued an Order on provisional measures nearly fifty years after the operative Judgment, directing that "[b]oth Parties shall immediately withdraw their military personnel currently present in the provisional demilitarized zone . . . and refrain from any military presence within that zone and from any armed activity directed at that zone"¹⁵⁷.

27. Similarly, in *Burkina Faso v. Mali*, the Court ordered both governments to "withdraw their armed forces to such positions, or behind such lines, as may . . . be determined by an agreement between those Governments, . . . that, failing such agreement, [by] the Chamber"¹⁵⁸. In *Costa Rica v.*

¹⁵⁶ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 30, para. 86 (judges' folder, tab 40).

¹⁵⁷ *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand) (Cambodia v. Thailand)*, Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II), p. 555, para. 69, emphasis added (judges' folder, tab 63).

¹⁵⁸ *Frontier Dispute (Burkina Faso/Republic of Mali)*, Provisional Measures, Order of 10 January 1986, I.C.J. Reports 1986, p. 12, para. 32 (judges' folder, tab 64).

Nicaragua, the Court likewise ordered “[e]ach Party shall refrain from sending to, or maintaining in the disputed territory . . . any personnel, whether civilian, police or security”¹⁵⁹.

28. Madam President, Members of the Court: there is a clear link between these first two provisional measures that Ukraine requests and the plausible rights Ukraine seeks to preserve while its Application is pending. As you have heard, the risk that Russia will irreparably harm Ukraine and its people in the name of preventing and punishing a non-existent genocide is very real. Unless Russia halts its military operation, Ukraine’s plausible claim that Russia is violating and abusing the Convention will only be heard when it is too late.

29. As Ms Cheek explained, the rights that Ukraine asserts are grounded in Russia’s bad faith performance of its obligations and its abuse of its duty to prevent and punish genocide under Articles I and IV of the Convention. The first two provisional measures share a direct link to Ukraine’s right under Article I to good faith performance of the Convention by any State party. Russia’s abuse of the Convention is the source of its claimed authority to use force in Ukraine. Thus, provisional measures by your Court directed against that lawless use of force would directly target the abuse of rights at issue here.

C. Third provisional measure

30. Third, Ukraine requests that this Court direct the Russian Federation to prevent any aggravation or extension of the dispute by refraining from any action and providing assurances that no action is taken that may aggravate this dispute or render it more difficult to resolve. This Court gave similar direction when indicating provisional measures in *Congo v. Uganda*, directing that “[b]oth Parties must, forthwith, prevent and refrain from any action, and *in particular any armed action*, which might prejudice the rights of the other Party . . . [and] aggravate or extend the dispute . . . or make it more difficult to resolve”¹⁶⁰.

31. The Court gave a nearly identical directive in its Order in *Cameroon v. Nigeria*, again declaring: “Both Parties should ensure that no action of any kind, and *particularly no action by their*

¹⁵⁹ *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011, p. 27, para. 86 (judges’ folder, tab 65).

¹⁶⁰ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 129, para. 47, emphasis added (judges’ folder, tab 62).

armed forces, is taken which might prejudice”¹⁶¹ the parties’ right in respect of a future judgment, or otherwise aggravate or extend the dispute before it.

32. Given the level of atrocities that are multiplying daily, and that you heard of from Mr. Gimblett, the Court should further order Russia not to aggravate the ongoing dispute by refraining from violations of human rights and humanitarian law in the course of military activities. In *The Gambia v. Myanmar*, you recall, this Court gave specific instruction that the entities under its judicial supervision shall not commit genocide, conspiracy to commit genocide, complicity in genocide or attempts to commit genocide¹⁶². In *Congo v. Uganda*, the Court likewise ordered that “[b]oth Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law”¹⁶³. Less than three months ago, in *Armenia v. Azerbaijan*, the Court ordered the parties to “protect from violence and bodily harm all persons captured in relation to [a] Conflict who remain in detention, and ensure their security and equality before the law”¹⁶⁴. The threat to the Ukrainian people is no less urgent.

D. Fourth provisional measure

33. Fourth and finally, Ukraine requests that “[t]he Russian Federation shall 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”. The gravity of and rapidly evolving nature of the situation in Ukraine, which has changed by the hour, call for a clear and ongoing reporting requirement to monitor Russia’s compliance, with the Order you may issue. Regular public reporting, as was ordered in *The Gambia v. Myanmar*, can allow you more directive

¹⁶¹ *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Provisional Measures, Order of 15 March 1996, I.C.J. Reports 1996 (I), p. 24, para. 49, emphasis added (judges’ folder, tab 66).

¹⁶² *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 30, para. 86 (judges’ folder, tab 40).

¹⁶³ *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Provisional Measures, Order of 1 July 2000, I.C.J. Reports 2000, p. 129, para. 47 (judges’ folder, tab 62).

¹⁶⁴ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)*, Provisional Measures, Order of 7 December 2021, p. 29, para. 98 (judges’ folder, tab 48).

rulings in the future, if monitoring demonstrates that Russia has refused to comply, until the Court can render final decision in this case¹⁶⁵.

34. Like the other measures we request, the fourth measure has the express goal of protecting the integrity of this proceeding before the Court and ensuring that the Court is properly equipped in due course to decide the merits of Ukraine's claim. Whether or not Russia chooses to appear and defend in these proceedings, it would be subject to the Court's *prima facie* jurisdiction under the Convention and should be required to account for its compliance with binding orders of the Court.

35. To be clear, the preliminary relief we request will not be the final relief requested. On the merits, Ukraine will seek final declarations of illegality, specific assurances, and guarantees of non-repetition that the Russian Federation will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide. In time, Ukraine will seek full reparations for all damages caused by the Russian Federation as a consequence of any action taken on the basis of Russia's false and fabricated claim of genocide. But those requests are for later. For now, we ask not that you give final relief; only that you indicate provisional measures in such a way that leaves that possibility open.

V. Conclusion

36. Madame President, Members of the Court: in less than two weeks, this case has become much bigger than just Ukraine versus Russia. It has become a test of who will prevail: Russia or the post-war international legal order. The tragedy we are all witnessing in the streets of Kyiv, Kharkiv, Mariupol, Kherson, Volnovakha and so many other Ukrainian cities is precisely what our modern international legal system was designed to prevent.

37. Just 77 years ago,

“WE THE PEOPLES OF THE UNITED NATIONS DETERMINED to save succeeding generations from the scourge of war . . . to reaffirm faith in fundamental human rights . . . and to establish conditions under which justice and respect for the obligations arising from . . . international law can be maintained”¹⁶⁶,

¹⁶⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 31, para. 86 (judges' folder, tab 40).

¹⁶⁶ Charter of the United Nations (1945), Preamble (judges' folder, tab 67).

created the United Nations and this Court. But what is the point of having these bodies if they do not act strongly at this moment of transparent aggression and injustice?

38. Madam President, Members of the Court: President Putin's short game is force. The world's long game is law. For the other institutions to do their job, inside and outside the United Nations system, first you must do yours. The Court's limited role at this juncture is to order the urgent measures of protection that we request that would enable the Convention — and the broader United Nations system of which it is a part — to work as intended.

39. But if this Court does not act decisively against this level of aggression and atrocity, based on outrageous abuse of one of the world's most important human rights treaties, rest assured this would not be the last such case. Putin's aggression and atrocity would not end with Ukraine. If this Court cannot decisively order Russia to stop its military actions, grounded in flagrant abuse of and disrespect for the Genocide Convention, why should any Permanent-5 United Nations Member see international law as a meaningful obstacle to whatever it might perceive as "necessary military action"? Then why would we not be forced to concede that the post-war international legal project has failed?

40. Madam President, Members of the Court: that *cannot* be the outcome here. Of course, there are limits to what the principal judicial organ of the United Nations may do. But by issuing decisive provisional measures, you can meaningfully preserve the status quo, follow precedent, while leaving room for complementary action by other international bodies. The provisional measures Ukraine requests are reasonable, achievable and grounded in the very measures you have granted in the past. You have undeniable legal authority to act. Anything less would fail to vindicate the rule of international law under these most dire of circumstances.

41. For all of these reasons, we ask you *immediately* to issue the provisional measures order that Ukraine so urgently requests.

42. Madam President, Members of the Court: the world awaits your actions.

43. I now ask you to give the podium to our Co-Agent, Ms Zolotaryova, who will present Ukraine's final submissions. Thank you.

The PRESIDENT: I thank Professor Koh and I now give the floor to the Co-Agent of Ukraine, Ms Oksana Zolotaryova. You have the floor, Madam.

Ms ZOLOTARYOVA:

CONCLUDING STATEMENT AND FINAL SUBMISSIONS

1. Madam President, distinguished Members of the Court, I am honoured to conclude Ukraine's oral pleadings and make Ukraine's final submissions regarding its urgent request for the indication of provisional measures.

2. Ukraine has now faced 11 days of Russia's brutal invasion of Ukraine. Many people said we could not withstand Russian aggression for so long. They underestimated the people of Ukraine. They underestimated our spirit, our unity, our devotion. Ukrainian heroes are bravely defending Ukraine — and we will keep defending Ukraine until the aggressor leaves.

3. Ukraine is being supported by the civilized world. We are grateful to each and every act and effort to support Ukraine. But we need more help. We need more help from our allies. We need more help from every institution in the world. That includes this Court.

4. Your power to act is clear. To defend actions that are indefensible, the Russian Federation fabricated allegations of genocide out of nothing. It used this horrible lie as a pretext for its unlawful assault on Ukraine. In doing so, Russia cynically abused the Genocide Convention. Russia twisted the crime of genocide to justify the crime of aggression. In the name of preventing and punishing the crime of genocide, Russia is committing war crimes and crimes against humanity.

5. Ukraine has come here before you, the World Court, to seek urgent protection for everyone who lives in Ukraine. As Professor Thouvenin explained, there is no doubt of a legal dispute under the Genocide Convention. As Mr. Zionts showed, the reports of United Nations missions and other neutral observers confirm that Russia's allegation of genocide is absurd. Marley Cheek demonstrated Ukraine's right not to be illegally invaded based on a bad faith abuse of the Genocide Convention by Russia. Mr. Gimblett highlighted the extreme urgency of the situation. And Professor Koh explained why the Court can, and must, order the measures Ukraine requests.

6. I could rest Ukraine's case here. But at this difficult moment, I am compelled to remind the Court of the real, human stakes of Ukraine's request.

7. As I am speaking, the Russian Federation continues its relentless assault on our cities, on our towns, on our villages, on our people. This assault has taken many forms. My hometown of Kharkiv suffers for days from indiscriminate shelling but heroically resists¹⁶⁷. Churches are ruined; hospitals are ruined; universities are ruined; civil infrastructure is ruined there. None of these can be considered as legitimate military targets.

8. The world is witnessing and documenting how Russia kills civilians in its indiscriminate attacks¹⁶⁸. We do not know yet the true number of Ukrainians that Russia has murdered in the past 11 days¹⁶⁹. We can only guess how many more will be murdered in the next 11 days, if this senseless aggression does not stop.

9. In these extraordinary circumstances, Ukraine requests that the Court order the following provisional measures:

- “a. The Russian Federation shall 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.
- b. The Russian Federation shall 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.
- c. The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.
- d. The Russian Federation shall 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.”

10. Madam President, Members of the Court, before I conclude Ukraine’s case on its request for provisional measures, I would like to refer to the words of the Secretary-General of the United Nations, António Guterres, immediately following the resolution of the General Assembly

¹⁶⁷ Human Rights Watch, “Ukraine: Cluster Munitions Launched Into Kharkiv Neighborhoods”, 4 Mar. 2022, available at <https://www.hrw.org/news/2022/03/04/ukraine-cluster-munitions-launched-kharkiv-neighborhoods>.

¹⁶⁸ OHCHR, United Nations Human Rights Monitoring Mission in Ukraine, Civilian Casualty Report, 3 Mar. 2022, available at <https://ukraine.un.org/sites/default/files/2022-03/Civilian%20casualties%20as%20of%2024.00%202%20March%202022%20ENG.pdf>; Ukraine: High Commissioner Cites “New and Dangerous” Threats to Human Rights, 3 Mar. 2022, available at <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=28191&LangID=E>.

¹⁶⁹ *Ibid.*

condemning Russia's actions: "People in Ukraine desperately need peace. And people around the world demand it."¹⁷⁰

11. On behalf of the Government of Ukraine, and on behalf of the people of Ukraine, I thank you for your attention in this matter of national life or death. I respectfully urge the Court to issue your Order with utmost urgency.

12. We are in your hands. Thank you.

The PRESIDENT: I thank the Co-Agent of Ukraine, whose statement brings to an end the hearing on the request for the indication of provisional measures submitted by Ukraine in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*.

I would like to thank the Agent, Co-Agent, counsel and advocates of Ukraine for their statements. In accordance with the usual practice, I shall request the Agent of Ukraine to remain at the Court's disposal to provide any additional information the Court may require. The Court will render its Order on the request for the indication of provisional measures as soon as possible. The Parties will be advised in due course as to the date on which the Court will deliver its Order in a public sitting.

Since the Court has no other business before it today, the sitting is declared closed.

The Court rose at 1.20 p.m.

¹⁷⁰ United Nations, press release, "General Assembly Resolution Seeking End to Ukraine Hostilities 'Is Loud and Clear', Secretary-General Says, Warning Situation Could Get Worse", 2 Mar. 2022, available at <https://www.un.org/press/en/2022/sgsm21163.doc.htm>.