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INTRODUCTORY NOTE TO ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKR. v. RUSS.) (JUDGMENT ON PRELIMINARY OBJECTIONS) (I.C.J.)

BY CATHERINE DRUMMOND*

[February 2, 2024]

Introduction

On February 2, 2024, the International Court of Justice (the Court) delivered its preliminary objections judgment in the case brought by Ukraine against Russia under the Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention).

Unlike any prior case brought under the Genocide Convention, Ukraine did not allege that Russia was *committing* genocide contrary to its obligations under the Genocide Convention. Rather, Ukraine argued that that Russia had *falsely asserted* that Ukraine was committing genocide and had unlawfully invaded Ukraine in 2022 on that basis. Specifically, Ukraine contended that Russia's "special military operation" and recognition of the Donetsk and Luhansk regions of Ukraine were inconsistent with Russia's obligations to prevent and punish genocide under Articles I and IV of the Genocide Convention.[1]

This was a transparent but understandable attempt by Ukraine to bring the legality of Russia's invasion before the Court through resort to one of the few treaties to which both Ukraine and Russia are parties that contain a compromissory clause conferring jurisdiction on the Court (in circumstances where the Court has no jurisdiction over disputes concerning the use of force or recognition of states). This practice of 'shoehorning' broader disputes into treaty-specific compromissory clauses[2] is not a new or necessarily unsuccessful phenomenon, but this particular attempt by Ukraine bore little meaningful fruit.

The Court upheld (by twelve votes to four) Russia's preliminary objection that uses of force and recognition of states, even when based on false allegation of genocide, fall outside the scope of the Genocide Convention such that the Court did not have jurisdiction to hear disputes in respect of them. The Court did accept, however (by thirteen votes to three), that it had jurisdiction to rule on what Russia termed Ukraine's "reverse compliance request"—that is, Ukraine's request for the Court to declare that it is *not* committing genocide against Russians or Russian-speakers in Ukraine.[3] The merits will now only consider this issue, but not any question of the legality of or responsibility for Russia's conduct. This was a significant blow to a core legal limb of Ukraine's multi-pronged defence against Russian aggression.

Judgment

The judgment deals with Russia's six preliminary objections. The first and overarching jurisdictional objection was that there was no "dispute" between the parties, which was rejected by the Court in short order.[4]

The Court then took the curious step of bifurcating the dispute into two parts, which it considered to be "fundamentally different in nature,"[5] and dealt with Russia's remaining five objections under the part of the dispute to which it related. The first part concerned Ukraine's "reverse compliance request"; the second concerned allegations that Russia breached the Genocide Convention through its use of force against Ukraine and its recognition of the so-called the Donetsk and Luhansk "Peoples' Republics."

In respect of the first part of the dispute concerning the legality of Ukraine's conduct (the "reverse compliance request"), Russia made four admissibility objections, all of which were rejected by the Court. They were that: (1) the Memorial introduced new claims in respect of Ukraine's "reverse compliance request"; (2) the case would have no practical effect for the Parties' rights and obligations under the Genocide Convention because Ukraine's claims were based on rules of international law outside the Genocide Convention; (3) a "reverse compliance request" was in and of itself inadmissible; and (4) the case constitutes an abuse of process (including on grounds

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that Ukraine arranged mass third-state intervention).[6] The Court therefore confirmed its ability to rule on the merits of whether Ukraine committed genocide.

In respect of the second part of the dispute concerning the legality of Russia's conduct, the Court addressed: (1) a parallel argument that the Memorial introduced new claims in respect of Russia's conduct, which was rejected;[7] and (2) Russia's contention that Ukraine's complaints of the unlawful use of force and recognition of the Donetsk and Luhansk "Peoples' Republics" were in fact based on the UN Charter and customary international law and therefore fell outside of the scope of the Genocide Convention and thus the jurisdiction *ratione materiae* of the Court. This objection was upheld. The Court found that, even assuming that Russia's invasion and recognition of the "republics" were fully established, such conduct is "not capable of constituting violations" of the duties to prevent and punish in Articles I and IV of the Genocide Convention.[8] Rather, such conduct would breach the relevant rules of international law applicable to the use of force and the recognition of states, over which the Court had no subject-matter jurisdiction.[9] The four judges in dissent on this issue offered cogent reasons to doubt the Court's approach,[10] all of which would have wound back the dial as to how much treaty interpretation the Court can legitimately engage in when considering preliminary objections, particularly where the construction arguments were central to Ukraine's case on the merits.

Implications

The judgment will be a serious disappointment for Ukraine and its legal efforts to resist Russian aggression. It will be even more keenly felt given that (1) the Provisional Measures Order had found Ukraine's case to be plausible and ordered Russia to suspend its military operation;[11] and (2) this judgment followed on the heels of another judgment issued by the Court in a separate case in which Ukraine lost on most of its claims concerning Russia's support for separatist groups in eastern Ukraine and its annexation of Crimea in 2014.[12]

Despite being the applicant in the case, Ukraine is now the only party having to defend itself against allegations of genocide. The only remedy available to Ukraine at the merits stage, if it is successful, will be a declaration that it did not commit genocide. There will be no declaration in respect of the legality of Russia's conduct or an order for reparations that Ukraine could leverage in order to obtain, for example, confiscation from third States of frozen Russian assets. It remains to be seen whether Ukraine will continue the case in these circumstances. Succeeding on the merits would, however, remove what Ukraine considers to be the principal justification for Russia's invasion and recognition of the "republics," and would prevent Russia from claiming that any discontinuance constitutes a concession that there is credible evidence that Ukraine has committed genocide. Moreover, Ukraine may decide to commence a fresh claim under the Genocide Convention, alleging the commission of genocide based on evidence that has surfaced since the initial Application was filed.[13]

The proceedings to date have been significant from the perspective of third-state involvement. This was the first case in which third states had intervened *en masse* under Article 63 of the Statute (which gives states parties to a treaty that is being interpreted by the Court a right to intervene to provide observations on its interpretation of that treaty).[14]

Thirty-two states appeared at the preliminary objections hearing, all supporting Ukraine's position.[15] Each was allocated only ten minutes to present (including where multiple states presented jointly), and the judgment did no more than to note what the interventions "in general" argued.[16] Despite this seemingly limited treatment, in her separate opinion, Judge Charlesworth noted that the intervening states' submissions "enriched the Court's consideration of the Parties' arguments."[17] This insight is to be welcomed in circumstances where the Court is increasingly faced with novel and complex questions on issues of fundamental importance in which many states have legitimate interests and in which there is an increasing appetite to engage with the Court. This much is evident from the involvement of an unprecedented number of states in cases before the Court at present, including by means of intervention and through participation in advisory opinion proceedings.[18] The most effective interventions will be those that strive to make a genuine legal contribution to assisting the Court to resolve difficult issues, while avoiding repetitive arguments. This will enable the Court to have the benefit of states' views without the process becoming politicised or procedurally unmanageable.

The Court is clearly still navigating the practicalities of how to allow effective participation while also being mindful of constraints on judicial time and resources. Following the preliminary objections hearing in this case, the Court

made changes to the Rules, clarifying the procedure for intervention at different stages of a case, and also granting the Court the discretion to refuse to allow states intervening under Article 63 a right to make submissions orally at a hearing.[19] These changes reinforce the importance of effective written interventions.

One potentially cautionary note is worth highlighting. In rejecting Russia's abuse of process argument that Ukraine orchestrated the mass intervention, the Court explained that Russia relied exclusively on the conduct and statements of the intervening states, not on conduct of Ukraine, which would be the relevant conduct for an abuse of process argument.[20] This left open whether encouraging or arranging third-state intervention is capable of constituting an abuse of process. Applicant states in future cases might see this as a warning regarding their engagement with other states interested in intervening contentious cases.

ENDNOTES

1 Ukraine's Application (Feb. 26, 2022), ¶¶ 30(c)–(d) framed this as conduct that "has no basis in the Genocide Convention". This was altered in the Memorial (July 1, 2022), ¶ 178(b)–(c) to assert that the conduct violated Articles I and IV of the Genocide Convention. The Court considered this a clarification of the same claims (¶ 128). President Donoghue regarded them to be materially changed and considered that such a change may have had an impact on the Court's jurisdiction *ratione materiae* (Separate Opinion of President Donoghue, in particular ¶¶ 24–25).

2 Former Judge of the Court, Sir Christopher Greenwood, famously referred to this practice as attempting "to force an ungainly foot into Cinderella's glass slipper." *See* Greenwood, *Challenges of International Litigation*, Lauterpacht Centre Lecture (Oct. 7, 2011), https://sms.cam.ac.uk/media/1180328.

3 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v Russ.), Judgment, 2024 I.C.J. (Feb. 2) [hereinafter Judgment], ¶ 81.

4 Judgment, ¶¶ 47–51.

5 *Id.* ¶¶ 53–56. Judge Charlesworth interrogates this distinction at ¶¶ 5–7 of her Separate Opinion.

6 *Id.* ¶¶ 60–118.

7 *Id.* ¶¶ 124–129.

8 *Id.* ¶ 147 and *see* ¶¶ 139–140.

9 *Id.* ¶ 146.

10 Separate Opinion of President Donoghue, Joint Dissenting Opinion of Judges Sebutinde and Robinson, and Separate Opinion of Judge Charlesworth.

11 Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v Russ.), Order of 16 March 2022, 2022 I.C.J. (Mar. 16). There is some debate about whether the Provisional Measures Order remains in force given it was not expressly lifted in the judgment, and if so whether the Court might rule on its breach at the merits stage: see Dai Tamada, Still Valid: Provisional Measures in Ukraine v. Russia (Allegations of Genocide), EJIL TALK! (Mar. 15, 2024), https://www.ejiltalk.org/still-valid-provisional-measures-in-ukraine-v-russia-allegations-of-genocide; Iryna Marchuk and Aloka Wanigasuriya, The Curious Fate of the False Claim of Genocide, VERFASSUNGSBLOG (Feb. 24, 2024), https://verfassungsblog.de/the-curious-fate-of-the-false-claim-of-genocide.

12 Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukr. v. Russ.), Judgment, 2024 I.C.J. (Jan. 31).

13 *See* Marc Weller, *Time for another Ukrainian Genocide Case?*, EJIL TALK! (Feb. 6, 2024), https://www.ejiltalk.org/time-for-another-ukrainian-genocide-case.

14 Statute of the Court, art. 63; Rules of Court, arts. 82–84, 86.

15 This did not mean, however, that there was not considerable diversity of views on specific issues, such as whether the use of force could be used to prevent genocide.

16 Judgment, ¶¶ 92, 134.

17 Separate Opinion of Judge Charlesworth, ¶ 2.

18 *See, e.g.*, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gamb. v. Myan.), I.C.J.; Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem, I.C.J.; Obligation of States in respect of Climate Change, I.C.J.

19 Press Release, Int'l Court of Justice, Amendments to Articles 81, 82 and 86 of the Rules of Court, Press Release No. 2024/18 (Feb. 28, 2024), https://www.icj-cij.org/sites/default/files/press-releases/0/000-20240228-wri-01-00-enc.pdf.

20 Judgment, ¶ 117.

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ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKR. v. RUSS.) (JUDGMENT ON PRELIMINARY OBJECTIONS) (I.C.J.)*
[February 2, 2024]

INTERNATIONAL COURT OF JUSTICE

YEAR 2024

2024
2 February
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No. 182

2 February 2024

ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE

(UKRAINE *v.* RUSSIAN FEDERATION: 32 STATES INTERVENING)

PRELIMINARY OBJECTIONS

General background — Application filed by Ukraine on 26 February 2022 — Article IX of Genocide Convention invoked as basis of jurisdiction — Russian Federation raised six preliminary objections to jurisdiction of Court and admissibility of Application.

*

First preliminary objection — Existence of dispute.

Statements of organs of Russian Federation that Ukraine committed genocide against Russian-speaking inhabitants of Donbas — Accusations rejected by Ukraine — Ukraine also disputed lawfulness of actions of Russian Federation undertaken on basis of such accusations — Dispute existed on date of Application — First preliminary objection rejected.

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Two aspects of dispute — First aspect: request of Ukraine for declaration that no genocide attributable to it committed in Donbas — Second aspect: compatibility of actions of Russian Federation with Genocide Convention.

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First aspect of dispute.

Second preliminary objection — Jurisdiction ratione materiae *under Genocide Convention — Objection does not concern first aspect of dispute and will be examined in relation to second aspect of dispute — No reason to call into question jurisdiction of Court to entertain first aspect of dispute.*

Third preliminary objection — Alleged new claims — Additional or amended claims inadmissible if transform subject of dispute in application — Amended submission in Memorial merely clarifies claim in Application — Subject of dispute not transformed — Third preliminary objection rejected.

Fourth preliminary objection — Alleged lack of practical effect of judgment — First aspect of dispute between the Parties involves disagreement on facts and on interpretation, application or fulfilment of their rights and obligations under Genocide Convention — Declaratory judgment on first aspect would have effect of clarifying whether Ukraine acted in accordance with its obligations under Genocide Convention — Fourth preliminary objection rejected.

Fifth preliminary objection — Alleged inadmissibility of request for declaration that Ukraine did not breach its obligations — Examination by the Court of five arguments made by Russian Federation: — (1) Practices of WTO on "reverse compliance request" provide no assistance on this question — (2) Request not precluded by Article IX Genocide Convention — (3) Jurisprudence of the Court does not provide response to this question — (4) Request not incompatible with judicial function of Court — (5) Request does not contradict principles of judicial propriety and equality of parties — In assessing admissibility of Ukraine's request, the Court takes account of following circumstances: — (1) Request made in context of armed conflict — (2) Russian Federation allegedly took measures in and against Ukraine to prevent and punish genocide in Donbas — Legal interest of Ukraine to make request in such special context — Request admissible in these particular circumstances — Fifth preliminary objection rejected.

Sixth preliminary objection — Alleged abuse of process — No exceptional circumstances to warrant rejection of claim for abuse of process — Sixth preliminary objection rejected.

*

Second aspect of dispute.

Third preliminary objection — Alleged new claims — Amended submissions in Memorial merely clarify claims in Application — Subject of dispute not transformed — Third preliminary objection rejected.

Second preliminary objection — Jurisdiction ratione materiae *under Genocide Convention — Requirement that alleged violations fall within provisions of treaty — Allegation by Ukraine that Russian Federation violated obligations under Articles I and IV Genocide Convention by false accusations of genocide and by invoking the Convention in bad faith to justify unlawful actions, in particular military actions, on that basis — Court's view that acts alleged by Ukraine could not constitute violation of Articles I and IV — Ukraine does not claim that Russian Federation refrained from taking measures to prevent or punish a genocide — In these circumstances, difficult to see how conduct complained of could constitute violation of obligations to prevent genocide and punish perpetrators of genocide — Alleged bad faith and abuse by Russian Federation could not in themselves constitute violations of obligations under Articles I and IV — Allegation that Russian Federation violated rules of international law in seeking to fulfil obligations under Articles I and IV — Genocide Convention does not incorporate rules of international law extrinsic to it such as rules on use of force — Violation of such other rules cannot constitute violation of Genocide Convention — Court without jurisdiction to entertain second aspect of dispute — Second preliminary objection upheld.*

No need to examine other preliminary objections in relation to second aspect of dispute.

*

Court has jurisdiction over first aspect of dispute on basis of Article IX of Genocide Convention — First aspect of dispute admissible.

JUDGMENT

Present: President DONOGHUE; *Vice-President* GEVORGIAN; *Judges* TOMKA, ABRAHAM, BENNOUNA, YUSUF, XUE, SEBUTINDE, BHANDARI, ROBINSON, SALAM, IWASAWA, NOLTE, CHARLESWORTH, BRANT; *Judge* ad hoc DAUDET; *Registrar* GAUTIER.

In the case concerning allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide,

between

Ukraine,

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Mr Attila Massimiliano Tanzi, Professor of International Law at the University of Bologna, 3 Verulam Buildings,

Mr Alessandro Sutera Sardo, Attaché Legal Affairs, Embassy of the Italian Republic in the Kingdom of the Netherlands,

Mr Luigi Ripamonti, Counsellor, Service for Legal Affairs, Diplomatic Disputes and International Agreements, Ministry of Foreign Affairs and International Cooperation of the Italian Republic,

Ms Ludovica Chiussi Curzi, Senior Assistant Professor of International Law, University of Bologna,

Mr Gian Maria Farnelli, Associate Professor of International Law, University of Bologna,

the Republic of Latvia,

represented by

Ms Kristīne Līce, Legislation and International Law Adviser to the President of the Republic of Latvia,

as Agent;

Mr Edgars Trumkalns, Chargé d'affaires a.i. of the Republic of Latvia in the Kingdom of the Netherlands,

as Co-Agent;

Mr Mārtiņš Paparinskis, Professor of Public International Law, University College London, member of the International Law Commission, member of the Permanent Court of Arbitration,

Mr Mamadou Hébié, Associate Professor of International Law, University of Leiden, member of the Bar of the State of New York,

Mr Vladyslav Lanovoy, Assistant Professor in Public International Law, Université Laval, Quebec City,

Mr Cameron Miles, member of the English Bar, 3 Verulam Buildings,

Mr Joseph Crampin, Lecturer of International Law, University of Glasgow,

Mr Luis Felipe Viveros, PhD candidate, University College London,

Ms Elīna Luīze Vītola, Deputy Agent of the Government, Office of the Representative of Latvia before International Human Rights Organizations, Ministry of Foreign Affairs of the Republic of Latvia,

Mr Arnis Lauva, Head of the International Law Division, Ministry of Foreign Affairs of the Republic of Latvia,

Ms Katrīna Kate Lazdine, Jurisconsult at the International Law Division, Ministry of Foreign Affairs of the Republic of Latvia,

the Principality of Liechtenstein,

represented by

HE Mr Pascal Schafhauser, Ambassador and Head of Mission of the Principality of Liechtenstein to the Kingdom of Belgium,

as Agent;

Mr Sina Alavi, Senior Adviser, the Republic of Lithuania,

represented by

Ms Gabija Grigaitė-Daugirdė, Vice-Minister of Justice of the Republic of Lithuania, Lecturer at Vilnius University,

as Agent;

Mr Ričard Dzikovič, Head of Legal Representation at the Ministry of Justice of the Republic of Lithuania, Lecturer at Mykolas Romeris University,

Ms Ingrida Bačiulienė, Head of the International Treaties Unit at the Ministry of Foreign Affairs of the Republic of Lithuania,

as Co-Agents;

Mr Pierre d'Argent, Professor at the University of Louvain (U.C. Louvain), member of the Institut de droit international, member of the Bar of Brussels,

Mr Gleider Hernández, Professor at the University of Leuven (K.U. Leuven),

Ms Inga Martinkutė, Advocate at MMSP, member of the Lithuanian Bar Association, Lecturer at Vilnius University,

Mr Christian J. Tams, Professor at the University of Glasgow and at Leuphana University, Lüneburg,

HE Mr Neilas Tankevičius, Ambassador of the Republic of Lithuania to the Kingdom of the Netherlands,

Mr Mindaugas Žičkus, Deputy Head of Mission, Embassy of the Republic of Lithuania in the Kingdom of the Netherlands,

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represented by

Mr Alain Germeaux, *Conseiller de légation adjoint*, Director of Legal Affairs, Ministry for Foreign and European Affairs of the Grand Duchy of Luxembourg,

as Agent;

HE Mr Jean-Marc Hoscheit, Ambassador of the Grand Duchy of Luxembourg to the Kingdom of the Netherlands,

as Co-Agent (until 4 October 2023);

HE Mr Mike Hentges, Ambassador of the Grand Duchy of Luxembourg to the Kingdom of the Netherlands,

as Co-Agent (from 4 October 2023);

Mr Thierry Ewert, Legal Adviser to the Ministry of Foreign and European Affairs, Luxembourg,

Ms Léa Siffert, Legal Adviser to the Embassy of Luxembourg in the Kingdom of the Netherlands,

as Deputy Agents,

the Republic of Malta,

represented by

Mr Christopher Soler, State Advocate, Republic of Malta,

as Agent;

HE Mr Mark A. Pace, Ambassador of the Republic of Malta to the Kingdom of the Netherlands,

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Ms Ariana Rowela Falzon, Lawyer, Office of the State Advocate,

Ms Margot Ann Schembri Bajada, Counsellor, Legal Unit, Ministry of Foreign and European Affairs and Trade of the Republic of Malta,

Ms Marilyn Grech, Legal Officer, Legal Unit, Ministry of Foreign and European Affairs and Trade of the Republic of Malta,

Mr Matthew Grima, Deputy Head of Mission, Counsellor, Embassy of the Republic of Malta in the Kingdom of the Netherlands,

Ms Mary Jane Spiteri, Research and Administrative Officer, Embassy of the Republic of Malta in the Kingdom of the Netherlands,

Mr Clemens Baier, Research and Administrative Officer, Embassy of the Republic of Malta in the Kingdom of the Netherlands,

the Kingdom of Norway,

represented by

Mr Kristian Jervell, Director General, Legal Department, Ministry of Foreign Affairs of the Kingdom of Norway,

as Agent;

Mr Martin Sørby, Deputy Director General, Legal Department, Ministry of Foreign Affairs of the Kingdom of Norway,

as Co-Agent;

HE Mr Bård Ivar Svendsen, Ambassador of the Kingdom of Norway to the Kingdom of the Netherlands and the Grand Duchy of Luxembourg,

Ms Kristin Hefre, Minister Counsellor for Legal Affairs, Royal Norwegian Embassy in the Kingdom of the Netherlands,

Ms Dagny Marie Ås Hovind, Adviser, Legal Department, Ministry of Foreign Affairs of the Kingdom of Norway,

Ms Frida Fostvedt, Adviser, Legal Department, Ministry of Foreign Affairs of the Kingdom of Norway,

Mr Zaid Waran, Intern, Legal Affairs, Royal Norwegian Embassy in the Kingdom of the Netherlands,

New Zealand,

represented by

Ms Victoria Hallum, Deputy Secretary, Ministry of Foreign Affairs and Trade of New Zealand,

as Agent;

Mr Andrew Williams, Chief International Legal Adviser (acting), Ministry of Foreign Affairs and Trade of New Zealand,

HE Ms Susannah Gordon, Ambassador of New Zealand to the Kingdom of the Netherlands,

as Co-Agents;

Ms Elana Geddis, Barrister, Kate Sheppard Chambers, Wellington, Mr Toby Fisher, Barrister, Matrix Chambers, London,

Ms Jane Collins, Senior Legal Adviser, Ministry of Foreign Affairs and Trade of New Zealand,

Ms Hannah Frost, Deputy Head of Mission, Embassy of New Zealand in the Kingdom of the Netherlands,

Mr Bastiaan Grashof, Policy Adviser, Embassy of New Zealand in the Kingdom of the Netherlands,

the Kingdom of the Netherlands,

represented by

Mr René J.M. Lefeber, Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

as Agent;

Ms Mireille Hector, Deputy Legal Adviser, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

as Co-Agent;

Ms Annemarieke Künzli, Legal Counsel, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Ms Marina Brilman, Legal Counsel, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

Ms Robin Geraerts, Legal Officer, Ministry of Foreign Affairs of the Kingdom of the Netherlands,

the Republic of Poland,

represented by

Mr Sławomir Majszyk, Acting Director of the Legal and Treaty Department of the Ministry of Foreign Affairs, Poland,

as Agent (until 25 January 2024);

Mr Artur Harazim, Director of the Legal and Treaty Department of the Ministry of Foreign Affairs, Poland,

as Agent (from 25 January 2024);

HE Ms Margareta Kassangana, Ambassador of the Republic of Poland to the Kingdom of the Netherlands,

as Co-Agent;

Mr Łukasz Kułaga, Counsellor of the Legal and Treaty Department, Ministry of Foreign Affairs of the Republic of Poland,

Ms Paulina Dudzik, First Secretary and Legal Adviser, Embassy of the Republic of Poland in the Kingdom of the Netherlands,

as Deputy Agents,

the Portuguese Republic,

represented by

Ms Patrícia Galvão Teles, Director of the Department of Legal Affairs, Ministry of Foreign Affairs of the Portuguese Republic, and member of the International Law Commission,

as Agent;

HE Ms Clara Nunes dos Santos, Ambassador of the Portuguese Republic to the Kingdom of the Netherlands,

as Co-Agent;

Mr Mateus Kowalski, Director of the International Law Directorate, Ministry of Foreign Affairs of the Portuguese Republic,

Mr Henrique Azevedo, Deputy Head of Mission, Embassy of the Portuguese Republic in the Kingdom of the Netherlands,

Ms Ana Margarida Pinto de Seabra, Legal Intern, Embassy of the Portuguese Republic in the Kingdom of the Netherlands,

Romania,

represented by

HE Mr Bogdan Aurescu, Adviser to the President of Romania, former Minister of Foreign Affairs of Romania, member of the International Law Commission,

as Agent (until 19 January 2024);

HE Ms Alina Orosan, Ambassador, Director General for Legal Affairs, Ministry of Foreign Affairs of Romania,

as Agent (from 19 January 2024, prior to that Co-Agent);

HE Mr Lucian Fătu, Ambassador of Romania to the Kingdom of the Netherlands,

as Co-Agent;

Mr Filip-Andrei Lariu, Attaché, Legal Directorate of the Ministry of Foreign Affairs of Romania,

Mr Eugen Mihuţ, Minister Plenipotentiary and Legal Counsellor, Embassy of Romania in the Kingdom of the Netherlands,

the United Kingdom of Great Britain and Northern Ireland,

represented by

Ms Sally Langrish, Legal Adviser and Director General Legal at the Foreign, Commonwealth and Development Office, United Kingdom of Great Britain and Northern Ireland,

as Agent;

Mr Paul McKell, Legal Director at the Foreign, Commonwealth and Development Office, United Kingdom of Great Britain and Northern Ireland,

as Co-Agent;

the Rt Hon. Ms Victoria Prentis, KC, MP, Attorney General,

Mr Ben Juratowitch, KC, member of the Bar of England and Wales, the Paris Bar and the Bar of Belize, Essex Court Chambers,

Ms Philippa Webb, Professor of Public International Law, King's College London, member of the Bar of England and Wales, and the Bars of the State of New York and Belize, Twenty Essex Chambers,

Ms Naomi Hart, member of the Bar of England and Wales, Essex Court Chambers,

Ms Susan Dickson, Legal Counsellor and Head of Europe and Human Rights Team, Legal Directorate, Foreign, Commonwealth and Development Office, United Kingdom of Great Britain and Northern Ireland,

Ms Ruth Tomlinson, Deputy Director and Head of International Law, Attorney General's Office,

Mr Michael Boulton, Assistant Legal Adviser, Europe and Human Rights Team, Legal Directorate, Foreign, Commonwealth and Development Office, United Kingdom of Great Britain and Northern Ireland,

the Slovak Republic,

represented by

Mr Metod Špaček, Chief of Staff at the Office of the President of the Slovak Republic,

as Agent;

Mr Peter Klanduch, Director of the International Law Department of the Ministry of Foreign and European Affairs of the Slovak Republic,

as Co-Agent;

HE Mr Juraj Macháč, Ambassador of the Slovak Republic to the Kingdom of the Netherlands,

Ms Zuzana Morháčová, Assistant Legal Adviser, Ministry of Foreign and European Affairs of the Slovak Republic,

Mr Jozef Kušlita, First Secretary, Embassy of the Slovak Republic in the Kingdom of the Netherlands,

Mr Peter Nagy, Second Secretary, Embassy of the Slovak Republic in the Kingdom of the Netherlands,

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represented by

Mr Marko Rakovec, Director-General for International Law and Protection of Interests, Ministry of Foreign and European Affairs of the Republic of Slovenia,

as Agent;

HE Mr Jožef Drofenik, Ambassador of the Republic of Slovenia to the Kingdom of the Netherlands,

as Co-Agent;

Mr Daniel Müller, Lawyer at FAR Avocats,

Mr Andrej Svetličič, International Law Department, Ministry of Foreign and European Affairs of the Republic of Slovenia,

Ms Silvana Kovač, Directorate for International Law and Protection of Interests, Ministry of Foreign and European Affairs of the Republic of Slovenia,

Ms Maša Devinar Grošelj, Embassy of the Republic of Slovenia in the Kingdom of the Netherlands,

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represented by

Ms Elinor Hammarskjöld, Director General for Legal Affairs, Ministry of Foreign Affairs of the Kingdom of Sweden,

as Agent;

Mr Daniel Gillgren, Deputy Director at the Department for International Law, Human Rights and Treaty Law, Ministry of Foreign Affairs of the Kingdom of Sweden,

as Co-Agent;

HE Mr Johannes Oljelund, Ambassador of the Kingdom of Sweden to the Kingdom of the Netherlands,

Ms Dominika Brott, First Secretary, Embassy of the Kingdom of Sweden in the Kingdom of the Netherlands,

the Czech Republic,

represented by

Mr Emil Ruffer, Director of the International Law Department, Ministry of Foreign Affairs of the Czech Republic,

as Agent;

HE Mr René Miko, Ambassador of the Czech Republic to the Kingdom of the Netherlands,

as Co-Agent;

Mr Pavel Caban, Head of Unit, International Law Department, Ministry of Foreign Affairs of the Czech Republic,

Ms Martina Filippiová, Legal Adviser, Embassy of the Czech Republic in the Kingdom of the Netherlands,

Mr Pavel Šturma, Professor of Public International Law, Charles University Prague, former member and chairman of the International Law Commission, associate member of the Institut de droit international,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. 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" (hereinafter the "Genocide Convention" or the "Convention").

2. In its Application, Ukraine seeks to found the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

3. Together with the Application, Ukraine submitted a Request for the indication of provisional measures, referring to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

4. The Registrar immediately communicated the Application to the Russian Federation, in accordance with Article 40, paragraph 2, of the Statute of the Court, and the Request for the indication of provisional measures, in accordance with Article 73, paragraph 2, of the Rules of Court. He also notified the Secretary-General of the United Nations of the filing of the Application and the Request by Ukraine.

5. In addition, by a letter dated 2 March 2022, the Registrar informed all States entitled to appear before the Court of the filing of the Application and the Request for the indication of provisional measures.

6. Pursuant to Article 40, paragraph 3, of the Statute of the Court, the Registrar subsequently notified the Member States of the United Nations through the Secretary-General, and any other State entitled to appear before the Court, of the filing of the Application, by transmission of the printed bilingual text.

7. Since the Court included no judge of Ukrainian nationality upon the Bench, Ukraine proceeded to exercise the right conferred upon it by Article 31, paragraph 2, of the Statute of the Court to choose a judge *ad hoc* to sit in the case; it chose Mr Yves Daudet.

8. By letters dated 1 March 2022, the Registrar informed the Parties that, pursuant to Article 74, paragraph 3, of its Rules, the Court had fixed 7 and 8 March 2022 as the dates for the oral proceedings on the Request for the indication of provisional measures. By a letter dated 5 March 2022, the Ambassador of the Russian Federation to the Kingdom of the Netherlands stated that his Government had decided not to participate in the oral proceedings on the Request for the indication of provisional measures.

9. A public hearing was held on 7 March 2022, in which the Russian Federation did not participate. By a letter dated 7 March 2022, received in the Registry shortly after the closure of the hearing, the Ambassador of the Russian Federation to the Kingdom of the Netherlands transmitted a document setting out "the position of the Russian Federation regarding the lack of jurisdiction of the Court in th[e] case".

10. By an Order dated 16 March 2022, the Court indicated the following provisional measures:

> "(1) The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
>
> (2) The Russian Federation shall 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 or direction, take no steps in furtherance of the military operations referred to in point 1 above;
>
> (3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve."

11. Pursuant to the instructions of the Court under Article 43, paragraph 1, of the Rules of Court, the Registrar addressed to States parties to the Genocide Convention the notification provided for in Article 63, paragraph 1, of the Statute of the Court. In addition, in accordance with Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the United Nations, through its Secretary-General, the notification provided for in Article 34, paragraph 3, of the Statute of the Court.

12. By an Order dated 23 March 2022, the Court fixed 23 September 2022 and 23 March 2023 as the respective time-limits for the filing of the Memorial of Ukraine and the Counter-Memorial of the Russian Federation. The Memorial of Ukraine was filed on 1 July 2022.

13. On 3 October 2022, within the time-limit prescribed by Article 79*bis*, paragraph 1, of the Rules of Court, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application. Consequently, by an Order of 7 October 2022, having noted that, by virtue of Article 79*bis*, paragraph 3, of the Rules of Court, the proceedings on the merits were suspended, the Court fixed 3 February 2023 as the time-limit within which Ukraine could present a written statement of its observations and submissions on the preliminary objections raised by the Russian Federation. Ukraine filed its written statement within the time-limit thus fixed.

14. Between 21 July 2022 and 15 December 2022, 33 States filed declarations of intervention under Article 63, paragraph 2, of the Statute of the Court. Such declarations were filed by the Republic of Latvia (hereinafter "Latvia") on 21 July 2022, the Republic of Lithuania (hereinafter "Lithuania") on 22 July 2022, New Zealand on 28 July 2022, the United Kingdom of Great Britain and Northern Ireland (hereinafter the "United Kingdom") on 5 August 2022, the Federal Republic of Germany (hereinafter "Germany") on 5 September 2022, the United States of

America (hereinafter the "United States") on 7 September 2022, the Kingdom of Sweden (hereinafter "Sweden") on 9 September 2022, Romania on 13 September 2022, the French Republic (hereinafter "France") on 13 September 2022, the Republic of Poland (hereinafter "Poland") on 15 September 2022, the Italian Republic (hereinafter "Italy") on 15 September 2022, the Kingdom of Denmark (hereinafter "Denmark") on 16 September 2022, Ireland on 19 September 2022, the Republic of Finland (hereinafter "Finland") on 21 September 2022, the Republic of Estonia (hereinafter "Estonia") on 22 September 2022, the Kingdom of Spain (hereinafter "Spain") on 29 September 2022, Australia on 30 September 2022, the Portuguese Republic (hereinafter "Portugal") on 7 October 2022, the Republic of Austria (hereinafter "Austria") on 12 October 2022, the Grand Duchy of Luxembourg (hereinafter "Luxembourg") on 13 October 2022, the Hellenic Republic (hereinafter "Greece") on 13 October 2022, the Republic of Croatia (hereinafter "Croatia") on 19 October 2022, the Czech Republic (hereinafter "Czechia") on 31 October 2022, the Republic of Bulgaria (hereinafter "Bulgaria") on 18 November 2022, the Republic of Malta (hereinafter "Malta") on 24 November 2022, the Kingdom of Norway (hereinafter "Norway") on 24 November 2022, the Kingdom of Belgium (hereinafter "Belgium") on 6 December 2022, Canada and the Kingdom of the Netherlands (hereinafter "the Netherlands"), jointly, on 7 December 2022, the Slovak Republic (hereinafter "Slovakia") on 7 December 2022, the Republic of Slovenia (hereinafter "Slovenia") on 7 December 2022, the Republic of Cyprus (hereinafter "Cyprus") on 13 December 2022 and the Principality of Liechtenstein (hereinafter "Liechtenstein") on 15 December 2022.

15. On 17 August 2022, the European Union, referring to Article 34, paragraph 2, of the Statute of the Court, and Article 69, paragraph 2, of the Rules of Court, furnished, on its own initiative, information which it considered relevant to the case. The Registrar immediately transmitted the document filed by the European Union to the Governments of Ukraine and the Russian Federation, indicating that this transmission did not prejudge any decision the Court might take concerning the information thus furnished.

16. Pursuant to Article 83, paragraph 1, of the Rules of Court, the Parties were invited to present written observations on the declarations of intervention filed by third States (see paragraph 14 above). Both Parties submitted such written observations on 17 October 2022 (written observations on the declarations of intervention of Latvia, Lithuania, New Zealand, the United Kingdom, Germany, the United States, Sweden, Romania, France, Poland and Italy), 15 November 2022 (written observations on the declarations of intervention of Denmark, Ireland, Finland, Estonia, Spain, Australia, Portugal, Austria, Luxembourg and Greece), 16 December 2022 (written observations on the declarations of intervention of Croatia and Czechia) and 30 January 2023 (written observations on the declarations of intervention of Bulgaria, Malta, Norway, Belgium, Canada and the Netherlands, Slovakia, Slovenia, Cyprus and Liechtenstein). In light of the objections of the Russian Federation to the admissibility of the declarations of intervention, the Court, pursuant to Article 84, paragraph 2, of its Rules, decided to invite the States seeking to intervene and the Parties to submit their views on the admissibility of the declarations of intervention in writing. On 10 and 13 February 2023, the States seeking to intervene thus presented their written observations on the admissibility of the declarations of intervention, followed by the written observations of the Parties on that same matter on 24 March 2023.

17. By a letter dated 21 March 2023, the Registrar, acting pursuant to Article 69, paragraph 3, of the Rules of Court, transmitted to the Secretary-General of the United Nations copies of the written proceedings filed thus far in the case, and asked whether the Organization intended to present observations in writing under that provision in relation to the preliminary objections raised by the Russian Federation. By a letter dated 23 March 2023, the Assistant Secretary-General in charge of the Office of Legal Affairs stated that the Organization did not intend to submit any observations in writing within the meaning of Article 69, paragraph 3, of the Rules of Court.

18. By an Order dated 5 June 2023, the Court decided that the declarations of intervention under Article 63 of the Statute submitted by 32 States (Australia, Austria, Belgium, Bulgaria, Canada and the Netherlands (jointly), Croatia, Cyprus, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden and the United Kingdom) were admissible at the preliminary objections stage of the proceedings in so far as they concerned the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the jurisdiction of the Court. The Court further found that the declaration of

intervention under Article 63 of the Statute submitted by the United States was inadmissible in so far as it concerned the preliminary objections stage of the proceedings. The Court also fixed 5 July 2023 as the time-limit for the filing of the written observations referred to in Article 86, paragraph 1, of the Rules of Court by the States whose declarations of intervention had been deemed admissible at the preliminary objections stage of the proceedings.

19. Further to the Order of 5 June 2023 and in accordance with Article 86, paragraph 1, of the Rules of Court, the States whose declarations of intervention were admissible at the preliminary objections stage were furnished with copies of the Memorial of Ukraine, the Preliminary Objections of the Russian Federation and the Written Statement of Ukraine on those preliminary objections.

20. By letters dated 9 and 12 June 2023 respectively, the Parties and intervening States were informed that the Court had fixed 18 September 2023 as the date for the opening of the oral proceedings on the preliminary objections raised by the Russian Federation.

21. The intervening States, with the exception of Liechtenstein, filed their written observations on the subject-matter of their interventions, within the time-limit fixed in the Order of 5 June 2023.

22. After ascertaining the views of the Parties, the Court decided, pursuant to Article 53, paragraph 2, of its Rules, that copies of the pleadings and documents annexed would be made accessible to the public on the opening of the oral proceedings. Further, after consulting the Parties and the States which had filed a declaration of intervention, the Court decided to make accessible to the public also the written observations of the Parties on the declarations of intervention pursuant to Article 83, paragraph 1, of the Rules of Court, the written observations of the States seeking to intervene and those of the Parties on the admissibility of the declarations of intervention in accordance with Article 84, paragraph 2, of the Rules of Court, as well as the written observations of the intervening States, referred to in Article 86, paragraph 1, of the Rules of Court, on the subject-matter of their interventions.

23. Public hearings on the preliminary objections raised by the Russian Federation were held on 18, 19, 20, 25 and 27 September 2023, at which the Court heard the oral arguments, replies and observations of:

For the Russian Federation:	HE Mr Gennady Kuzmin,
	Mr Hadi Azari,
	Mr Alfredo Crosato Neumann,
	Mr Sienho Yee,
	Mr Kirill Udovichenko,
	HE Ms Maria Zabolotskaya,
	Mr Jean-Charles Tchikaya,
	HE Mr Alexander Shulgin.
For Ukraine:	HE Mr Anton Korynevych,
	Mr Harold Hongju Koh,
	Ms Marney L. Cheek,
	Mr Jean-Marc Thouvenin,
	Mr David M. Zionts,
	Mr Jonathan Gimblett,
	HE Ms Oksana Zolotaryova.
For the intervening States:	
For Germany:	Ms Wiebke Rückert.
For Australia:	Mr Stephen Donaghue.

For Austria, Czechia, Liechtenstein and Slovakia:	Mr Emil Ruffer.
For Belgium, Croatia, Denmark, Estonia, Finland, Ireland, Luxembourg, Romania and Sweden:	Ms Kerli Veski, Mr Piet Heirbaut.
For Bulgaria:	Ms Dimana Dramova.
For Canada and the Netherlands:	Mr Alan H. Kessel, Mr René J.M. Lefeber.
For Cyprus:	Ms Mary-Ann Stavrinides, Mr Antonios Tzanakopoulos.
For Spain:	Mr Santiago Ripol Carulla.
For France:	HE Mr François Alabrune.
For Greece:	Ms Zinovia Chaido Stavridi.
For Italy:	Mr Stefano Zanini, Mr Attila M. Tanzi.
For Latvia:	Mr Mārtiņš Paparinskis.
For Lithuania:	Ms Gabija Grigaitė-Daugirdė.
For Malta:	Mr Christopher Soler.
For Norway:	Mr Kristian Jervell.
For New Zealand:	Mr Andrew Williams.
For Poland:	HE Ms Margareta Kassangana.
For Portugal:	Ms Patrícia Galvão Teles.
For the United Kingdom:	Rt Hon. Ms Victoria Prentis.
For Slovenia:	Mr Marko Rakovec.

*

24. In the Application, the following requests were made by Ukraine:

"30. Ukraine respectfully requests the Court to:

(a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.

(b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(e) Require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.

(f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide."

25. In the written proceedings on the merits, the following submissions were presented on behalf of the Government of Ukraine in its Memorial:

"178. For the reasons set out in this Memorial, Ukraine respectfully requests the Court to:

(a) Adjudge and declare that the Court has jurisdiction over this dispute.

(b) Adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention.

(d) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 21 February 2022 violates Articles I and IV of the Genocide Convention.

(e) Adjudge and declare that, by failing to immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine, and by failing to 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 or direction, take no steps in furtherance of these military operations, the Russian Federation violated the independent obligations imposed on it by the Order indicating provisional measures issued by the Court of 16 March 2022.

179. Accordingly, the Court is respectfully requested to:

(a) Order the Russian Federation to immediately terminate its use of force in and against Ukraine that it commenced on 24 February 2022.

(b) Order the Russian Federation to immediately withdraw its military units from the territory of Ukraine, including the Donbas region.

(c) Order the Russian Federation to ensure that any military or irregular armed units which may be directed or supported by it (including but not limited to those of the DPR and the LPR), as well as any organizations and persons which may be subject to its control or direction, take no further steps in support of Russia's use of force in and against Ukraine that it commenced on 24 February 2022.

(d) Order the Russian Federation to withdraw its recognition of the DPR and the LPR.

(e) Order the Russian Federation to provide assurances that it will not undertake any further use of force in or against Ukraine.

(f) Order full reparation for all harm suffered by Ukraine as a consequence of the Russian Federation's use of force in the territory of Ukraine that it commenced on 24 February 2022, in an amount to be quantified in a separate phase of these proceedings.

(g) Order full reparation for all harm suffered by Ukraine as a consequence of the Russian Federation's violations of the Court's 16 March 2022 Order indicating provisional measures, in an amount to be quantified in a separate phase of these proceedings."

26. In the Preliminary Objections, the following submissions were presented on behalf of the Government of the Russian Federation:

> "In view of the foregoing, the Russian Federation respectfully requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought by Ukraine against the Russian Federation in its Application dated 26 February 2022 and Memorial dated 1 July 2022 and/or that Ukraine's claims are inadmissible.
>
> The Russian Federation reserves the right to make further preliminary objections during further proceedings, if any."

27. In the Written Statement on the preliminary objections, the following submissions were presented on behalf of the Government of Ukraine:

> "Accordingly, for the reasons set out in this Written Statement, Ukraine makes the following submissions, respectfully requesting the Court to:
>
> *(a)* Dismiss the Preliminary Objections filed by the Russian Federation on 3 October 2022;
>
> *(b)* Adjudge and declare that the Court has jurisdiction to hear the claims presented by Ukraine as set forth in its Application and Memorial, and that those claims are admissible; and
>
> *(c)* Proceed to hear those claims on the merits."

28. At the oral proceedings on the preliminary objections, the following submissions were presented by the Parties:

On behalf of the Government of the Russian Federation,

> "Having regard to the arguments set out in the Preliminary Objections of the Russian Federation and during the oral proceedings, the Russian Federation respectfully requests the Court to adjudge and declare that it lacks jurisdiction over the claims brought by Ukraine against the Russian Federation in the present proceedings, and/or that Ukraine's claims are inadmissible."

On behalf of the Government of Ukraine,

> "On the basis of the facts and legal arguments presented in its written and oral pleadings, Ukraine respectfully requests the Court to:
>
> *(a)* Dismiss the Preliminary Objections filed by the Russian Federation on 3 October 2022;
>
> *(b)* Adjudge and declare that the Court has jurisdiction to hear the claims presented by Ukraine as set forth in its Application and Memorial, and that those claims are admissible; and
>
> *(c)* Proceed to hear those claims on the merits."

*

* *

I. GENERAL BACKGROUND

29. In the spring of 2014, an armed conflict erupted in the Donbas region of eastern Ukraine, between Ukrainian armed forces and forces linked to two entities that refer to themselves as the "Donetsk People's Republic" (DPR) and the "Luhansk People's Republic" (LPR). Despite attempts to achieve a peaceful resolution, the armed conflict continued between 2014 and 2022.

30. On 21 February 2022, the Russian Federation, by decrees of its President, Mr Vladimir Putin, formally recognized the DPR and LPR as independent States. In an address delivered on the same day, the President of the

Russian Federation stated, *inter alia*, that this decision was taken in light of continuing attacks against the Donbas communities and "[t]he killing of civilians, the blockade, the abuse of people, including children, women and the elderly" while "the so-called civilised world, which our Western colleagues proclaimed themselves the only representatives of, prefers not to see this, as if this horror and genocide, which almost 4 million people are facing, do not exist".

31. On 22 February 2022, the Russian Federation concluded what it refers to as two "Treaties on Friendship, Cooperation and Mutual Assistance", one with the DPR and the other with the LPR. On the same date, the DPR and LPR requested military assistance from the Russian Federation pursuant to these "treaties". At 6 a.m. (Moscow time) on 24 February 2022, the President of the Russian Federation declared that he had decided to conduct a "special military operation" in Ukraine. In his speech, he stated:

> "[I]n accordance with Article 51 (chapter VII) of the Charter of the United Nations, I have decided to conduct a special military operation with the approval of the Federation Council of Russia and pursuant to the treaties on friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, as ratified by the Federal Assembly on 22 February this year.
>
> Its purpose is to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years. And to this end, we will seek the demilitarization and the de-Nazification of Ukraine, as well as the prosecution of those who have committed numerous bloody crimes against civilians, including citizens of the Russian Federation." (Address by the President of the Russian Federation, Annex to the letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN doc. S/2022/154 (24 February 2022), p. 6.)

32. The "special military operation" was launched early in the morning on the same day.

33. By a letter dated 24 February 2022, the Permanent Representative of the Russian Federation to the United Nations forwarded to the Secretary-General of the United Nations the text of the address of the President of the Russian Federation of the same date, explaining that this address informed the citizens of Russia "of the measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence" (Letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN doc. S/2022/154 (24 February 2022)).

34. On 26 February 2022, the Ministry of Foreign Affairs of Ukraine issued a statement denouncing "Russia's false and offensive allegations of genocide as a pretext for its unlawful military aggression against Ukraine". The Ministry asserted in particular:

> "Ukraine resolutely denies Russia's allegations of genocide and rejects any attempt to use such manipulative allegations as an excuse for its unlawful aggression. The crime of genocide is defined in the Genocide Convention, and under that Convention, Russia's claims are baseless and absurd." (Statement of 26 February 2022, subsequently distributed as a document of the General Assembly and the Security Council, namely the annex to the letter dated 26 February 2022 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN doc. A/76/727-S/2022/161 (28 February 2022).)

35. On the same day, a few hours after the issuance of this statement, Ukraine filed its Application before the Court, together with a Request for the indication of provisional measures (see paragraphs 1 and 3 above). On 16 March 2022, the Court indicated provisional measures, ordering in particular that the Russian Federation immediately suspend the military operations that it had commenced on 24 February 2022 in the territory of Ukraine (see paragraph 10 above). The armed conflict between the Russian Federation and Ukraine continues to this day.

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36. Ukraine invokes Article IX of the Genocide Convention as a basis of the Court's jurisdiction. This provision reads as follows:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

37. The Russian Federation has raised six preliminary objections, contending that: (1) the Court lacks jurisdiction as there was no dispute between the Parties under the Genocide Convention at the time of the filing of the Application (first preliminary objection); (2) the Court lacks jurisdiction *ratione materiae* (second preliminary objection); (3) Ukraine made new claims in the Memorial and these should be found inadmissible (third preliminary objection); (4) Ukraine's claims are inadmissible as the Court's potential judgment would lack practical effect (fourth preliminary objection); (5) Ukraine's request for a declaration that it did not breach its obligations under the Convention is inadmissible (fifth preliminary objection); and (6) Ukraine's Application is inadmissible as it constitutes an abuse of process (sixth preliminary objection).

II. EXISTENCE AND SUBJECT OF THE DISPUTE

A. EXISTENCE OF THE DISPUTE (FIRST PRELIMINARY OBJECTION)

38. In paragraph 30 of its Application filed on 26 February 2022 against the Russian Federation, Ukraine made the submissions that are reproduced in paragraph 24 above.

Ukraine contends, in essence, that the Russian Federation has made false allegations that the Applicant committed genocide in the Luhansk and Donetsk oblasts (administrative territorial units), and that the Respondent cannot lawfully, on the basis of such allegations, take any action against Ukraine under the Genocide Convention, in particular the recognition of the independence of the "Donetsk People's Republic" and the "Luhansk People's Republic" and the launch of the "special military operation".

39. The submissions in paragraph 178 of Ukraine's Memorial, filed on 1 July 2022, are formulated in terms different from those in the Application (see paragraph 25 above). The question whether this difference has legal implications — and, if so, what implications — will be examined below, in response to the third preliminary objection raised by the Russian Federation, which contests the admissibility of the submissions in the Memorial on the ground that the claims made therein are manifestly different from those advanced in the Application (see paragraphs 60 and 121 below).

40. The Court must first determine whether, on the date of the filing of the Application, a dispute existed between the Parties relating to the subject-matter of the Application submitted to the Court.

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41. In its first preliminary objection, the Russian Federation submits that there was no dispute between the Parties on that date under the Genocide Convention, which is the sole basis of jurisdiction relied on by Ukraine. It argues that, according to the jurisprudence of the Court, an applicant must demonstrate that a dispute existed on the date of the filing of the application relating to the claims it has made, and that the parties were aware, or could not have been unaware, that they held positively opposed views with respect to the obligations in question. The Russian Federation is of the view that these conditions are not met in the present case. According to the Respondent, there is no evidence that, on the date the Application was filed, Ukraine had clearly alleged that the Russian Federation had acted inconsistently with the Genocide Convention. The statement posted by Ukraine's Ministry of Foreign Affairs on 26 February 2022 (see paragraph 34 above) was vague and imprecise, and had been published on the Ministry's website only very shortly before the filing of the Application, such that the Russian Federation was not aware, and could not have been aware, of it at that time. The Russian Federation further contends that, before the critical date of 26 February 2022, Ukraine had made no statement or communication alleging any "abuse" or "misuse" of the Convention. Finally, according to the Russian Federation, there was no dispute between the Parties with regard to the

responsibility of Ukraine for a violation of its obligations under the Genocide Convention. It notes in this regard that it has never sought to invoke Ukraine's international responsibility under the Convention, and that Ukraine has not declared that there was a dispute on this subject. It observes that the use of the term "genocide" in certain public statements made by Russian officials cannot by itself be viewed as an invocation of the Applicant's responsibility under the Convention, or as evidence of the existence of a dispute concerning such responsibility.

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42. Ukraine replies that, at the time the Application was filed, there was indeed a dispute between the Parties concerning the commission of genocide and the appropriate measures to be taken to prevent and punish it. It notes that since 2014 the Russian Federation has falsely alleged that the Applicant and its officials have been committing acts of genocide in the Luhansk and Donetsk oblasts in the eastern part of Ukraine. The "Investigative Committee" of the Russian Federation was the first to make such allegations, which were echoed by Russian politicians at the highest level, including President Putin in his speech of 24 February 2022 announcing the launch of the "special military operation" against Ukraine.

43. The Applicant adds that it clearly refuted these allegations through a number of statements made by its official representatives before the filing of the Application. On 26 February 2022, Ukraine publicly condemned the Russian Federation's use of false allegations of genocide as "an excuse for its unlawful aggression". Finally, it submits that it openly demonstrated through its actions that it rejected the right claimed by the Russian Federation based on the Genocide Convention to use force to prevent, punish and bring to an end purported acts of genocide: it did not permit the Russian Federation to enter its territory for that purpose and even responded militarily.

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44. As the Court has recently stated, "[t]he existence of a dispute between the parties is a requirement for [its] jurisdiction under Article IX of the Genocide Convention" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J Reports 2022 (II)*, p. 502, para. 63). According to established jurisprudence, a dispute is "a disagreement on a point of law or fact, a conflict of legal views or of interests" between parties (*Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 11). In order for a dispute to exist, "[i]t must be shown that the claim of one party is positively opposed by the other" (*South West Africa (Ethiopia* v. *South Africa; Liberia* v. *South Africa), Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328). As regards disputes concerning the alleged violation of an obligation, "'the two sides [must] hold clearly opposite views concerning the question of the performance or non-performance of certain' international obligations" (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, quoting *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74). It does not matter "which one of [the parties] advances a claim and which one opposes it" (*ibid.*).

45. The Court's determination of the existence of a dispute is a matter of substance, not of form or procedure (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 84, para. 30). The date on which the existence of a dispute must be determined is in principle the date on which the application is filed (*Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 27, para. 52). It must be demonstrated that, on that date, the respondent was aware, or could not have been unaware, that its views were positively opposed by the applicant (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *India), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2016 (I)*, p. 271, para. 38; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 32, para. 73; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections,*

Judgment, I.C.J. Reports 2011 (I), p. 100, para. 63). However, it is not necessary that a State must expressly refer to a specific treaty in its exchanges with the other State to enable it later to invoke that instrument before the Court (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 85, para. 30). Nor is it always necessary for the respondent to have expressly opposed the claims of the applicant, since the silence of the respondent may be sufficient in certain circumstances for the Court to infer the existence of a dispute (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J Reports 2022 (II)*, p. 505, para. 71).

46. For the most part, the Parties agree on the criteria to be applied to establish the existence of a dispute but they differ on the application of those criteria in the present case. The Court will now turn to this application.

47. The Court observes that there was, on the date of the filing of the Application, a disagreement on the question whether genocide attributable to Ukraine had been, or was being, committed in the eastern part of its territory. Several organs of the Russian Federation, having the authority to represent the Russian Federation in international relations, issued statements that acts of Ukraine constituted genocide against the Russian-speaking inhabitants of the Donbas. The President of the Russian Federation declared, in his address of 21 February 2022 which coincided with that State's recognition of the "republics" of Donetsk and Luhansk, that "4 million people" living in the eastern region of Ukraine were victims of "genocide" (see paragraph 30 above). The Permanent Representative of the Russian Federation to the United Nations, defending the recognition of the two "republics" in question before the General Assembly on 23 February 2022, claimed that the inhabitants of the Donbas region were victims of a "blatant genocide" (United Nations, *Official Records of the General Assembly*, doc. A/76/PV.58 (23 February 2022), p. 14). In his address of 24 February 2022, the President of the Russian Federation claimed that the purpose of the "special military operation" was "to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years" (see paragraph 31 above).

48. Ukraine has consistently rejected accusations that genocide was being committed in its territory. The Ukrainian authorities had already, in the years before the launch of the "special military operation", denounced the activities of the "Investigative Committee" of the Russian Federation, which was charged, *inter alia*, with investigating alleged acts of genocide committed in the Donbas region, as having no serious basis. In this context, as early as 2014, the Prosecutor General's Office of Ukraine initiated criminal proceedings against certain Russian officials who were members of the Committee.

Following the launch of the "special military operation" on 24 February 2022, the Ministry of Foreign Affairs of Ukraine issued a statement denouncing "Russia's false and offensive allegations of genocide" (statement of 26 February 2022; see paragraph 34 above). The Russian Federation could therefore not have been unaware that the Applicant categorically rejected the allegations that it had committed genocide.

49. Furthermore, Ukraine denounced the use by the Russian Federation of allegations of genocide against it as a pretext for justifying an "unlawful aggression", stating that such baseless allegations were "an insult to the Genocide Convention itself and the international community's relentless efforts in preventing and punishing the world's most egregious crime" (above-mentioned statement of the Ministry of Foreign Affairs of Ukraine).

50. Even though this statement was issued only shortly before the institution of the proceedings, it is clear that the Russian Federation knew at that time that its views were positively opposed by Ukraine, which was accusing it of acting unlawfully by using the Convention as a pretext to justify its actions against Ukraine. In the specific circumstances of the case, the Court considers that Ukraine could seise it without further delay.

51. The Court thus concludes that, on the date of the Application, a dispute existed between the Parties on the question whether acts of genocide attributable to Ukraine had been committed in the Donbas region and on the lawfulness of the Russian Federation's actions allegedly undertaken on the basis of such an accusation.

The Russian Federation's first preliminary objection must therefore be rejected.

52. In reaching the foregoing conclusion, the Court does not prejudge the question whether and to what extent the dispute in question falls within the provisions of the Genocide Convention and, consequently, within the scope of the compromissory clause in Article IX thereof. That question will be examined later in the present Judgment.

B. THE TWO ASPECTS OF THE DISPUTE

53. There are two aspects of the dispute submitted to the Court by Ukraine, the essential characteristics of which are distinct and which the Court therefore considers it necessary to examine separately and in turn.

54. The first aspect of the dispute arises from Ukraine's request that the Court declare that, contrary to the allegations of the Respondent, the Applicant has not committed genocide. This request is set out in paragraph 30, subparagraph *(a)*, of the Application ("[a]djudge and declare that, contrary to what the Russian Federation claims, no acts of genocide . . . have been committed in the Luhansk and Donetsk oblasts of Ukraine"). It is repeated in different terms in paragraph 178, subparagraph *(b)*, of the Memorial ("[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide . . . in the Donetsk and Luhansk oblasts of Ukraine").

By such a request, Ukraine does not seek to invoke the international responsibility of the Russian Federation for an internationally wrongful act attributable to that State; it seeks a judicial finding that it has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine's view, imputed to it in public statements.

55. The second aspect of the dispute arises from Ukraine's requests that the Court find that the Russian Federation has acted unlawfully with respect to the Genocide Convention, and corresponds to the submissions made in paragraph 30, subparagraphs *(b)*, *(c)* and *(d)*, of the Application and paragraph 178, subparagraphs *(c)* and *(d)*, of the Memorial. In its Application, Ukraine requests the Court to adjudge and declare "that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine" on the basis of its false claims that genocide has been committed (paragraph 30, subparagraph *(b)*); that the Russian Federation's recognition of the independence of the two "republics" of Donetsk and Luhansk has no basis in the Convention (paragraph 30, subparagraph *(c)*); finally that the "special military operation" carried out by the Russian Federation also "has no basis in the Genocide Convention", since it is based on a false claim (paragraph 30, subparagraph *(d)*). In its Memorial, Ukraine requests the Court to adjudge and declare that "the Russian Federation's use of force . . . beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention" (paragraph 178, subparagraph *(c)*), as does the recognition of the two so-called "republics" (paragraph 178, subparagraph *(d)*).

56. The Court notes that this second aspect of the dispute is fundamentally different in nature from the first. Through these submissions, Ukraine seeks to invoke the international responsibility of the Russian Federation by imputing internationally wrongful conduct to it. The claims for reparation submitted by Ukraine in paragraph 30, subparagraphs *(e)* and *(f)*, of the Application and paragraph 179 of the Memorial are part of that second aspect.

57. In view of the foregoing, the Court will address below, in turn, the two aspects of the dispute thus described, and will examine in respect of each aspect, as necessary, the questions of jurisdiction and admissibility raised by the preliminary objections of the Russian Federation.

III. THE FIRST ASPECT OF THE DISPUTE: UKRAINE'S SUBMISSION THAT NO GENOCIDE ATTRIBUTABLE TO IT HAS BEEN COMMITTED IN THE DONBAS REGION

58. The Court has found that a dispute existed between the Parties and therefore concluded that the first preliminary objection must be rejected (see paragraph 51 above). During the oral proceedings, the Russian Federation stated that its second preliminary objection, in which it contends that Ukraine's claims must be dismissed because the Court lacks jurisdiction *ratione materiae* under Article IX of the Genocide Convention, concerns submissions *(c)* and *(d)* in paragraph 178 of Ukraine's Memorial. Since the second preliminary objection does not concern the first aspect of the dispute, the Court will examine this objection in relation to the second aspect of the dispute in

Part IV of the present Judgment. The Court sees no reason to call into question its jurisdiction to entertain the first aspect of the dispute.

59. The Court thus turns to the remaining four preliminary objections raised by the Russian Federation, which concern the admissibility of Ukraine's claims: (A) the Applicant has inappropriately changed the substance of the claims in its Memorial as compared to the claims raised in its Application (third preliminary objection); (B) any potential judgment rendered by the Court based on the Convention would lack practical effect (fourth preliminary objection); (C) Ukraine's request for a declaration that it did not breach its obligations under the Convention is contrary to the jurisprudence of the Court and detrimental to its judicial function (fifth preliminary objection); and (D) Ukraine's Application constitutes an abuse of process (sixth preliminary objection). As this part of the Judgment deals with the first aspect of the dispute, the Court will now examine these objections only in relation to that aspect.

A. Introduction of new claims (third preliminary objection)

60. In its third preliminary objection, the Russian Federation contends that Ukraine has inappropriately changed the substance of its claim in the Memorial as compared to its claim raised in the Application. In its view, Ukraine's claim in the Memorial is manifestly different from the one advanced in the Application, and it is therefore inadmissible.

61. The Russian Federation argues that the applicant State must set out, in its application, the precise nature and the basis of its claims, which can be "built upon but not remade" in its subsequent submissions. For the Respondent, it is not possible for an applicant to amend its claims or make new ones during the proceedings in such a way as to alter the subject of the dispute as originally set forth in the application. The Russian Federation maintains that the Court should follow the approach taken in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, which has been confirmed in subsequent cases. It stresses that, to be admissible, a claim first introduced in the memorial must have been implicit in the application or must arise directly out of the question which is the subject-matter of that application.

62. Regarding Ukraine's submission *(b)* in paragraph 178 of its Memorial, the Russian Federation contends that Ukraine has changed the nature of its claims in respect of acts of genocide. The Respondent notes that Ukraine, in its Application, asked the Court to find that there were no acts of genocide, as defined in Article III of the Convention, committed in the Donbas region. In its Memorial, however, Ukraine merely seeks a confirmation from the Court that "there is no credible evidence that Ukraine is responsible" for any such acts. This shift in the submission indicates that the Applicant's purpose in instituting the proceedings before the Court has changed from confirming that no acts of genocide were committed to seeking to absolve itself from responsibility for such acts. In the Respondent's view, alleging that there has been no genocide in the Donbas region is different from claiming that such acts are not attributable to Ukraine. The Applicant's new claim in the Memorial thus requires the Court to examine issues extraneous to Ukraine's original claim; it is not implicit in its Application nor does it arise directly out of the question which is the subject-matter of that Application. The Respondent submits that Ukraine's new or amended claim significantly alters the one initially advanced by Ukraine in its Application and transforms it beyond recognition.

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63. Ukraine, for its part, argues that, during the course of the proceedings, a party is expected to develop and elaborate on its submissions, which may therefore evolve.

64. Ukraine does not dispute the relevance of the criteria formulated by the Court in *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)* and maintains that the decisive question in that case was whether the subject of the dispute originally submitted to the Court would be transformed if the Court entertained the claim. In its view, what matters is that the adjusted claims should fall within the subject of the dispute brought before the Court.

65. With respect to submission *(b)* in paragraph 178 of its Memorial, Ukraine insists that it has not transformed the dispute by requesting the Court to find that there is no credible evidence that it committed acts of

genocide in the Donetsk and Luhansk oblasts. The Applicant stresses that it simply added specificity to its claim, as is permitted by the Rules of Court. The formulations in the Application and the Memorial both arise from the same dispute with the same subject-matter. According to Ukraine, the Court will have to determine whether there is credible evidence of Ukraine's responsibility for genocide in order to settle the dispute submitted to it. The Applicant contends that a declaratory judgment framed in terms of an absence either of acts of genocide or of credible evidence of such acts would equally advance the resolution of the present dispute, which concerns Ukraine's alleged responsibility for genocide.

66. Ukraine therefore submits that the dispute has in no way been transformed by its adjustment of the precise wording of the declaration it now seeks and that all its claims relate to the subject of the dispute before the Court.

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67. The Court recalls its well-settled jurisprudence on the subject of additional or amended claims formulated in the course of proceedings, based on Article 40, paragraph 1, of the Statute of the Court as well as Article 38, paragraph 2, and Article 49, paragraphs 1 and 4, of the Rules of Court.

Article 40, paragraph 1, of the Statute provides that "the subject of the dispute . . . shall be indicated" in an application. Article 38, paragraph 2, of the Rules of Court reads as follows:

> "The application shall specify as far as possible the legal grounds upon which the jurisdiction of the Court is said to be based; it shall also specify the precise nature of the claim, together with a succinct statement of the facts and grounds on which the claim is based."

Article 49, paragraph 1, of the Rules of Court further provides that "[a] Memorial shall contain a statement of the relevant facts, a statement of law, and the submissions". Article 49, paragraph 4, specifies that "[e]very pleading shall set out the party's submissions at the relevant stage of the case . . . or shall confirm the submissions previously made". The Court has considered these provisions "essential from the point of view of legal security and the good administration of justice" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69).

68. On the basis of these provisions, the Court has declared that additional or amended claims formulated in the course of proceedings are inadmissible if they would "transform[] 'the subject of the dispute originally brought before [the Court] under the terms of the [a]pplication'" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 39, quoting *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, p. 695, para. 108; see also *Société commerciale de Belgique, Judgment, 1939, P.C.I.J., Series A/B, No. 78*, p. 173). In this respect, the memorial, "though it may elucidate the terms of the [a]pplication, must not go beyond the limits of the claim as set out therein" (*Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69, quoting *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, p. 14).

69. An additional or amended claim is not inadmissible *ipso facto*; the decisive consideration is the nature of the connection between the claim presented in the memorial and the one formulated in the application (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 656-657, paras. 40-41). A connection of a general nature is not sufficient (see *Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea (Nicaragua* v. *Honduras), Judgment, I.C.J. Reports 2007 (II)*, pp. 695-696, para. 110). The Court has identified two criteria for assessing whether the required connection exists: either the additional or amended claims "must be implicit in the [a]pplication" or they "must arise directly out of the question which is the subject-matter of the [a]pplication" (*Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 657, para. 41, citing *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67). The purpose of these criteria is ultimately to determine whether the additional or amended

claims would transform the subject of the dispute originally brought before the Court under the terms of the application.

70. The Court observes that Ukraine accepts that it made "adjustments" to its claims in the Memorial. The Russian Federation notes this "admi[ssion]" by Ukraine and argues that the claims in the Memorial are "new" and therefore inadmissible. The Court does not consider that a difference in the formulation of a claim would, in itself, render the claim inadmissible (see paragraph 69 above).

71. The Court has recognized that claims advanced subsequent to the application may clarify the scope of the dispute (*Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 855, para. 54). In the present case, both submission *(a)* in Ukraine's Application and its amended submission *(b)* in its Memorial concern the same allegations of genocide made by the Respondent. The Court is of the view that Ukraine's amended submission *(b)* merely clarifies the claim as presented in its Application and therefore does not transform the subject of the dispute originally brought before the Court under the terms of the Application. Accordingly, the Court hereinafter considers the first aspect of the dispute to be defined in terms of Ukraine's submission *(b)* in its Memorial, namely whether "there is . . . credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine".

72. In light of the foregoing, the Court finds that the Russian Federation's third preliminary objection to the admissibility of Ukraine's submission *(b)* in paragraph 178 of the Memorial based on the introduction of additional or amended claims must be rejected.

B. LACK OF PRACTICAL EFFECT OF THE JUDGMENT (FOURTH PRELIMINARY OBJECTION)

73. In its fourth preliminary objection, the Russian Federation contends that a potential judgment of the Court on Ukraine's submissions would be devoid of any practical effect. Citing the *Northern Cameroons (Cameroon* v. *United Kingdom)* case, the Respondent argues that the Court may only render judgments on the merits that "have some practical consequence in the sense that [they] can affect existing legal rights or obligations of the parties" and are "capable of effective application" or "susceptible of . . . compliance or execution".

74. The Russian Federation maintains that the claims made by Ukraine in its Memorial are based on rules of international law that lie outside the Genocide Convention. The Respondent considers that any judgment under the Genocide Convention would be devoid of practical effect because it could not affect the Parties' rights and obligations, or remove the uncertainty in their legal relations.

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75. Ukraine, for its part, argues that a potential judgment of the Court will determine the rights and responsibilities of each Party under the Genocide Convention irrespective of whether the Russian Federation puts forward a separate justification for its actions under other rules of international law. In the Applicant's view, the Russian Federation has not established that "it is impossible for any judgment to have any purpose". Ukraine maintains that a declaratory judgment finding that there is no credible evidence that Ukraine is responsible for committing genocide will have a practical effect, because the legal position thus established could not again be called into question.

76. According to Ukraine, the circumstances in the present case are not like those in the *Northern Cameroons (Cameroon* v. *United Kingdom)* case, where the applicant sought a declaration concerning the respondent's obligations under an agreement that was no longer in force.

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77. The Court recalls that, even if it finds that it has jurisdiction, it is not compelled in every case to exercise it because "[t]here are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore" (*Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment,*

I.C.J. Reports 1963, p. 29). The Court has stated that "[its] judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations" (*ibid.*, p. 34). It is not the function of the Court to provide a basis for political action if no question of actual legal rights is involved (*ibid.*, p. 37). Accordingly, the Court "cannot adjudicate upon the merits of the claim" when it considers that "any adjudication [would be] devoid of purpose" (*ibid.*, p. 38).

78. The Applicant requests the Court to "[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine". The Court notes that its jurisprudence and that of its predecessor make clear that the Court may, in an appropriate case, issue a declaratory judgment (*Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia* v. *Greece), Judgment, I.C.J. Reports 2011 (II)*, p. 662, para. 49, citing *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 37). The purpose of a declaratory judgment "is to ensure recognition of a situation at law, once and for all and with binding force as between the [p]arties; so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned" (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, p. 20).

79. The Court observes that the first aspect of the dispute between the Parties involves a disagreement on a point of fact as well as on the interpretation, application or fulfilment of their rights and obligations under the Genocide Convention. A declaratory judgment on whether there exists credible evidence that Ukraine is responsible for committing genocide in violation of its obligations under the Convention would have the effect of clarifying whether the Applicant acted in accordance with its obligations under Article I of the Convention.

80. In light of the foregoing, the Court finds that the Russian Federation's fourth preliminary objection to the admissibility of Ukraine's submission *(b)* in paragraph 178 of the Memorial based on the lack of practical effect of the judgment on the merits must be rejected.

C. Inadmissibility of a request for a declaration that the Applicant did not breach its obligations (fifth preliminary objection)

81. In its fifth preliminary objection, the Russian Federation contends that Ukraine's submission *(b)* in paragraph 178 of the Memorial, which it refers to as a "reverse compliance request", is inadmissible. The Respondent has raised five arguments in support of this objection.

82. First, according to the Russian Federation, "reverse compliance requests" are extremely rare in inter-State dispute settlement because, in the normal course of a dispute, a State invokes the responsibility of another State for the latter's internationally wrongful act. "Reverse compliance requests" are currently reserved for the World Trade Organization (hereinafter the "WTO"), whose practices are not directly transposable to the Court.

83. Second, the Russian Federation argues that Article IX of the Genocide Convention was never intended to determine whether a respondent State has made a valid allegation of genocide against an applicant State. It maintains that there is no textual basis in the Convention for the Court to entertain such a claim. Relying on the *travaux préparatoires*, it asserts that the drafters of the Convention attached no specific meaning to the phrase "any of the parties to the dispute" in Article IX and considered the addition merely editorial in nature. Under the Genocide Convention, submission *(b)* could effectively be considered only within the framework of an application brought against Ukraine, but not by Ukraine.

84. Third, the Russian Federation contends that the Court has never accepted a "reverse compliance request" in its jurisprudence. According to the Russian Federation, the nature of the claim and the circumstances in the present case are completely different from those in *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, where, in particular, France did not seek any remedies and asked the Court a question of a purely legal nature that did not hinge on the examination of evidence. Libya's request in *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* was different from the one made by Ukraine in the present case, as Libya sought proof of a "positive fact" that all measures were taken, while Ukraine seeks a negative finding. The Respondent further stresses

that the Court limited itself to stating that a dispute existed and refrained from considering Libya's non-violation claim.

85. Fourth, the Russian Federation contends that Ukraine's "reverse compliance request" is incompatible with the judicial function of the Court, which has a duty to settle legal disputes and does not act as a fact-finding body. The Respondent insists that, by making this request while the competent authorities of the Russian Federation are engaged in ongoing criminal investigations, Ukraine is attempting to use the Court as an interim fact-finding body. The Russian Federation asserts that it is not the Court's role to gather and assess the facts on the ground.

86. Fifth, the Russian Federation argues that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties. A determination of Ukraine's claim may pre-empt the Russian Federation's right to invoke Ukraine's responsibility under the Convention if and when it considers it appropriate to do so. The Respondent considers that a premature "reverse compliance request" can have the unwarranted effect of not only exonerating the applicant from responsibility before other States have had the opportunity to prepare their claims and invoke the applicant's responsibility, but also obstructing any national or international investigation. If a State were allowed to secure a pre-emptive favourable finding based on incomplete evidence, it would be protected against subsequent claims against it, even those made on the basis of compelling new evidence that becomes available in the future. In its view, Ukraine could obtain an undue advantage by virtue of Article 60 of the Statute of the Court because an eventual judgment would constitute *res judicata*.

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87. Ukraine, for its part, contends that there is a dispute with the Respondent as to whether Ukraine is responsible for committing genocide in violation of the Genocide Convention and that, as a party to such a dispute, it may seek its resolution by the Court. The Applicant is of the view that its claim is better described as a request for a declaration of conformity or compliance rather than a "reverse compliance request".

88. Ukraine argues that, in accordance with the ordinary meaning of Article IX of the Genocide Convention, if there is a dispute over responsibility for genocide, "any of the parties" to that dispute, and not just the State making an allegation of genocide, is entitled to seek the resolution of such a dispute. The Applicant contends that this meaning of Article IX is confirmed by the *travaux préparatoires* of the Convention. Furthermore, Ukraine maintains that this is a dispute relating to the "fulfilment" of the Genocide Convention, which refers to a party's compliance or non-compliance with the provisions of the Convention.

89. According to Ukraine, the Court has already accepted requests for declarations of conformity. In *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, France's request that the Court find that its actions were in conformity with the relevant treaty was admitted. The factual differences between that case and the present one are irrelevant. In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, the Court did not dismiss Libya's claim that it had fully complied with the Montreal Convention.

In Ukraine's view, the Court's silence on requests for a declaration of compliance in these cases confirms that there is nothing judicially improper about the Court declaring a State to be in compliance with its obligation. Even if the Court were to consider that these cases do not provide a direct precedent, the alleged novelty of a particular type of claim is not a legal reason for the Court to decline to exercise jurisdiction.

90. Additionally, Ukraine contends that its claim is compatible with the judicial function of the Court. It maintains that acting as a fact-finding body in order to resolve a dispute in which the facts are contested is inherent in the Court's function as a judicial body.

91. Finally, Ukraine considers that its claim does not contradict the principles of judicial propriety and the equality of the parties. There is nothing "premature" about its request. For Ukraine, when the Court issues a judgment based on the best available factual record, there is nothing problematic about that judgment being *res judicata* between the respondent and the applicant.

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92. In interpreting Article IX of the Convention, the intervening States argue in general that nothing in the text of Article IX precludes the Court from admitting a claim requesting it to declare that an applicant State complied with or did not breach its obligations under the Genocide Convention. They further assert that the wording of Article IX, in particular the term "fulfilment" and the phrase "at the request of any of the parties to the dispute", indicates that the Court can issue a declaration of this kind.

* *

93. The Court notes a significant variation in the terms employed by the Parties and some intervening States to describe Ukraine's submission *(b)* in paragraph 178 of the Memorial. Relying in part on the practices of the WTO, the Russian Federation uses the term "reverse compliance request". Ukraine, on the other hand, refers to a request for "a declaration of conformity", "a declaration of compliance" or "a non-violation declaration". The intervening States have used terms such as "non-violation complaints" and requests for "negative declarations". The Court does not find it necessary to explore the legal significance of the various terms employed by the Parties and the intervening States. It suffices to note that Ukraine's submission *(b)* is a request for a declaration that the Applicant did not breach its obligations under the Convention.

94. The Court will now turn to the five arguments made by the Russian Federation to support its fifth preliminary objection.

95. First, the Respondent contends that the practices of the WTO are not directly transposable to the Court. The Court considers that the practices of the WTO provide no assistance to the Court for determining the admissibility of Ukraine's request because they are based on particular provisions of the Marrakesh Agreement establishing the World Trade Organization.

96. Second, the Russian Federation argues that Article IX of the Genocide Convention was not intended for "reverse compliance requests".

97. Article IX of the Genocide Convention reads:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

Article IX clearly allows a State that invokes the responsibility of another State for genocide to submit the dispute to the Court. The question before the Court is whether Article IX precludes the possibility for a State to seek a declaration that it is not responsible for committing genocide in violation of its obligations under the Convention.

98. The Court has considered the phrase "including those [disputes] relating to the responsibility of a State for genocide" to be an "unusual feature of Article IX", pointing out that "[a]ccording to the English text of the Convention, the responsibility contemplated is responsibility 'for genocide' (in French, 'responsabilité . . . en matière de génocide'), not merely responsibility 'for failing to prevent or punish genocide'" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 114, para. 169). The Court has also noted the exceptional inclusion of the additional term "fulfilment" in Article IX (see *ibid.*, para. 168). Moreover, Article IX specifies that disputes "relating to the interpretation, application or fulfilment" of the Convention include disputes "relating to the responsibility of *a* State for genocide" and provides that "*any* of the parties to the dispute" may submit such a dispute to the Court (emphasis added).

99. In light of the above, the Court considers that Article IX does not preclude the possibility for a State to seek a declaration that it is not responsible for committing genocide in violation of the Convention.

100. Third, the Respondent argues that the Court has never accepted "reverse compliance requests" in its jurisprudence. The Parties disagree as to whether the Court's decisions in *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)* and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)* support the admissibility of Ukraine's submission *(b)*.

101. In *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America)*, France requested a declaration from the Court that "the Decree of December 30th, 1948, is in conformity with the treaty provisions which are applicable to Morocco and are binding on France and the United States" (*Judgment, I.C.J. Reports 1952*, p. 182). The United States did not file a preliminary objection to that request but instead made a submission requesting the Court to find that "[the Decree of December 30th, 1948] is in direct contravention of the treaty rights of the United States forbidding prohibition on American imports" (*ibid.*). Given these specific circumstances, the Court is of the view that this case does not demonstrate that a request for a declaration of compliance has been accepted in its jurisprudence.

In *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom)*, Libya requested the Court to declare that it had "fully complied with all of its obligations under the Montreal Convention" and was therefore "justified in exercising the criminal jurisdiction provided for by that Convention" (*Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 14, para. 14). The Court observes that the nature of the claim made by Libya is different from that made by Ukraine in the present case. Libya sought a declaration that it had complied with its obligations under the Montreal Convention in order to assert its right to exercise criminal jurisdiction as provided for by the Convention; it did not institute proceedings in response to allegations by the respondent that it had violated the Convention (see *ibid.*, p. 14, para. 14 *(b)*, and p. 18, para. 26 *(b)*). That case is thus not comparable to the present case.

Accordingly, the Court considers that these two cases do not provide a basis for concluding that the Court has either accepted or denied in its jurisprudence an applicant's request for a declaration that it did not breach its obligations under a treaty.

102. Fourth, the Respondent argues that Ukraine's submission *(b)* is incompatible with the judicial function of the Court. The Russian Federation contends that, by ruling on Ukraine's submission *(b)*, the Court would be acting as an interim fact-finding body while criminal investigations are ongoing.

103. In the Court's view, to address Ukraine's submission *(b)*, it would have to make findings of facts in light of the evidence presented by the Parties, and then apply the provisions of the Genocide Convention to the facts it has established. As the Court stated in *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica)*,

> "[i]t is the duty of the Court, after having given careful consideration to all the evidence in the record, to assess its probative value, to determine which facts must be considered relevant, and to draw conclusions from them as appropriate. In keeping with this practice, the Court will make its own determination of the facts, on the basis of the totality of the evidence presented to it, and it will then apply the relevant rules of international law to those facts which it has found to be established" (*Judgment, I.C.J. Reports 2015 (II)*, p. 726, para. 176).

The Court will only make such findings of fact as are necessary for it to be able to respond to Ukraine's submission (see *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Judgment, I.C.J. Reports 2005*, p. 200, para. 57). In doing so, it must "assess the relevance and probative value of the evidence proffered by the Parties in support of their versions of the facts" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 74, para. 180). The Court considers that it is an integral part of its judicial function to establish the facts in light of the evidence presented and apply the provisions of the Genocide Convention to the established facts. Accordingly, the Court finds that the reasons advanced by the Respondent cannot support its argument that Ukraine's submission *(b)* is incompatible with the judicial function of the Court.

104. Fifth, the Respondent argues that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties. To support this argument, the Russian Federation, referring to the principle of *res judicata*, argues that Ukraine's claim, if upheld by the Court, may exonerate the Applicant from responsibility by pre-empting the rights of the Respondent and other States to invoke Ukraine's responsibility under the Genocide Convention in the future.

105. The Court need not consider questions that may arise in the hypothetical situation that, subsequent to a judgment on the merits in the present case, the Russian Federation decides to institute proceedings against Ukraine invoking the latter's responsibility for committing genocide in violation of its obligations under the Genocide Convention. The contents of a judgment on the merits are unknown, as is the substance of the claims the Russian Federation may make should it decide to seise the Court. It is not for the Court to speculate about these matters. It suffices for the Court to observe that, whenever a dispute is settled by the Court by way of a judgment, there is a possibility that a future claim is covered by the *res judicata* effect of that judgment. This possibility, however, does not per se provide a basis for finding that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties.

106. For these reasons, the Court cannot accept the Respondent's fifth argument that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties.

107. The Court has found that Article IX of the Genocide Convention does not preclude the possibility for a State to seek a declaration that it is not responsible for committing genocide in violation of the Convention (see paragraph 99 above). In assessing the admissibility of Ukraine's request contained in submission *(b)* of its Memorial, the Court takes account of the circumstances in which the request was made.

108. In the present case, Ukraine made a request for a declaration that it did not breach its obligations under the Genocide Convention in the context of an armed conflict between the Parties. The Respondent took the allegedly unlawful measures in and against Ukraine with a stated purpose of preventing and punishing genocide allegedly committed in the Donbas region. In such a special context, the Court recognizes the legal interest that Ukraine has under the Genocide Convention to resolve the dispute regarding its submission *(b)*. The Court stated on 16 March 2022 that,

> "[s]ince [24 February 2022], there has been intense fighting on Ukrainian territory, which has claimed many lives, has caused extensive displacement, and has resulted in widespread damage. The Court is acutely aware of the extent of the human tragedy that is taking place in Ukraine" (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 216, para. 17).

The armed conflict between the Applicant and the Respondent continues to this day. A judgment of the Court regarding Ukraine's submission *(b)* will clarify the rights and obligations of the Parties under the Genocide Convention, in particular whether Ukraine acted in accordance with its obligations under Article I of the Convention. The Court is mindful of its responsibilities in the maintenance of international peace and security as well as in the peaceful settlement of disputes under the Charter of the United Nations and the Statute of the Court.

109. In the particular circumstances of the present case, the Court considers that Ukraine's request for a declaration that it did not breach its obligations under the Convention is not inadmissible. In light of the foregoing, the Court finds that the fifth preliminary objection of the Russian Federation must be rejected.

D. Abuse of process (sixth preliminary objection)

110. In its sixth preliminary objection, the Russian Federation contends that Ukraine's Application is inadmissible because it constitutes an abuse of process. It maintains that "Ukraine's claims and conduct in these proceedings constitute such a serious abuse of process that this [c]ase should qualify as an exceptional instance in which the Court should reject Ukraine's claims on the ground of abuse of process".

111. The Russian Federation presents three arguments in support of its contention. First, the Respondent alleges that Ukraine has abusively changed its legal case during the course of the proceedings. It explains that Ukraine has introduced new claims in its Memorial and invoked new provisions of the Convention that were not referred to in its Application. Second, the Russian Federation asserts that the timing of Ukraine's Application is abusive, because Ukraine did not file it against the Respondent until 2022, even though it alleges that a dispute has been in existence since 2014. Third, the Respondent asserts that Ukraine, in an attempt to put pressure on the Court, rallied States to arrange an abusive mass intervention in the case. The Russian Federation maintains that, in its Order of 5 June 2023, the Court did not rule on whether the manner in which Ukraine rallied States to arrange a mass intervention amounted to an abuse of process.

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112. Ukraine requests the Court to reject this objection by the Russian Federation. Regarding the Respondent's first argument, Ukraine is of the view that the Respondent is merely repeating its third objection under the guise of an abuse of process. The Russian Federation cannot claim abuse of process by feigning confusion over Ukraine's straightforward and consistent case. Regarding the Respondent's second argument, Ukraine asserts that the Parties' disagreement over Ukraine's alleged responsibility for genocide took on new importance when the Russian Federation relied on its false allegations of genocide as a pretext for its recognition of the DPR and LPR and for its invasion of Ukraine. In relation to the Respondent's third argument, Ukraine stresses that the Russian Federation is merely repeating an argument that the Court already rejected in its Order of 5 June 2023. It adds that the intervening States have agreed to be bound by the Court's interpretation of the Convention and that their oral pleadings were focused on the questions of interpretation before the Court.

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113. The Court recalls that "[i]t is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process" (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150). The Court has specified that there has to be "clear evidence" that the Applicant's conduct amounts to an abuse of process (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 36 para. 93). An abuse of process "goes to the procedure before a court or tribunal" and concerns the question whether a State has misused that procedure to such an extent that its case should be rejected at the preliminary phase of the proceedings (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 335-336, paras. 146-150).

114. The Respondent's first argument that Ukraine introduced new claims in the Memorial is the same as the one in its third preliminary objection. The Court has already concluded that the third preliminary objection must be rejected with respect to the first aspect of the dispute (see paragraph 72 above). Accordingly, the Court does not accept the Respondent's first argument.

115. The Court recalls that it "cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52). The Court is therefore not persuaded by the Respondent's second argument relating to the timing of Ukraine's Application.

116. The Court observes that its Order of 5 June 2023 did not address the Respondent's third argument that the manner in which Ukraine allegedly rallied States to arrange a mass intervention amounts to an abuse of process. Its analysis was limited to whether the declarations of intervention were inadmissible on the ground of an abuse of process (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Declarations of Intervention, Order of 5 June 2023*, para. 59).

117. The Court notes that, in support of the third argument, the Respondent relies exclusively on the conduct and statements of the intervening States. It has not adduced any evidence regarding Ukraine's alleged abuse of process. The Court does not consider that Ukraine, having established a valid title of jurisdiction, should be barred at this preliminary stage without clear evidence that its conduct with respect to the interventions amounts to an abuse of process (see *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 336, para. 150). For this reason, the Court does not consider the third argument of the Respondent convincing.

118. The Respondent thus has not demonstrated that there are exceptional circumstances that would warrant rejecting Ukraine's claim on the ground of abuse of process. Accordingly, the Court finds that the Russian Federation's sixth preliminary objection to the admissibility of Ukraine's submission *(b)* in paragraph 178 of the Memorial based on abuse of process must be rejected.

IV. THE SECOND ASPECT OF THE DISPUTE: UKRAINE'S SUBMISSIONS RELATING TO THE COMPATIBILITY OF THE RUSSIAN FEDERATION'S ACTIONS WITH THE CONVENTION

119. In subparagraphs *(c)* and *(d)* of paragraph 178 of its Memorial, Ukraine requests the Court to "*(c)* [a]djudge and declare that the Russian Federation's use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention" and "*(d)* [a]djudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 21 February 2022 violates Articles I and IV of the Genocide Convention" (see paragraph 25 above). These submissions differ in their formulation from those in the Application, in which Ukraine asked the Court to find "that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine", to declare that the Russian Federation's recognition of the two "so-called" republics was "based on a false claim of genocide and therefore ha[d] no basis in the Genocide Convention", and to make a similar declaration regarding the "special military operation" conducted by the Russian Federation from 24 February 2022 (paragraph 30, subparagraphs *(b)*, *(c)* and *(d)* of the Application, see paragraph 24 above).

120. The Russian Federation raises two arguments in particular against these submissions. First, according to the Respondent, the submissions presented in the Memorial are new submissions which have the effect of transforming the subject of the dispute as set out in the Application and are therefore inadmissible. This argument is set out in the third preliminary objection raised by the Russian Federation. Second, the submissions at issue fall outside the scope *ratione materiae* of the Convention and therefore do not fall within the compromissory clause in Article IX. This argument is part of the second preliminary objection. The Court must first examine the question of the admissibility of the submissions in the Memorial. In light of the answer to that question, it will then consider whether the submissions relating to the second aspect of the dispute, as described in paragraph 55 above, fall within its jurisdiction *ratione materiae*.

A. INTRODUCTION OF NEW CLAIMS (THIRD PRELIMINARY OBJECTION)

121. According to the Russian Federation, the submissions in paragraph 178, subparagraphs *(c)* and *(d)*, of Ukraine's Memorial are inadmissible, because they differ from the claims in the Application to the point that they are beyond recognition and change the nature of the dispute submitted to the Court. The Respondent notes, in this regard, that the new submissions are based on provisions of the Convention which were not mentioned in the submissions in the Application, and that they contain allegations of violation of obligations under the Convention by the Russian Federation that were not in the Application, in which the Applicant merely claimed that the actions of the Russian Federation "ha[d] no basis in the Genocide Convention", which is a completely different matter.

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122. Ukraine contends, on the contrary, that all the claims in its Memorial relate to the subject of the dispute as presented in the Application, namely the Russian Federation's allegations that Ukraine is committing genocide and its reliance on such false allegations to take unilateral action in and against Ukraine. It observes that, contrary

to the assertion of the Respondent, it already alleged in the Application that the actions of the Russian Federation were incompatible with the Convention and violated Ukraine's rights. According to the Applicant, the submissions presented at the end of the Memorial simply clarify the legal grounds of its original claims, namely the violation by the Russian Federation of Articles I and IV of the Convention. It notes in this regard that while Article IV of the Convention was not mentioned in the Application, it is directly linked to Article I, to which explicit reference was made.

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123. Earlier in this Judgment (see paragraphs 60-72 above), the Court examined the same objection to admissibility raised by the Russian Federation with regard to the submission in subparagraph *(b)* of paragraph 178 of the Memorial.

It recalled its well-established jurisprudence on the question of additional or amended claims (see paragraphs 68 and 69 above). An additional or amended claim formulated in the course of proceedings is inadmissible if it has the effect of transforming the subject of the dispute originally brought before the Court under the terms of the application; it is, however, admissible if it is implicit in the application or if it arises directly out of the question which is the subject-matter of the application (see in this sense *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 266, para. 67; see also *Ahmadou Sadio Diallo (Republic of Guinea* v. *Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, pp. 656-657, paras. 39-41).

Having applied these criteria to subparagraph *(b)* of paragraph 178 of the Memorial (see paragraphs 70 and 71 above), the Court will now apply them to subparagraphs *(c)* and *(d)*.

124. The wording of the claims presented by Ukraine in its Application is certainly not identical to that of the claims set out in the Memorial (see paragraph 119 above).

125. It is true, as the Russian Federation points out, that none of the claims in the Application refers specifically to Articles I and IV of the Convention. Nor is there an explicit assertion that the Russian Federation violated its obligations under the Convention. By contrast, the submissions at the end of the Memorial (see paragraph 25 above) contain the explicit allegation that the actions of the Russian Federation "violate" the Convention and specify that, in Ukraine's view, the provisions violated are those of Articles I and IV of the Convention.

126. However, a difference in wording is not in itself decisive. What must be ascertained is whether the claim as it is newly formulated would transform the subject of the dispute originally brought before the Court under the terms of the Application (see paragraph 69 above).

127. In this regard, the Court notes that, in paragraph 30, subparagraph *(b)*, of the Application, Ukraine submitted that the Russian Federation could not "lawfully" take any action on the basis of its false claims of genocide. In addition, in paragraph 26 of the Application, Ukraine claimed that

> "the Russian Federation's declaration and implementation of measures in or against Ukraine in the form of a 'special military operation' declared on 24 February 2022 on the basis of alleged genocide, as well as the recognition that preceded the military operation, is incompatible with the Convention".

This allegation is repeated in paragraph 29, according to which the actions of the Russian Federation "based on a false claim of genocide [are] incompatible with the Genocide Convention and violat[e] Ukraine's rights".

In asserting that the Russian Federation had acted unlawfully by carrying out actions incompatible with the Convention which violated Ukraine's rights, the Applicant was already challenging in the Application the conformity of the Russian Federation's conduct with its obligations under the Convention and raising the question of the Respondent's responsibility vis-à- vis the Applicant, whose rights had purportedly been violated.

Lastly, by presenting claims for reparation under submissions *(e)* and *(f)* of its Application (see paragraph 24 above), Ukraine was necessarily calling into question the lawfulness of the actions undertaken by the Russian Federation.

128. It thus follows from the foregoing that, from the very institution of the proceedings, Ukraine was not merely requesting that the Court declare that it had not committed genocide but was also seeking a finding that the actions of the Russian Federation were incompatible with its obligations under the Convention. It is true that the submissions at the end of the Application were not without a certain ambiguity. It is also true that, while Article I of the Convention was referred to several times in the Application, there was no mention of Article IV. However, in the opinion of the Court, the submissions in the Memorial clarify Ukraine's claims and make them more specific without transforming the subject of the dispute such as it was submitted to the Court in the Application instituting proceedings.

129. The Court concludes that the submissions set out in paragraph 178, subparagraphs *(c)* and *(d)*, of the Memorial are admissible, and that, in this regard, the third preliminary objection raised by the Respondent is unfounded and must be rejected.

130. Consequently, the Court will examine the question of its jurisdiction *ratione materiae* to entertain the second aspect of the dispute on the basis of the Applicant's submissions as formulated in subparagraphs *(c)* and *(d)* of paragraph 178 of the Memorial.

B. JURISDICTION *RATIONE MATERIAE* OF THE COURT UNDER THE GENOCIDE CONVENTION (SECOND PRELIMINARY OBJECTION)

131. The Russian Federation contends that the Court lacks jurisdiction *ratione materiae* to entertain the claims in submissions *(c)* and *(d)* presented by Ukraine at the end of its Memorial. According to the Respondent, these claims fall outside the scope *ratione materiae* of the Genocide Convention and, consequently, do not fall within the scope of its compromissory clause. The Russian Federation considers that Ukraine does not really expect the Court to declare that the Respondent has breached its obligations under Articles I and IV of the Convention, but rather that the Court declare that the recognition of the "Donetsk People's Republic" and the "Luhansk People's Republic" and the "special military operation" are unlawful under the Charter of the United Nations and customary international law. However, in the view of the Russian Federation, the rules of international law relating to the recognition of States and the use of force are in no way incorporated in the Convention, in particular Articles I and IV. According to the Respondent, Ukraine erroneously attempts to read into the Convention certain implicit obligations, such as an obligation, for a State party, to act within the limits of international law and an obligation not to "misapply" or "abuse" the Convention. Such an approach would have the effect of incorporating into the Convention an indefinite number of other rules of international law and unduly expanding the Court's jurisdiction *ratione materiae* under Article IX. According to the Respondent, it would be inconsistent with Article IX to broaden the Court's jurisdiction under that provision to cover issues that are not regulated by the Convention, as Ukraine seeks to do.

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132. Ukraine argues, on the contrary, that the Court has jurisdiction to entertain claims that the Russian Federation has violated Articles I and IV of the Convention. According to the Applicant, these provisions do not authorize but rather prohibit one contracting party from harming another under the guise of preventing and punishing a genocide that has been alleged without basis. The Applicant adds that a State party to the Convention which takes action to prevent and punish the crime of genocide must do so in good faith and without abuse. It concludes that an abuse of the Convention constitutes a violation thereof and not merely a violation of a general principle of law outside the Convention.

133. Ukraine submits that, in the present case, the Russian Federation has acted for the stated purpose of bringing a genocide to an end and punishing the perpetrators; but that it has not done so in good faith, that it has done so abusively and by going beyond the limits of international law. Consequently, according to the Applicant, the Russian Federation has violated the undertakings it made under the Convention, since those undertakings involved an obligation to take measures to prevent and punish genocide in good faith, without abuse and within the limits of international law. Ukraine concludes therefrom that the ensuing dispute between the Parties falls squarely within the jurisdiction of the Court under the compromissory clause; it is immaterial whether or not the Parties also have another dispute under the Charter of the United Nations.

*

134. In interpreting Article IX of the Genocide Convention, the intervening States argue in general that any dispute relating to the Convention falls within the scope of Article IX, irrespective of whether the parties also have a dispute concerning rights and obligations under other rules of international law. They contend that a dispute regarding the content or implementation of the obligation to prevent or punish genocide is necessarily a dispute about the "interpretation, application or fulfilment" of Articles I and IV of the Convention, and therefore falls within the Court's jurisdiction under Article IX.

* *

135. According to its well-established jurisprudence, when the Court is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State party for the breach of obligations under the treaty, in order for the Court to have jurisdiction, it is not sufficient for the applicant to claim an alleged violation of the treaty and for the respondent to contest it. The Court must also "ascertain whether the violations of the [t]reaty . . . pleaded . . . do or do not fall within the provisions of the [t]reaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain, pursuant to" the compromissory clause (*Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16; see also *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 308, para. 46). In some of its decisions, particularly among its most recent, the Court has expressed this same requirement in slightly different terms, by stating that it had jurisdiction only if "the acts of which the applicant complains fall within the provisions of the treaty containing the compromissory clause" (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 31-32, para. 75; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 584, para. 57; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 23, para. 36; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018 (II)*, p. 414, para. 18; *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Provisional Measures, Order of 7 December 2016, I.C.J. Reports 2016 (II)*, p. 1159, para. 47). The Court has also had occasion to ascertain "whether . . . the . . . claims [fall] within the scope of" a convention (*Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar* v. *United Arab Emirates), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 94, para. 72).

136. All the formulations quoted above have the same meaning: it must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty.

This may require, to a certain extent, that the Court interpret the provisions which have allegedly been violated and which define the scope of the treaty (*Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 32, para. 75).

137. In the present case, the acts complained of by Ukraine are, in essence, that the Russian Federation falsely accused the Applicant of committing genocide and invoked the Convention in bad faith in order to justify, in an abusive manner, its actions, particularly its military actions, which go beyond the limits of international law. According to Ukraine, these acts constitute violations of obligations under the Convention. More specifically, the obligations allegedly violated are those under Articles I and IV of the Convention.

138. Article I of the Convention reads as follows: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

Article IV, for its part, provides that "[p]ersons committing genocide or any of the other acts enumerated in article III shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals".

139. The Court is of the view that, even assuming that the acts of the Russian Federation complained of by Ukraine are fully established — which is not for the Court to decide at this stage — they would not constitute a violation of obligations under Articles I and IV cited above.

140. Ukraine does not claim that the Russian Federation refrained from taking any measure to prevent a genocide or to punish persons who had committed such a genocide. On the contrary, the Applicant claims that the genocide invoked by the Russian Federation did not occur and the allegation was made in bad faith. The purpose of the first aspect of Ukraine's legal action is to request a finding by the Court that there is no credible evidence that it has committed any such genocide (see Part III of the present Judgment above). In these circumstances, it is difficult to see how the conduct of the Russian Federation complained of by Ukraine could constitute a violation, by the Respondent, of its obligations to prevent genocide and punish the perpetrators.

141. It is true that Ukraine seeks to demonstrate that the acts of which it accuses the Russian Federation constitute violations of obligations under Articles I and IV of the Convention by relying on two grounds: the first is that the Russian Federation has invoked the Convention in bad faith and implemented its obligations abusively; the second is that the measures it has adopted in invoking the Convention go beyond the limits permitted by international law. Most of the intervening States took the position that, in both situations, the Convention would be violated and, consequently, a claim based on such alleged violations would fall within the jurisdiction *ratione materiae* of the Court under Article IX.
The Court will examine the two arguments put forward by Ukraine below.

142. It is indisputable that "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith" (Article 26 of the Vienna Convention on the Law of Treaties, reflecting customary international law). More generally, the Court has recalled on a number of occasions that the principle of good faith is "a well-established principle of international law" (*Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 296, para. 38) and "one of the basic principles governing the creation and performance of legal obligations" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94, citing *Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 268, para. 46; *Nuclear Tests (New Zealand* v. *France), Judgment, I.C.J. Reports 1974*, p. 473, para. 49).

However, the Court has also stated that the principle of good faith "is not in itself a source of obligation where none would otherwise exist" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94). What matters, for the purpose of establishing the Court's jurisdiction *ratione materiae* when it is seised of an application alleging the respondent's violation of an obligation under a treaty, is whether the respondent State could have violated a specific obligation incumbent upon it and whether the alleged violation falls within the scope of the Court's jurisdiction. In the present case, even if the Russian Federation had, in bad faith, alleged that Ukraine committed genocide and taken certain measures against it under such a pretext — which the Respondent contests — this would not in itself constitute a violation of obligations under Articles I and IV of the Convention.

143. It is no more convincing to argue that the Respondent's conduct amounts to an "abuse of right" or, as Ukraine sometimes put it, an "abuse of the Convention". It is certainly not consistent with the principle of good faith to invoke a treaty abusively, by claiming that there is a specific situation falling within its scope when it is clearly not the case, or by deliberately interpreting the treaty incorrectly for the sole purpose of justifying a given action. However, while such an abusive invocation will result in the dismissal of the arguments based thereon, it does not follow that, by itself, it constitutes a breach of the treaty. In the present case, even if it were shown that the Russian Federation had invoked the Convention abusively (which is not established at this stage), it would not

follow that it had violated its obligations under the Convention, and in particular that it had disregarded the obligations of prevention and punishment under Articles I and IV.

144. As regards the Applicant's argument that the actions undertaken by the Russian Federation on the basis of its false allegation of genocide go beyond the limits of international law, this raises questions that, in the opinion of the Court, do not fall within the scope *ratione materiae* of the Convention.

145. Ukraine and some of the intervening States rely in this respect on the *dictum* in paragraph 430 of the Judgment on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* cited above. The Court stated in that Judgment that the obligation to prevent genocide requires States parties to "employ all means reasonably available to them, so as to prevent genocide so far as possible", while adding that "it is clear that every State may only act within the limits permitted by international law" (*Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430).

146. However, it does not follow from the foregoing that, if a State seeks to fulfil its obligation of prevention under the Convention through an act that is in breach of international law, such action by itself constitutes a violation of the Convention. The Court did not intend, by its 2007 ruling, to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force. It sought to clarify that a State is not required, under the Convention, to act in disregard of other rules of international law. Nor can a State avail itself of the obligation of prevention under the Convention to act beyond the limits permitted elsewhere by international law. Those limits are not defined by the Convention itself but by other rules of international law.

Thus, in the present case, assuming — for the sake of argument — that by recognizing the DPR and LPR and by launching the "special military operation", the Russian Federation sought to implement its obligations under the Convention, and that the acts in question are contrary to international law, it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force. These matters are not governed by the Genocide Convention and the Court does not have jurisdiction to entertain them in the present case.

147. In conclusion, the acts complained of by Ukraine in submissions *(c)* and *(d)* of the Memorial, from whichever point of view they are considered, are not capable of constituting violations of the provisions of the Convention relied on by Ukraine. These acts do not fall within the provisions of the Convention and, consequently, submissions *(c)* and *(d)*, which constitute the second aspect of the dispute brought before the Court by Ukraine, fall outside the scope of the compromissory clause of Article IX.

It follows that the second preliminary objection raised by the Russian Federation must be upheld.

148. In view of the foregoing conclusion, it is not necessary for the Court to examine the other objections raised by the Respondent inasmuch as they relate to the second aspect of the dispute.

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* *

149. In summary, the Court considers that the Russian Federation's second preliminary objection, according to which submissions *(c)* and *(d)* in paragraph 178 of Ukraine's Memorial do not fall within the Court's jurisdiction *ratione materiae*, must be upheld.

However, the Court considers that it must reject: the first preliminary objection, based on the lack of jurisdiction of the Court to entertain the totality of Ukraine's submissions because of the alleged non-existence of a dispute; the third preliminary objection, based on the inadmissibility of the submissions presented in the Memorial on the ground that these submissions are allegedly new and transform the subject of the dispute; the fourth preliminary objection, based on the inadmissibility of Ukraine's submissions because of the alleged lack of practical effect of a judgment on the merits; the fifth preliminary objection, based on the inadmissibility of a request for a declaration that the Applicant

did not breach its obligations under the Convention; and the sixth preliminary objection, based on the inadmissibility of the Application on the ground that it allegedly constitutes an abuse of process.

It follows from the foregoing that submissions *(c)* and *(d)* in paragraph 178 of Ukraine's Memorial do not fall within the jurisdiction of the Court and that the Court may not deal with them on the merits, while submission *(b)* in paragraph 178 of Ukraine's Memorial does fall within the jurisdiction of the Court and that the claim contained therein is admissible. At the next stage of the proceedings, the Court will therefore examine this claim on the merits.

150. The Court recalls, as it has on several occasions in the past, that there is a fundamental distinction between the question of the acceptance by States of the Court's jurisdiction and the conformity of their acts with international law. States are always required to fulfil their obligations under the Charter of the United Nations and other rules of international law. Whether or not they have consented to the jurisdiction of the Court, States remain responsible for acts attributable to them that are contrary to international law (see, for example, *Legality of Use of Force (Serbia and Montenegro* v. *Belgium), Preliminary Objections, Judgment, I.C.J. Reports 2004 (I)*, p. 328, para. 128; see also *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo* v. *Rwanda), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006*, pp. 52-53, para. 127).

*

* *

151. For these reasons,

THE COURT,

(1) By fifteen votes to one,

Rejects the first preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian;

(2) By twelve votes to four,

Upholds the second preliminary objection raised by the Russian Federation, which relates to submissions *(c)* and *(d)* in paragraph 178 of the Memorial of Ukraine;

IN FAVOUR: *Vice-President* Gevorgian; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Bhandari, Salam, Iwasawa, Nolte, Brant; *Judge* ad hoc Daudet;

AGAINST: *President* Donoghue; *Judges* Sebutinde, Robinson, Charlesworth;

(3) By fifteen votes to one,

Rejects the third preliminary objection raised by the Russian Federation relating to submission *(b)* in paragraph 178 of the Memorial of Ukraine;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian;

(4) By fourteen votes to two,

Rejects the third preliminary objection raised by the Russian Federation relating to submissions *(c)* and *(d)* in paragraph 178 of the Memorial of Ukraine;

IN FAVOUR: *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *President* Donoghue; *Vice-President* Gevorgian;

(5) By fourteen votes to two,

Rejects the fourth preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judge* Bennouna;

(6) By thirteen votes to three,

Rejects the fifth preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna;

(7) By fifteen votes to one,

Rejects the sixth preliminary objection raised by the Russian Federation;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian;

(8) By fifteen votes to one,

Finds that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain submission *(b)* in paragraph 178 of the Memorial of Ukraine;

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Abraham, Bennouna, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian;

(9) By thirteen votes to three,

Finds that submission *(b)* in paragraph 178 of the Memorial of Ukraine is admissible.

IN FAVOUR: *President* Donoghue; *Judges* Tomka, Yusuf, Xue, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth, Brant; *Judge* ad hoc Daudet;

AGAINST: *Vice-President* Gevorgian; *Judges* Abraham, Bennouna.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this second day of February, two thousand and twenty-four, in thirty-five copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of Ukraine, the Government of the Russian Federation, and the Governments of Australia, the Republic of Austria, the Kingdom of Belgium, the Republic of Bulgaria, Canada, the Republic of Croatia, the Republic of Cyprus, the Czech Republic, the Kingdom of Denmark, the Republic of Estonia, the Republic of Finland, the French Republic, the Federal Republic of Germany, the Hellenic Republic, Ireland, the Italian Republic, the Republic of Latvia, the Principality of Liechtenstein, the Republic of Lithuania, the Grand Duchy of Luxembourg, the Republic of Malta, the Kingdom of the Netherlands, New Zealand, the Kingdom of Norway, the Republic of Poland, the Portuguese Republic, Romania, the Slovak Republic, the Republic of Slovenia, the Kingdom of Spain, the Kingdom of Sweden, and the United Kingdom of Great Britain and Northern Ireland, respectively.

(Signed) Joan E. DONOGHUE,

President.

(Signed) Philippe GAUTIER,

Registrar.

President DONOGHUE appends a separate opinion to the Judgment of the Court; Vice-President GEVORGIAN appends a dissenting opinion to the Judgment of the Court; Judge TOMKA appends a declaration to the Judgment of the Court; Judge ABRAHAM appends a partially dissenting opinion to the Judgment of the Court; Judge BENNOUNA appends a declaration to the Judgment of the Court; Judges SEBUTINDE and ROBINSON append a joint dissenting opinion to the Judgment of the Court; Judges IWASAWA and CHARLESWORTH append separate opinions to the Judgment of the Court; Judge BRANT appends a declaration to the Judgment of the Court; Judge *ad hoc* DAUDET appends a separate opinion to the Judgment of the Court.

(Initialled) J.E.D.

(Initialled) Ph.G.

DOI:10.1017/ilm.2024.24

Separate opinion of President Donoghue

Second aspect of the dispute — Ukraine transformed subject of the dispute originally brought before the Court — Inadmissibility of claims as formulated in the Memorial — Court should have accepted jurisdiction ratione materiae *over the claims as formulated in the Application.*

1. I submit this separate opinion to explain my votes in relation to subparagraphs (2) and (4) of the operative paragraph of today's Judgment.

2. In the Application, Ukraine asks the Court to adjudge and declare that the Russian Federation falsely claimed that acts of genocide were committed in the Luhansk and Donetsk oblasts of Ukraine (corresponding to what the Court calls the "first aspect of the dispute"). The Application also contains a request for the Court to adjudge and declare that the "special military operation" that the Russian Federation initiated on 24 February 2022, as well as the Russian Federation's recognition of the independence of the "Donetsk People's Republic" (hereinafter the "DPR") and the "Luhansk People's Republic" (hereinafter the "LPR"), were based on this false claim of genocide and thus had no basis in the Convention (corresponding to what the Court calls the "second aspect of the dispute").

3. I believe that the Court has jurisdiction *ratione materiae* with respect to both aspects of the dispute, which are closely related. I therefore voted "no" in relation to subparagraph (2) of the operative paragraph, pursuant to which the Court upheld the objection to the Court's jurisdiction *ratione materiae*, as it pertains to the second aspect of the dispute.

4. I return below to the reasons why I consider that the Court has jurisdiction *ratione materiae* in relation to the second aspect of the dispute. Before that, I explain that I believe that the question of the Court's jurisdiction *ratione materiae* should have been examined on the basis of the claims set out in Ukraine's Application, not with reference to the alleged "violations" of the Convention that Ukraine asserted in the submissions contained in its Memorial. In brief, I consider that Ukraine's Memorial so significantly changed the substance of Ukraine's claims as to render inadmissible the claims as presented in the submissions included in the Memorial. That is why I voted against subparagraph (4) of the operative paragraph, in which the Court rejected the third preliminary objection of the Russian Federation, relating to submissions *(c)* and *(d)* in paragraph 178 of the Memorial of Ukraine.

I. The submissions in Ukraine's Memorial fundamentally change the claims forming part of the second aspect of the dispute

5. I consider that the Court should have found inadmissible the claims that form part of the second aspect of the dispute, as they are set out in the submissions in Ukraine's Memorial, because, in revising its claims, Ukraine has "transform[ed] 'the subject of the dispute originally brought before [the Court]'"(*Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo), Merits, Judgment, I.C.J. Reports 2010 (II)*, p. 656, para. 39).

6. The request for relief contained in Ukraine's Application reads as follows (in relevant part):

> "Ukraine respectfully requests the Court to:
>
> *(a)* Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.
>
> *(b)* Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.
>
> *(c)* Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

. . . . . .

(f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide." (Application, para. 30).

7. In the Memorial, Ukraine's submissions include the following:

"For the reasons set out in this Memorial, Ukraine respectfully requests the Court to:

. . . . . .

(b) Adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention.

(d) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called "Donetsk People's Republic" and "Luhansk People's Republic" on 21 February 2022 violates Articles I and IV of the Genocide Convention.

. . . . . .

(f) Order full reparation for all harm suffered by Ukraine as a consequence of the Russian Federation's use of force in the territory of Ukraine that it commenced on 24 February 2022, in an amount to be quantified in a separate phase of these proceedings." (Memorial, paras. 178 and 179).

8. I agree with the Court (Judgment, para. 70) that the difference in the formulation of Ukraine's claims does not in itself render inadmissible the claims as formulated in the Memorial. However, I do not agree that the Memorial "merely clarifies" the claims presented in the Application (Judgment, para. 71).

9. As the Court notes, the relief sought in the Application is not without a certain ambiguity (Judgment, para. 128). It is therefore necessary to interpret the request for relief contained in the Application, as the Court has scope to do (see *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 635, para. 43), in order to compare the relief sought therein to the corresponding submissions in the Memorial. Consistent with the Court's jurisprudence, I have taken into account not only the formulation of subparagraph *(b)* in the paragraph of the Application containing the request for relief, but also other parts of the Application.

10. The relief sought in the Application does not include a request that the Court find the Russian Federation to have violated any obligations under the Genocide Convention. The absence of such a formulation is notable because an allegation of a violation is usually the centrepiece of an application in which jurisdiction is predicated on a compromissory clause. Ukraine's own application in *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation)* is one example of such a case. Moreover, in the present Application, Ukraine states that its pleadings in this other case document the Russian Federation's "sustained violations of its international obligations" that it calls "serious breaches of international law" (Application, para. 16).

11. In the present Application, however, instead of alleging that the Russian Federation violated obligations under the Convention, the request for relief adopts an unusual formulation. It asks the Court to adjudge and declare that the Russian Federation "cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of [the Russian Federation's] false claims of genocide". It also asks the Court to adjudge and declare that the "special military operation" and the recognition of the

independence of the "so-called 'Donetsk People's Republic' and 'Luhansk People's Republic'" are "based on a false claim of genocide" and therefore have "no basis" in the Genocide Convention (Application, para. 30 *(b)-(d)*).

12. The other parts of the Application shed light on the meaning of these elements of the request for relief. In the "Facts" section of its Application, Ukraine alleges that the Russian Federation has launched "a full-scale invasion against Ukraine, based on false and pretextual allegations of genocide in Ukraine's Luhansk and Donetsk oblasts" (Application, para. 16). When it sets out the "Legal Grounds" for its claims, Ukraine asserts that the duty to prevent and punish genocide enshrined in Article I of the Convention must be performed in good faith and must not be abused and that a Contracting Party may not subject another Contracting Party to unlawful action, including armed attack, especially when it is based on a wholly unsubstantiated claim of preventing and punishing genocide (Application, para. 27).

13. The Application further states (para. 29) that the "special military operation" and the Russian Federation's "acts of recognition" are "based on a false claim of genocide" and are "incompatible with the Genocide Convention". It states that these actions "violate[] Ukraine's rights" without pointing to any rights of Ukraine under the Convention or any corresponding obligations of the Russian Federation under the Convention.

14. A party is not required to set out its detailed legal theories in an application. However, bearing in mind that States are obligated under international law to interpret and to perform treaties in good faith (see *Vienna Convention on the Law of Treaties*, Arts. 26 and 31, reflecting customary international law), in line with the principle of *pacta sunt servanda*, the Application can be understood to call for a decision by the Court both on the interpretation of the Genocide Convention that Ukraine alleges to have been held by the Russian Federation and on the Respondent's alleged application of the Convention. Nowhere, however, does the Application ask the Court to decide whether the Russian Federation violated the Convention when it initiated the "special military operation" and recognized the independence of the DPR and LPR.

15. In the Order of 16 March 2022, the Court found, prima facie, that it had jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 223, para. 48). In that Order, the Court identified a divergence of views between the Parties

> "as to whether certain acts allegedly committed by Ukraine in the Luhansk and Donetsk regions amount to genocide in violation of its obligations under the Genocide Convention, as well as whether the use of force by the Russian Federation for the stated purpose of preventing and punishing alleged genocide is a measure that can be taken in fulfilment of the obligation to prevent and punish genocide contained in Article I of the Convention" *(ibid*., pp. 222-223, para. 45).

There is no suggestion that the Court understood the second aspect of the dispute to concern alleged violations by the Russian Federation of its obligations under the Genocide Convention.

16. The submissions in the Memorial, on the other hand, expressly allege, *inter alia*, that the Russian Federation's use of force in and against Ukraine violates Articles I and IV of the Genocide Convention. In the Memorial, Ukraine also revises the reparations that it seeks, seeking "full reparation for all harm . . . as a consequence of the Russian Federation's use of force in the territory of Ukraine . . . in an amount to be quantified in a separate phase of these proceedings".

17. Taken together, these changes in the relief requested by Ukraine do not simply clarify the claims set out in the Application. The submissions in the Memorial instead expand the scope of Ukraine's claims and transform the subject of the dispute originally brought before the Court.

18. The significance of these changes, as I see it, lies in the relationship between the substance of a claim on the merits and the form of reparation that would be appropriate if the claim were successful. Taken together, Articles 2 and 34 of the Articles on the Responsibility of States for Internationally Wrongful Acts establish that full reparation is required for the injury caused by a breach of an international obligation that is attributable to a State. If the case were to proceed to the merits on the submissions in the Memorial, a decision by the Court that the Russian Federation

had violated obligations imposed on it by the Genocide Convention would provide a clear foundation for reparations, potentially including compensation, which Ukraine expressly seeks in the Memorial (Memorial, paras. 169-170). If a State has violated a treaty obligation and the other conditions for awarding compensation are met (proof of damage and a sufficient causal link), compensation is an available remedy.

19. If the claims that form part of the second aspect of the dispute were limited to those presented in the Application, however, the Court would not be asked to find that the Russian Federation had violated obligations under the Convention. Absent a finding on the merits that the Respondent had violated obligations under the Convention, the basis for awarding compensation (assuming that Ukraine had prevailed on the merits) would be far less evident. In such a situation, the relief granted to Ukraine might well have been limited to a declaratory judgment addressing the question whether the Respondent had interpreted and applied the Convention in good faith.

20. By recasting its claims on the merits as violations of obligations under the Genocide Convention, Ukraine more clearly laid a foundation for the claim for reparations that it seeks in the Memorial, including compensation. The Court could award reparations in relation to the second aspect of the dispute, however, only if jurisdiction and admissibility were established and if the Court were to accept on the merits the claims forming part of the second aspect of the dispute. I therefore turn next to the question of jurisdiction *ratione materiae* in relation to those claims.

II. THE COURT HAS JURISDICTION *RATIONE MATERIAE* OVER THE CLAIMS THAT FORM PART OF THE SECOND ASPECT OF THE DISPUTE, AS THEY WERE PRESENTED IN THE APPLICATION

21. I first comment on the reasoning that leads the Court to find that it lacks jurisdiction *ratione materiae* in relation to the second aspect of the dispute and then consider the scope of the Court's jurisdiction *ratione materiae* to adjudicate the relevant claims as set out in the Application (as distinct from those presented in the Memorial).

22. In setting out its reasons for finding that it lacks jurisdiction *ratione materiae* in relation to the second aspect of the dispute, the Court states that "the acts complained of by Ukraine are, in essence, that the Russian Federation falsely accused the Applicant of committing genocide and invoked the Convention in bad faith in order to justify, in an abusive manner, its actions" and that "[a]ccording to Ukraine, these acts constitute violations of obligations under the Convention" (Judgment, para. 137). The Court then concludes that the acts of which Ukraine complains are not capable of constituting violations of the provisions of the Convention relied on by Ukraine (Judgment, para. 147). As a result, the Court concludes that it lacks jurisdiction *ratione materiae* in relation to the second aspect of the dispute.

23. I agree with the Court that the acts about which Ukraine complains are not capable of constituting violations of the Convention. However, the Court's jurisdiction *ratione materiae* is not limited to addressing alleged violations of the Convention; Article IX gives the Court jurisdiction to settle disputes relating to "the interpretation, application or fulfilment" of the Convention.

24. I have some doubt that Ukraine, by revising the formulation of its claims in the Memorial, limited its case to alleged violations of the Convention and abandoned its claims that the Russian Federation had not interpreted and applied the Convention in good faith. In the oral proceedings, Ukraine continued to maintain that the Court's jurisdiction on the basis of Article IX of the Convention would permit it to settle a dispute over whether a Contracting Party applied and fulfilled the Convention in good faith (CR 2023/14, p. 76, paras. 39-40 (Thouvenin)). Even accepting that the question of the Court's jurisdiction *ratione materiae* should have been addressed on the basis of the claims as set out in the Memorial, there may have been scope for the Court to consider, at the merits phase, the questions whether the Russian Federation had interpreted and applied the Convention in good faith, which are distinct from the question whether the Russian Federation violated its obligations under the Convention.

25. The analysis of the Court's jurisdiction is different if it proceeds on the basis of the claims that form part of the second aspect of the dispute as they were set out in the Application. Those claims call for the Court to decide whether the Russian Federation interpreted and applied the Convention in good faith. Thus formulated, the claims of Ukraine plainly fall within the scope *ratione materiae* of the Convention.

26. Moreover, it cannot be concluded at this stage that the claims as set out in the Application would inevitably require the Court to examine the lawfulness of the use of force by the Russian Federation, a question that falls

outside the Court's jurisdiction *ratione materiae*. If the Court were to find the allegations of the Russian Federation to be false, it would instead consider the Parties' arguments about the interpretation and application of the Convention, such as Ukraine's argument that a State party is required to exercise due diligence before using force against another State party in order to prevent and punish genocide (CR 2023/14, p. 77, para. 41 (Thouvenin)). On the other hand, if the Court were to reject Ukraine's contention that the allegations of genocide were false, the Court would have no basis to pronounce on the lawfulness of the conduct of the Russian Federation. If it did so, it would be answering a question not presented to it, which would amount to an *ultra petita*.

27. In closing, I offer two additional comments on today's Judgment.

28. First, I call attention to the limited scope of today's Judgment. Ukraine filed its Application on 26 February 2022, a few days after the Russian Federation began its "special military operation", invoking the Genocide Convention as the basis for the Court's jurisdiction. Today the Court does not decide whether the "special military operation" is consistent with the rights and obligations of the Russian Federation under the Genocide Convention or any other rule of international law. In relation to the "special military operation" and the Russian Federation's recognition of the independence of the DPR and LPR, the Court decides only that it lacks jurisdiction under the Genocide Convention to address the claims of Ukraine.

29. Second, I note that the Court's decision that it lacks jurisdiction *ratione materiae* over the claims forming part of the second aspect of the dispute means that the Court will address only the legality of Ukraine's conduct when the case proceeds to the merits. It will take no decision on the conduct of the Russian Federation that, according to Ukraine, was taken on the basis of false accusations of genocide. The conduct of both Parties, and their respective interpretations and applications of the Convention, would have been before the Court at the merits phase if the Court had instead found that it had jurisdiction over the more limited claims set out in the Application. I regret that the Court did not proceed on that basis.

(Signed)
Joan E. DONOGHUE.

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DISSENTING OPINION OF VICE-PRESIDENT GEVORGIAN

Agreement with the Court's decision to dismiss the second aspect of Ukraine's claim for lack of ratione materiae *jurisdiction — The Court's assessment of the existence and scope of the dispute at the time of the Application is problematic — "Reverse compliance" complaints are not compatible with the Court's judicial function and undermine the object and purpose of the Genocide Convention — The Court fails to engage in a substantive analysis of the Russian Federation's abuse of process argument.*

I. Introduction

1. At the outset, it is important to reiterate the fundamental principle that the Court's jurisdiction emanates from consent[1]. No State can, without its consent, be compelled to submit its disputes to the Court. Neither Ukraine nor the Russian Federation accept the Court's jurisdiction as compulsory under Article 36 (2) of the Statute. Therefore, the only form of consent to binding judicial settlement by the Court that the two States have expressed can be found in compromissory clauses included in specific treaties, which allow the Court to rule on disputes relating to that — and only to that — specific treaty. In the present case, Ukraine based its claim exclusively on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or "Convention"). Article IX of the Convention states that

> "[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

2. Ukraine's formal submissions in this case have been divided by the Court into two aspects. The first aspect comprises Ukraine's request for the Court to declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine. The second aspect of Ukraine's claim is the submission that the Russian Federation, by recognizing the "Donetsk People's Republic" and "Luhansk People's Republic", and by using force against Ukraine, has breached Articles I and IV of the Convention.

3. As I have already pointed out in my declaration on the Court's Order on provisional measures of 16 March 2022, the present case constitutes an attempt by Ukraine to circumvent the limits of the Court's jurisdiction and to undermine the principle of consent[2]. While Ukraine's submissions seem ostensibly related to the Genocide Convention, it is evident that the true aim of these submissions is to bring before the Court matters not regulated by the Convention, namely the legality of the use of force by the Russian Federation against Ukraine. I therefore appreciate that, in today's decision, the Court has rejected the notion that the compromissory clause of the Convention provides the Court with jurisdiction to rule on alleged breaches of obligations of international law that are extrinsic to the Convention, including the rules governing the use of force. As a result, the Court dismissed the second aspect of Ukraine's claim, and therefore the majority of Ukraine's submissions, as outside the Court's jurisdiction *ratione materiae*. I concur with this decision.

4. However, the majority of judges also decided to uphold the Court's jurisdiction over the first aspect of Ukraine's claim, namely the request to "[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine". I cannot support this finding for two main reasons: first, I am of the opinion that Ukraine has not adequately demonstrated the existence of a dispute in relation to both aspects of its claims at the time it instituted the present proceedings. And second, I am convinced that the admission of Ukraine's request for a "declaration of compliance" (or "reverse compliance" complaint) is incompatible with the Court's judicial function in contentious cases and also compromises the object and purpose of the Genocide Convention. Therefore, while I agree with the Court's decision to uphold the second preliminary objection, I am convinced that the Russian Federation's first and fifth preliminary objection should have equally been upheld.

II. Existence and scope of the dispute in the present case

5. According to the Court's jurisprudence, in order to establish the existence of a dispute, the evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court[3]. Moreover, the respondent must have been aware, or could not have been unaware, that its views were "positively opposed" by the applicant[4]. Finally, for the Court to have jurisdiction, the "dispute must in principle exist at the time the Application is submitted to the Court"[5].

6. The present Judgment concludes that there was "on the date of the filing of the Application, a disagreement on the question whether genocide attributable to Ukraine had been, or was being, committed, in the eastern part of its territory"[6]. The Judgment draws this conclusion mainly from two statements, namely a speech made by the President of the Russian Federation on national television, which contained a generic reference to victims of genocide, as well as a statement by the Representative of the Russian Federation to the United Nations, who made a similarly vague reference[7]. While it is correct that, in principle, the Court may take statements made in multilateral fora into account[8], the Court has never established the existence of a dispute based exclusively on statements made in such fora, or to a domestic audience.

7. To overcome this deficiency, the Judgment also refers to the so-called "Investigative Committee" of the Russian Federation, which was tasked, *inter alia*, with the investigation of persons in relation to their individual criminal responsibility for the crime of genocide[9]. However, the apparent dispute identified by the Court is about the commission of genocide "attributable to Ukraine", in other words, the State responsibility of Ukraine for acts of genocide. Moreover, as the Court has previously noted, in assessing statements by a party for the purpose of establishing a dispute, it will pay special attention to "the author of the statement or document, their intended or actual addressee, and their content"[10]. In the present Judgment, the Court equally considered whether the relevant statements mentioned above were issued by organs that had the authority to represent the Russian Federation in international relations[11]. The Judgment fails to mention, however, that the Investigative Committee had no such authority. Accordingly, the activities of the Investigative Committee, and Ukraine's reaction thereto, are of little evidentiary value in relation to the existence of a dispute over Ukraine's State responsibility under the Genocide Convention.

8. Finally, the Judgment refers to the statement of 26 February 2022, in which the Ministry of Foreign Affairs of Ukraine denounced "Russia's false and offensive allegations of genocide"[12]. This statement was issued only hours before Ukraine filed its Application before the Court. While the Court has found in previous cases that "positive opposition" of claims can be established by inference or silence where a response is called for[13], such inference cannot be drawn without giving the opposite party any opportunity at all to react before filing a case. The Judgment merely notes that the "specific circumstances of the case" allowed Ukraine to seise the Court "without further delay"[14]. However, it fails to mention what exactly these "specific circumstances" are and why they somehow justify an unprecedented relaxation of legal standards concerning the existence of a dispute. One can assume that the Court refers to the fact that an armed conflict had emerged between the two States. However, cases taking place in the context of ongoing armed hostilities are neither new nor special in the Court's jurisprudence. Indeed, in comparable cases, the Court did not consider that hostilities affect the criteria necessary to establish the existence of a dispute[15].

9. For these reasons, I believe the Russian Federation's first preliminary objection should have been upheld.

III. Admissibility of "non-violation" or "reverse compliance" claims

10. I am also unable to join the majority in relation to another essential aspect of today's decision. As mentioned above, the Court upheld its jurisdiction over Ukraine's request to declare that there is no credible evidence that acts of genocide attributable to Ukraine took place in the Donbas. In doing so, the Court espoused a concept of a "non-violation" or "reverse compliance" complaint that lacks support in the Court's jurisprudence. In the following paragraphs, I will explain why I cannot agree with this finding.

11. At the outset, it bears emphasizing that this is an extremely unusual claim that has no precedent in the Court's jurisprudence. As the Judgment correctly concludes, the two cases discussed by the Parties, *US Nationals in*

Morocco and *Lockerbie*, are not apposite and provide no guidance on the admissibility of the present claim[16]. This is thus the first time that this Court decides on this issue, and in my view it has not decided correctly.

12. I believe this claim finds no more support in the Genocide Convention's letter or spirit. First, I do not agree that the terms "fulfilment", "responsibility of *a* State" or "*any* of the parties to the dispute" in Article IX contain any indication about the admissibility of requests for a declaration of compliance under the Genocide Convention, like the Court suggests[17]. In particular, the aim of including the phrase "at the request of *any* of the parties to the dispute" was simply to allow the unilateral seising of the Court by the applicant, and thus clarify that the case need not be brought with the agreement of both parties, as acceptance of Article IX expresses the parties' advance consent to the Court's jurisdiction. This position is corroborated by the Convention's *travaux préparatoires*. The possibility of a reverse compliance request was simply not considered during the negotiation of the Convention. In fact, the prototypical example of a case brought under the Convention's compromissory clause was that of a State referring a case to the Court against another State when genocide *was* being committed[18].

13. Moreover, Article IX, like any other treaty provision, must be interpreted in light of the treaty's object and purpose[19], that is, in a way that advances the treaty's goals. The Genocide Convention's object and purpose, which is indicated, *inter alia*, in its title[20], is the prevention and punishment of genocide. The compromissory clause must be seen as a mechanism serving those goals of prevention and punishment of genocide by holding States accountable when they may have committed or failed to prevent genocide[21]. The purpose of the Convention, and in particular its Article IX, is not to exculpate States from an allegation of genocide that, according to the applicant, is false. In the present case, Ukraine claims no genocide has occurred. It turns the Genocide Convention on its head when it seeks to use it to establish that there is no genocide to prevent or punish. This use of Article IX in that way cannot serve the Convention's object and purpose.

14. Furthermore, admitting this claim raises issues of judicial propriety. In its fifth preliminary objection, Russia claimed, *inter alia*, that a decision on Ukraine's submission may pre-empt the Russian Federation's right to invoke Ukraine's responsibility under the Convention if and when it considers it appropriate to do so. The Judgment responded to this argument by stating that

> "[i]t suffices for the Court to observe that, whenever a dispute is settled by the Court by way of a judgment, there is a possibility that a future claim is covered by the *res judicata* effect of that judgment. This possibility, however, does not per se provide a basis for finding that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties."[22]

However, due to the principle of *res judicata*, a judgment declaring that there is no credible evidence that Ukraine is responsible for committing genocide in the Donetsk and Luhansk oblasts precludes the Russian Federation from invoking Ukraine's responsibility for such a genocide on the basis of the factual record and time period considered in the original proceedings. If the Russian Federation were to uncover new evidence after that judgment, its only option would be to apply for a revision of the judgment under Article 61 of the Statute. But this option is not equivalent to bringing a new case and subject to very strict temporal conditions. As a result, admitting this claim deprives Russia of the opportunity of proving that acts of genocide have been committed and should not be permissible for reasons of judicial propriety and the equality of parties.

15. The problem is compounded by the fact that the Court has adopted a low threshold for the existence of a dispute in relation to this claim. In the present Judgment, the Court cites political statements made in the context of multilateral fora or addresses to Russian citizens in support of its finding that a dispute existed[23]. I believe the majority fails to appreciate the potential repercussions of admitting a declaration of compliance claim under these circumstances. One can imagine a situation whereby a State official would make good-faith allegations of genocide or other serious human rights violations in multilateral fora in order to ring the alarm bell and provoke a reaction from the international community without necessarily having gathered sufficient evidence to meet the high standard of proof ("fully conclusive" evidence)[24]. Such States could then be prevented from collecting evidence and proving the existence of genocide through the admission of a "reverse compliance" claim leading to a judgment barring any future claims through the force of *res judicata*. This undermines the very object and purpose of the Convention.

16. Finally, I must address the Court's view that the "particular circumstances" in which the "reverse compliance request" was made weigh in favour of its admissibility. The Court here refers to the armed conflict between the Parties as such a "particular" circumstance[25]. Unfortunately, however, the existence of an armed conflict between parties is not an unusual situation. Therefore, I do not believe this is an adequate limiting factor, and I see no reason why it would in this case justify, above all concerns, the admission of a claim completely unprecedented in the Court's jurisprudence.

IV. Abuse of process

17. Finally, I would like to mention that the Court has failed to engage in substance with the Russian Federation's objection based on an alleged "abuse of process". As the Judgment mentions, an abuse of process concerns the question of whether a State has misused the procedure of the Court to such an extent that its case should be rejected at the preliminary phase of the proceedings[26]. As I have mentioned in my declaration on the Order of 5 June 2023, I have serious concerns regarding how the tool of intervention has been utilized in the present case[27]. In particular, I fear that the Court has set a precedent that incentivizes States to orchestrate politically motivated mass interventions.

18. Nevertheless, in today's Judgment, the Court notes that the Respondent failed to demonstrate "exceptional circumstances that would warrant rejecting Ukraine's claim on the ground of abuse of process" without further inquiry into the background of the present mass intervention[28]. While I acknowledge that the Court has never upheld an objection based on abuse of process in the past, I believe that the circumstances of the present case can indeed be categorized as "exceptional". I therefore think the Court should have inquired more seriously into whether such conduct would compromise the sound administration of justice to an extent that might require it to declare an application inadmissible.

19. For these reasons, I respectfully dissent.

(Signed)
Kirill GEVORGIAN.

ENDNOTES

1 *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, p. 101, para. 26; *Monetary Gold Removed from Rome in 1943 (Italy* v. *France, United Kingdom of Great Britain and Northern Ireland, and United States of America), Preliminary Question, Judgment, I.C.J. Reports 1954*, p. 32.

2 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, declaration of Vice-President Gevorgian, p. 234, para. 7.

3 See e.g. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 41; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74.

4 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, p. 850, para. 41.

5 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 502, para. 64; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 634, para. 39; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 442, para. 46.

6 Judgment, para. 47.

7 *Ibid*.

8 *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 2016 (II)*, pp. 849-850, para. 39.

9 Judgment, para. 48.

10 *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 100, para. 63.

11 Judgment, para. 47.

12 Judgment, para. 48.

13 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 507, para. 75; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

14 Judgment, para. 50.

15 See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (II)*, p. 120, para. 113.

16 Judgment, para. 101.

17 Judgment, para. 98.

18 See *Sixth Committee of the General Assembly, Summary records of meeting no. 104, Paris, 13 November 1948* (UN doc. A/C.6/SR.104), p. 444 ("When it became clear that genocide *was being committed*, any party to the convention could refer the matter to the International Court of Justice." Emphasis added.)

19 See Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT). While the VCLT predates the Genocide Convention and is, therefore, not directly applicable, the principles of interpretation enshrined in Article 31 form part of customary international law. See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 510, para. 87; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 598, para. 106; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 109-110, para. 160.

20 See *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 118, para. 39; *Maritime Delimitation in the Indian Ocean (Somalia* v. *Kenya), Preliminary Objections, Judgment, I.C.J. Reports 2017*, p. 31, para. 70; *Certain Norwegian Loans (France* v. *Norway), Judgment, I.C.J. Reports 1957*, p. 24.

21 This is confirmed by the *travaux*. See *Sixth Committee of the General Assembly, Summary records of meeting no. 104, Paris, 13 November 1948* (UN doc. A/C.6/SR.104), p. 444 ("[T]he United Kingdom delegation had felt that provision to refer acts of genocide to the International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide.").

22 Judgment, para. 105.

23 Judgment, paras. 30 and 47.

24 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 74, para. 178.

25 Judgment, para. 109.

26 Judgment, para. 113.

27 *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Declarations of Intervention, Order of 5 June 2023*, declaration of Vice-President Gevorgian, para. 1.

28 Judgment, para. 118.

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Declaration of Judge Tomka

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

1. In its submission *(b)*, as formulated in its Memorial, Ukraine requests the Court to

> "[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine" (Memorial of Ukraine, para. 178, quoted in Judgment, para. 25)

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

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

I. Ukraine's submission

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

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

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

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

5. Let it be observed first that the Parties spent some time discussing a distinct — and arguably antecedent or preliminary — issue: namely whether Ukraine's submission *(b)*, because of its particular features, is inadmissible per se. The Russian Federation has put forward several arguments in support of such a view under the heading of its fifth preliminary objection, which the Court examines and rejects in paragraphs 93 to 109 of the present Judgment. The Russian Federation has focused in particular on two admittedly curious features of Ukraine's submission. One such feature is that the Applicant seeks a declaration by the Court that *it — the Applicant —* did not breach its obligations under the Genocide Convention. For the Respondent, the question whether Ukraine did or did not breach the Convention may be considered only in the framework of an application "brought *against* Ukraine [by another State], not *by* Ukraine"[3]. Another feature identified by the Respondent is that submission *(b)* seeks a "negative declaration" or "negative finding" — namely a declaration by the Court that "the genocide *did not* take place"[4]. For the Russian Federation, this feature alone militates in favour of finding that submission *(b)* is inadmissible.

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

7. The Respondent asserts that the Court may not make a "negative declaration". The Respondent does not explain why this is so. In reality, the Court and its predecessor have found on numerous occasions, in the operative parts of their Judgments, that a party appearing before it had not breached the obligations at issue. In the *"Lotus"* case, the PCIJ held in the operative part of its Judgment that, in assuming jurisdiction over a French subject with

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

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

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

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

11. I would also note that applicants have sometimes asked the Court to make a declaratory judgment concerning their own conduct[15]. Some instances are noted in the Judgment (Judgment, para. 101). By way of illustration, as recently as in *Dispute over the Status and Use of the Waters of the Silala*, the applicant in the case requested a declaration that it did not breach its obligations under international law[16]. True, the Court has not formulated a specific legal criterion concerning the admissibility of such requests (*ibid*.). In the end, when there is a clear opposition of views, it is immaterial which party institutes the proceedings to settle the dispute[17].

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

matters is whether the Court may, in the circumstances, render a declaratory judgment of the kind sought by Ukraine (see paragraph 3 above). This is essentially an issue of admissibility which cannot be determined on any *a priori* basis, but must be considered in light of the circumstances of the particular case.

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

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

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

II. THE BURDEN OF PROOF

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

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

17. The Court has recognized that the principle of *onus probandi incumbit actori* is not an absolute one applicable in all circumstances. It has underlined that "[t]he determination of the burden of proof is in reality dependent on the subject-matter and the nature of each dispute brought before the Court; it varies according to the type of facts which it is necessary to establish for the purposes of the decision of the case"[22]. In particular, when faced with a submission or claim concerning a negative fact, the Court has shown some flexibility in its approach, and, on occasion, reversed or partly reversed the burden of proof such that the applicant would not be alone in shouldering it[23].

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

19. The Court has recognized that there may be circumstances in which the applicant should be allowed a more liberal recourse to inferences of fact in order to prove a negative. In the *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)* case, the Court had before it an allegation by the United States that Nicaragua was involved in arms supply, an allegation which the latter sought to refute. In this context, the Court observed that the evidence offered by Nicaragua had to be assessed "bearing in mind the fact

that, in responding to that allegation, Nicaragua has to prove a negative"[24]. The Court has also recognized that there may be circumstances in which the applicant cannot be required to prove a negative fact. This was the case in *Ahmadou Sadio Diallo*, where the Court had before it a claim by Guinea that its citizen had not been afforded, by a public authority of the Democratic Republic of the Congo (DRC), certain procedural guarantees to which he was entitled. In this context, the Court found it appropriate that neither party be alone in bearing the burden of proof[25]. By contrast, in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia)*, the Court did not find it appropriate to contemplate a reversal of the burden of proof[26]. It considered that it was not for Serbia, as the respondent, to prove a negative fact, such as the absence of facts constituting the *actus reus* of genocide. More recently, in *Armed Activities on the Territory of the Congo*, the Court considered that it was for Uganda to establish, at the reparations phase of the case, that a particular injury alleged by the DRC in Ituri "was *not* caused by Uganda's failure to meet its obligations as an occupying Power"[27]. In other words, the Court in that case placed the burden of proving a negative squarely on the respondent.

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

(Signed)
Peter TOMKA.

ENDNOTES

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

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

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

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

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

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

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

8 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 237, para. 471 (2) (emphasis added).

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

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

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

12 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, pp. 237-238, para. 471 (2), (3), and (4).

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

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

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

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

des mesures réglementaires prises par les autorités chérifiennes dans l'exercice de la compétence étatique sont ou non conformes au droit international." (Emphasis added.)

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

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

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

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

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

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

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

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

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

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

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

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

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OPINION PARTIELLEMENT DISSIDENTE DE M. LE JUGE ABRAHAM

Accord avec la conclusion de la Cour relative à la recevabilité des demandes figurant dans le mémoire — Différence de nature entre les deux demandes constituant les deux aspects du différend identifiés par la Cour — Absence de compétence ratione materiae *pour connaître du second aspect du différend — Caractère insolite de la première demande de l'Ukraine — Inexistence de précédents dans lesquels la Cour aurait admis la recevabilité d'une telle demande tendant à obtenir un constat judiciaire qu'une allégation formulée contre un État est fausse — Article IX laissant la question ouverte — Portée générale de la question — Non-pertinence du degré de gravité de l'accusation portée à l'encontre de l'État demandeur — Principe fondamental selon lequel un État qui engage une action judiciaire doit posséder un intérêt juridique légitime et suffisant de nature à rendre recevable cette action — Inexistence en droit international de procédures destinées à permettre aux États de préserver leur réputation et de défendre leur honneur — Absence d'intérêt juridique suffisant pour justifier de la recevabilité d'une telle action sauf en cas de circonstances très spéciales — Absence de telles circonstances spéciales en l'espèce — Allégations de génocide ne constituant pas la cause déterminante des décisions prises par la défenderesse concernant la reconnaissance de l'indépendance des deux « républiques » et le déclenchement de l'« opération militaire spéciale » — Question de la conformité des actions de la Fédération de Russie aux règles du droit international général échappant à la compétence de la Cour — Doutes sérieux à cet égard.*

1. L'Ukraine a saisi la Cour le 26 février 2022 d'une requête dirigée contre la Fédération de Russie, dans laquelle elle a présenté deux demandes dont la nature est très différente.

En premier lieu, elle a demandé à la Cour de rendre un arrêt déclaratoire par lequel celle-ci constaterait que la demanderesse n'a pas commis de génocide à l'égard de la population russophone de la région du Donbas, alors qu'elle en a été accusée par certaines déclarations publiques émanant des plus hautes autorités de l'État russe.

En second lieu, elle a demandé à la Cour de dire qu'en reconnaissant l'indépendance des deux « prétendues » républiques de Donetsk et de Louhansk et en engageant l'« opération militaire spéciale » mise en œuvre à partir du 24 février 2022 sur la base de cette allégation mensongère de génocide, la Fédération de Russie a agi d'une manière qui « ne trouve … aucune justification dans la convention sur le génocide ».

2. Ces deux demandes ont été modifiées dans leur formulation, sans qu'il en résulte pour autant une transformation de l'objet du différend, dans le mémoire de l'Ukraine : la première demande consiste désormais en ce que la Cour est priée de dire qu'« il n'y a pas d'élément crédible prouvant que l'Ukraine est responsable de la commission d'un génocide … dans les oblasts … de Donetsk et de Louhansk »; la seconde demande consiste désormais à prier la Cour de dire que l'emploi de la force par la Fédération de Russie contre l'Ukraine et la reconnaissance des deux « prétendues » républiques emportent violation de la convention, précisément de ses articles premier et IV.

La Cour, estimant que les demandes formulées dans le mémoire sont recevables et qu'elles se sont valablement substituées à celles qui figuraient dans la requête, a considéré en conséquence qu'elle était saisie des conclusions du mémoire — ce en quoi je l'approuve.

3. La différence de nature entre les deux demandes de l'Ukraine, que la Cour a caractérisées comme constituant les « deux aspects du différend », est frappante. La seconde demande se présente, de manière classique, comme celle d'un État qui vient devant la Cour aux fins d'invoquer la responsabilité internationale d'un autre État pour un fait internationalement illicite qui serait attribuable à ce dernier. Appliquant à une telle demande, en vue de déterminer sa compétence *ratione materiae* pour en connaître, les critères de la jurisprudence issue de l'affaire des *Plates-formes pétrolières (République islamique d'Iran c. États-Unis d'Amérique)* (*exception préliminaire, arrêt, C.I.J. Recueil 1996 (II)*, p. 810, par. 16), la Cour conclut à son absence de compétence, ce dont il suit que la demande en cause échappe au champ d'application de la clause compromissoire de l'article IX de la convention. J'adhère entièrement à l'analyse de l'arrêt sur ce point, et c'est pourquoi j'ai voté en faveur du point 2 du dispositif.

La première demande, au contraire, se présente en des termes particulièrement insolites, au point qu'on ne trouve aucun exemple qu'une pareille demande ait été acceptée, ni dans la jurisprudence de la Cour ni dans celle de sa devancière. Les deux précédents que l'Ukraine a cru pouvoir invoquer en vue de justifier la recevabilité

d'une demande d'une telle nature sont dépourvus de pertinence, comme la Cour l'affirme à bon droit (paragraphe 101 de l'arrêt). L'État demandeur ne cherche pas ici à mettre en cause la responsabilité internationale du défendeur pour un fait illicite. Il souhaite obtenir, par un jugement purement déclaratoire, une sorte de « certificat de bonne conduite », c'est-à-dire le constat judiciaire qu'une allégation formulée contre lui par un autre État dans un cadre extrajudiciaire, allégation selon laquelle il aurait méconnu une obligation juridique internationale, est fausse ou du moins qu'elle ne repose sur aucun élément de preuve crédible. Une telle demande soulève une question qui n'a pas trait selon moi à la compétence de la Cour pour en connaître, mais à sa recevabilité. C'est d'ailleurs bien sous cet angle que la Cour aborde la question, en réponse à la cinquième exception préliminaire soulevée par la Fédération de Russie.

4. J'observe d'abord qu'il est vain de chercher la réponse à la question dans le libellé même de la clause compromissoire qui fonde en l'espèce la compétence de la Cour, à savoir l'article IX de la convention sur le génocide. L'Ukraine a cherché à tirer argument de certaines particularités de la rédaction de l'article IX pour convaincre la Cour qu'au moins lorsque cette disposition s'applique elle autorise une demande du type de celle qui est présentée en l'espèce. En réalité, il n'y a rien dans les termes mêmes de l'article IX qui distingue cette disposition de la plupart des clauses compromissoires, en tout cas au regard de la question qui nous occupe. On ne saurait donc considérer que l'article IX fournit par lui-même un fondement juridique à la recevabilité d'une demande de ce genre (que l'on pourrait qualifier de « demande en déclaration de non-violation d'une obligation internationale »), et la Cour ne trouve pas dans les termes de l'article IX un tel fondement. Ce n'est pas à dire pour autant que l'article IX, par son libellé, fait lui-même obstacle à la recevabilité d'une telle demande, comme le constate le paragraphe 99 de l'arrêt. L'examen de l'article IX laisse donc la question ouverte.

5. En réalité, c'est dans le droit international général applicable au contentieux interétatique qu'il faut chercher la réponse à la question. Cela signifie que cette réponse ne saurait être limitée au cadre de la convention sur le génocide, mais qu'elle doit nécessairement avoir une portée générale.

6. Il arrive souvent qu'un État accuse publiquement un autre État de se comporter d'une manière incompatible avec telle ou telle obligation internationale, ou plus simplement, sans se référer explicitement à aucune obligation spécifique, de commettre des actes dont on peut déterminer qu'ils constituent des manquements à des obligations juridiques incombant à l'État ainsi accusé. En pareil cas, lorsqu'il existe une base de compétence valide, il est certain que l'État accusateur peut saisir la Cour de ses griefs contre celui qu'il accuse — s'il estime opportune l'introduction d'une telle instance, qui n'est jamais une obligation. La question qui était devant la Cour était de savoir si l'État accusé pouvait lui-même saisir la Cour (toujours à condition qu'il existe une base de compétence, ce qui est le cas en l'espèce) afin d'obtenir une déclaration de l'absence de bien-fondé de l'accusation portée contre lui.

7. À cet égard, il est difficile de faire dépendre la réponse du degré de gravité de l'accusation contre laquelle réagit l'État qui en est l'objet. Certes, l'accusation de commission d'un génocide est la plus grave de toutes celles qui peuvent être formulées contre un État, d'un double point de vue juridique et moral. Mais d'autres griefs atteignent également un seuil de gravité élevé (en particulier tous ceux qui imputent à un État un comportement contraire à une obligation relevant du *jus cogens*), et quel que soit le degré de gravité de l'accusation on ne voit ni pour quelle raison l'« action en déclaration de non-violation » serait recevable dans le cas de certaines accusations et pas dans d'autres, ni sur quel critère clair et indiscutable on pourrait asseoir une telle distinction.

8. C'est dans les principes généraux applicables à la recevabilité des actions judiciaires dans le contentieux interétatique qu'il faut chercher la réponse à la question soulevée en l'espèce par la demande inhabituelle de l'Ukraine.

Il est un principe fondamental selon lequel un État qui engage une action judiciaire doit posséder un intérêt juridique légitime et suffisant de nature à rendre recevable cette action, à moins que des dispositions spéciales ne règlent la question autrement.

L'intérêt pour agir de la partie demanderesse n'est pas souvent discuté en tant que tel devant la Cour; dans la majorité des cas, ce sont des questions de compétence qui occupent la Cour lorsqu'elle a à examiner des exceptions préliminaires soulevées par la partie défenderesse, ou bien des questions de recevabilité d'une autre nature que celle

de l'intérêt pour agir. Cela s'explique par le fait que cette dernière condition ne donne qu'assez rarement lieu à un doute quant à sa réalisation.

La question de l'intérêt pour agir ne se pose guère dans les affaires relatives aux frontières terrestres et aux délimitations maritimes, ainsi que dans celles qui concernent des questions de souveraineté territoriale. En ce qui concerne les instances dans lesquelles la partie demanderesse cherche à mettre en jeu la responsabilité internationale de la défenderesse, la question principale est de savoir si la partie qui saisit la Cour a la qualité d'État lésé au sens du droit coutumier de la responsabilité, ou bien si, le défendeur ayant à son égard une obligation *erga omnes*, cette partie a qualité pour saisir la Cour comme l'aurait tout autre État auquel est due la même obligation.

9. Dans la présente espèce, la question se pose en des termes tout à fait originaux parce que l'action elle-même est originale : elle ne tend pas à mettre en jeu la responsabilité de la défenderesse (dans la partie du différend que nous considérons ici) mais à obtenir un jugement purement déclaratoire affirmant qu'une allégation formulée par cette dernière, et qui comporte à l'égard de la demanderesse une accusation de violation d'une obligation internationale, est fausse.

10. Je suis d'avis qu'en pareil cas l'État demandeur ne possède pas, en règle générale, un intérêt juridique suffisant pour rendre recevable sa demande; seules des circonstances tout à fait spéciales sont, selon moi, de nature à renverser cette présomption.

Les États ne sont pas, dans l'ordre juridique international, dans une situation comparable à celle des personnes privées dans l'ordre interne. Les personnes privées, individus ou entreprises, sont légitimement soucieuses de préserver leur réputation et de défendre leur honneur, dont dépend une grande partie de leur activité et de leur vie sociale. C'est pourquoi les lois nationales mettent généralement à leur disposition diverses procédures à cette fin : par exemple, l'action pénale en diffamation, ou encore l'action en responsabilité civile de droit commun par laquelle une personne demande réparation à une autre personne des préjudices qu'elle a subis du fait du comportement fautif de celle-ci, sans qu'il soit même nécessaire, le plus souvent, d'établir l'existence d'un fait illicite. De telles procédures se trouvent présentes dans la plupart des systèmes juridiques nationaux.

11. Il n'existe rien de tel en droit international. Cela ne signifie pas que les États ne soient pas légitimement soucieux de leur réputation. Mais ils n'ignorent pas que dans la vie internationale les allégations d'un État visant à mettre en cause tel ou tel comportement d'un autre État au regard du droit, de la morale ou des besoins de la société internationale sont extrêmement courantes. Lorsqu'un État considère qu'une telle accusation portée contre lui est injuste ou mensongère, il lui est loisible de se défendre en y répondant par la même voie que celle qu'a empruntée l'accusateur, c'est-à-dire celle d'une déclaration visant à réfuter la précédente. Il n'a pas besoin d'un juge à cette fin, et son intérêt pour agir en justice ne me paraît donc pas généralement constitué. C'est ainsi que fonctionne au jour le jour la société des États.

12. J'admets cependant qu'il puisse y avoir des circonstances très spéciales dans lesquelles un État qui s'estime mis en cause de manière infondée quant au respect de ses obligations internationales justifie d'un intérêt légitime pour demander à un organe judiciaire international (à condition qu'il existe une base de compétence valide) de déclarer qu'il respecte ses obligations, contrairement à ce dont il a été accusé par le défendeur.

Est-on en l'espèce en présence de telles circonstances très spéciales ? La Cour répond à cette question par l'affirmative. Je ne suis pas convaincu.

13. Le raisonnement de l'arrêt, sur ce point, repose sur deux affirmations combinées. Il existe un conflit armé, qui se poursuit jusqu'à ce jour, entre l'Ukraine et la Fédération de Russie; ce conflit a été engagé par la Fédération de Russie « dans le but déclaré de prévenir ou de punir un génocide qui aurait été commis dans la région du Donbas » (paragraphe 108).

14. Je ne suis pas en désaccord sur l'idée, implicite dans ce raisonnement, selon laquelle l'une des hypothèses particulières dans lesquelles un État justifie d'un intérêt légitime pour chercher à obtenir un constat judiciaire de ce qu'il n'a pas méconnu une obligation internationale est celle dans laquelle l'accusation portée contre lui a eu et continue à avoir à son égard des conséquences préjudiciables graves, et que l'obtention d'un tel constat judiciaire constitue le seul moyen, ou du moins le moyen le plus efficace, de se prémunir contre de telles conséquences.

Le point sur lequel je diverge du raisonnement de l'arrêt, qui est d'ailleurs très sommaire à cet égard, concerne la place accordée à l'allégation de génocide formulée par la Fédération de Russie contre l'Ukraine en tant que cause déterminante des décisions prises par la défenderesse concernant la reconnaissance de l'indépendance des deux « républiques » et le déclenchement de l'« opération militaire spéciale ». J'estime que c'est dénaturer la réalité des faits que d'accorder à l'allégation en cause un tel rôle causal.

15. Il résulte de l'ensemble des déclarations émises par les autorités responsables de la Fédération de Russie à l'époque pertinente et de tous les documents officiels figurant au dossier que la défenderesse n'a jamais invoqué qu'une seule base juridique pour justifier le déclenchement de l'« opération militaire spéciale », à savoir le droit de légitime défense au sens de l'article 51 de la Charte des Nations Unies, combiné aux « traités d'assistance mutuelle » conclus par elle avec les deux « républiques » dont elle venait de reconnaître l'indépendance. Jamais, ni avant l'introduction de l'instance devant la Cour, ni au cours de la procédure elle-même, la Fédération de Russie n'a prétendu tenir de la convention sur le génocide un titre juridique l'habilitant à agir sur le territoire de l'Ukraine, ou à employer la force armée à l'égard de celle-ci, en vue de prévenir ou de faire cesser un génocide (l'eût-elle fait, elle aurait eu tort, pour les raisons qu'indique excellemment la Cour au paragraphe 146 de l'arrêt).

Il n'est pas non plus établi selon moi que son allégation de génocide ait joué en fait un rôle déterminant dans les décisions de la Fédération de Russie relatives à la reconnaissance des deux « républiques » comme États indépendants et au déclenchement des opérations militaires.

16. Il est vrai qu'on trouve, aussi bien dans le discours prononcé le 21 février 2022 par le chef de l'État russe en vue de justifier la décision de reconnaître les deux « républiques », que dans celui prononcé le 24 février suivant pour annoncer et justifier le déclenchement des opérations militaires, la claire allégation que les habitants russophones du Donbas étaient victimes d'un « génocide » de la part du pouvoir central ukrainien.

Mais une telle allégation était placée dans un contexte bien particulier : il s'agissait d'insister sur les raisons (légitimes selon la Fédération de Russie) que pouvait avoir la population du Donbas de faire sécession d'un État qui lui infligeait de si mauvais traitements, et, partant, des raisons (tout aussi légitimes) que possédait la Fédération de Russie de reconnaître les deux « républiques » ayant proclamé unilatéralement leur indépendance et de conclure des « traités » avec ces entités. Pour décrire les « mauvais traitements » infligés, selon elle, à la population du Donbas, la Fédération de Russie a employé une variété de termes : « meurtres de civils », « horreur », « crimes sanglants », « bains de sang », « atrocités » et « génocide ». Rien n'indique que la qualification particulière de « génocide » ait joué un rôle déterminant dans les décisions prises par les autorités russes à l'égard de l'Ukraine à cette époque. L'emploi du terme visait plutôt à souligner que les « mauvais traitements » et les « outrages » dénoncés atteignaient le niveau le plus grave que de tels traitements pouvaient atteindre, celui du crime le plus inacceptable et le plus choquant pour la conscience universelle. Mais c'est lui accorder une place qu'elle n'avait pas en réalité que de voir dans cette qualification, en elle-même, l'élément déclencheur des actions mises en œuvre par la Fédération de Russie contre l'Ukraine.

17. Il va de soi qu'en écrivant ce qui précède, je ne me prononce aucunement sur la conformité des actions de la Fédération de Russie aux règles du droit international général relatives à la reconnaissance des États et à l'emploi de la force, qui soulève selon moi des doutes sérieux. Je m'en abstiens parce que ces questions échappent en l'espèce à la compétence de la Cour.

Une analyse des faits que je crois impartiale et rigoureuse me conduit à la conclusion que l'Ukraine ne justifie pas être dans l'une de ces circonstances très spéciales qui rendrait recevable une demande tendant à un constat judiciaire de non-violation.

18. J'ajoute, pour terminer, une considération qui, sans être déterminante à elle seule, ne saurait cependant être négligée. Sur la base du présent arrêt sur les exceptions préliminaires, la Cour va s'engager, au stade suivant de la procédure, dans l'exercice consistant à rechercher s'il existe ou non des « éléments crédibles » prouvant que l'Ukraine est responsable de la commission d'un génocide dans la partie orientale du pays. La Fédération de Russie, qui n'est pas demanderesse dans l'affaire, ne sera pas tenue de produire devant la Cour les preuves dont elle dispose au soutien des allégations qu'elle a formulées en dehors du cadre judiciaire, à supposer qu'elle dispose de telles preuves. Quelle que soit l'issue de l'affaire — ou plutôt de ce qu'il en reste — celle-ci risque de

n'avoir qu'un effet des plus limités sur la clarification des droits et obligations des Parties. Même si la Cour conclut qu'il n'existe pas d'élément crédible démontrant l'existence d'un génocide commis par l'Ukraine, cela ne démontrera pas l'illicéité des actions entreprises par la Fédération de Russie, à partir de février 2022, ce qui était selon toute vraisemblance la principale préoccupation de l'Ukraine lorsqu'elle a décidé d'introduire cette instance. Cela ne fera pas obstacle à l'introduction éventuelle d'une nouvelle instance par la Fédération de Russie tendant à invoquer la responsabilité internationale de l'Ukraine. Cela ne signifiera pas non plus que la défenderesse, en portant une telle accusation à l'encontre de la demanderesse, a commis un fait illicite et que sa responsabilité est engagée de ce chef. Cela n'ouvrira donc aucun droit à réparation en faveur de l'Ukraine. En bref, la décision qu'est appelée à rendre la Cour risque fort d'être frustrante pour les Parties et assez vaine dans ses effets; à un moment où la Cour est très sollicitée, c'était une raison supplémentaire pour elle de ne pas s'engager dans un exercice sans grande signification.

19. Tout cela s'explique par le fait que l'Ukraine a cherché à faire entrer artificiellement son différend avec la Fédération de Russie dans le cadre de la convention sur le génocide, dans lequel ce différend ne peut pas entrer. À cette tentative visant à faire entrer un contenu dans un contenant inadapté, pour des raisons que l'on comprend, la Cour n'a résisté que partiellement, en écartant le « second aspect » du différend comme ne ressortissant pas à sa compétence. Elle aurait mieux fait, selon moi, de mettre un terme définitif à l'instance.

(Signé)
Ronny ABRAHAM.

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Declaration of Judge Bennouna

[Original English Text]

1. The case brought before the Court by Ukraine against the Russian Federation is exceptional in more ways than one. These proceedings were instituted further to the "special military operation" launched by Russia on 24 February 2022 against Ukraine, which Russia presented as "measures taken in accordance with Article 51 of the Charter of the United Nations in exercise of the right of self-defence" (letter dated 24 February 2022 from the Permanent Representative of the Russian Federation to the United Nations addressed to the Secretary-General, UN doc. S/2022/154 (24 February 2022)). On the same day that the Court was seised, namely 26 February 2022, Ukraine referred to "Russia's false and offensive allegations of genocide as a pretext for its unlawful military aggression against Ukraine" (Statement of 26 February 2022, subsequently distributed as a document of the General Assembly and the Security Council as an annex to the letter dated 26 February 2022 from the Permanent Representative of Ukraine to the United Nations addressed to the Secretary-General, UN doc. A/76/727-S/2022/161 (28 February 2022)). Ukraine invoked Article IX of the United Nations Genocide Convention as a basis for the Court's jurisdiction.

2. The Court has, of course, had occasion to rule on the 1948 Convention, in respect of either its advisory jurisdiction (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 15) or its contentious jurisdiction (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 3). But this is the first time that a State has asked the Court to exercise its jurisdiction to consider allegations of genocide made by another State as a pretext for the use of force and to establish the unlawfulness of such conduct.

3. When the Court adopted its Order of 16 March 2022 indicating provisional measures, I observed at the time that this Convention was not conceived and adopted "to enable a State, such as Ukraine, to seise the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force". However, it was the Court's prima facie jurisdiction that was under consideration at that stage.

4. In its Judgment on the objections to jurisdiction and admissibility raised by Russia, the Court has found that a dispute exists between the Parties under the Genocide Convention. It considers that there are two aspects to this dispute. The first "seeks a judicial finding that [Ukraine] has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine's view, imputed to it in public statements" (paragraph #54 of the Judgment). The second seeks to invoke Russia's international responsibility by imputing internationally wrongful conduct to it (paragraph #55 of the Judgment). This conduct consists in Russia's recognition of the independence of the two "republics" of Donetsk and Luhansk and its use of force in violation of Articles I and IV of the Convention (paragraph #55 of the Judgment).

5. While I voted with the majority with regard to the Court's lack of jurisdiction over the latter aspect of the dispute (the second aspect), I nevertheless voted against the Court's finding that Ukraine's claim relating to the first aspect of the dispute concerning a declaration of non-violation by Ukraine of the Genocide Convention is admissible (paragraph #151, subparagraph 9 of the operative part).

6. This first aspect relates to what Russia considers to be "reverse compliance requests", whereby Ukraine has requested the Court to "[a]djudge and declare that there is no credible evidence that [it] is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine" (paragraph #78 of the Judgment).

7. In my view, such declarations are not part of the Court's judicial function, which is to settle legal disputes between States concerning the interpretation or application of international law. Yet the only dispute between the Parties in this case concerns the legality of the use of force by Russia, which, according to Ukraine, is based on

false allegations of genocide. This is the heart of the legal controversy between the Parties and the Court considered that it lacked jurisdiction to entertain such a dispute.

8. As regards the question of a declaration of compliance, it is just one step in a line of reasoning that, in fact, seeks a proclamation by the Court that the use of force by Russia is unlawful.

9. Dividing the dispute into two separate aspects has, in my opinion, proved to be an artificial and even hazardous exercise in so far as it has led the Court to set a precedent for it to entertain requests for declarations of compliance, which is contrary to the Court's judicial function under its Statute and Rules.

10. The artificiality of this separation is, moreover, highlighted by the Court itself, when it defines Ukraine's legal interest in requesting such a declaration of compliance. The Court, at this point, introduces a new principle whereby the question of the admissibility of a State's request for a declaration of compliance depends on the "circumstances" in which such a request is made (paragraph #107 of the Judgment). The Court goes on to state that the particular circumstances in this case relate to the armed conflict that began on 24 February 2022 on Ukrainian territory with a view to preventing or punishing genocide. Thus, although the Court stated that the two aspects of the dispute were "fundamentally different" (paragraph #56 of the Judgment), it justifies Ukraine's legal interest by referring to facts that characterize the second aspect of the dispute, namely the use of force.

11. Although there are indeed particular "circumstances" relating to the war that began nearly two years ago between the two Parties, the Court has not, in my view, shown that Ukraine had standing before the Court to challenge the allegations of the Russian Federation. First, such allegations are commonplace in political discourse uttered by State representatives and they are often refuted at the same level. Consequently, they cannot form the subject-matter of proceedings before the International Court of Justice in so far as they do not concern compliance with obligations under the Genocide Convention. Even if an accusation of genocide is false, international law — unlike domestic law — does not allow States to institute what are simply defamation proceedings. Second, the compliance request submitted by Ukraine could not have any practical effect, even if it were upheld by the Court at the merits stage of the case.

(Signed)
Mohamed BENNOUNA.

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JOINT DISSENTING OPINION OF JUDGES SEBUTINDE AND ROBINSON

No basis for the finding of a lack of jurisdiction over submissions (c) *and* (d) *in paragraph 178 of Ukraine's Memorial — Failure to take account of the principle of good faith in determining jurisdiction* ratione materiae *— Incorporation of the principle of good faith into the Genocide Convention.*

Essence of the good-faith principle is the duty to act reasonably — The Russian Federation did not act reasonably in discharging its obligation under Article I of the Genocide Convention because it did not adopt the means available to it under Articles VIII and IX.

Obligation of a State party to the Convention to act within the limits permitted by international law — In conducting the "special military operation", the Russian Federation did not act within the limits permitted by international law — Disagreement with majority's understanding of the Court's 2007 Bosnian Genocide *Judgment.*

INTRODUCTION

1. We have voted with the majority in favour of operative paragraphs 151 (1), (3), (4), (5), (6), (7), (8) and (9) of the Judgment. However, we have voted against operative paragraph 151 (2). In this opinion, we explain our disagreement with the Court's finding in operative paragraph 151 (2) of the Judgment, upholding the second preliminary objection raised by the Russian Federation relating to submissions *(c)* and *(d)* of paragraph 178 of the Memorial of Ukraine. The Russian Federation's objection is that the Court lacks jurisdiction *ratione materiae* to entertain the claims in submissions *(c)* and *(d)* of Ukraine's Memorial. We conclude that the Court does have jurisdiction *ratione materiae* to entertain the claims contained in submissions *(c)* and *(d)* of Ukraine's Memorial and that they are both admissible. In paragraph 178 of its Memorial, Ukraine requested the Court,

> "[f]or the reasons set out in th[e] Memorial, . . . to:
>
> . . . . . .
>
> *(c)* Adjudge and declare that the Russian Federation's use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention.
>
> *(d)* Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 21 February 2022 violates Articles I and IV of the Genocide Convention."

2. Regrettably, and respectfully, the majority have fallen into error, because they have misconstrued the duty imposed by the Genocide Convention (hereinafter the "Convention") on a State party to act in good faith, reasonably and "within the limits permitted by international law" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430) in any action that it takes to fulfil its undertaking under the Convention to prevent and punish genocide.

3. Failure to interpret the Convention in this way flies in the face of the generally accepted scope of the duty to prevent and punish genocide and may result in serious harm for some State parties. Take, for instance, State A, a small, militarily weak developing country. Its population consists mainly of the descendants of enslaved Africans, but the rest of its population includes a small minority of citizens who are descendants of Indian indentured labourers. Nearby is State B, a big, militarily strong country, which has ethnic ties to State B's Indian population. This country alleges that State A is killing members of the Indian minority population in a manner that amounts to genocide under the Genocide Convention. State A vehemently denies this accusation, describing it as a shameful concoction. Nonetheless, State B uses this allegation of State A's breach of the Genocide Convention as a pretext for invading State A; in taking this action, State B asserts that it is acting under the Genocide Convention to prevent State A's genocidal acts. The militarily weak State A is in no position to resist this invasion, which results in the death of a significant number of its population and causes damage to property amounting to billions of dollars. Both States A and B are parties to the Genocide Convention.

4. State A institutes proceedings before the Court for reparations arising from State B's invasion on the ground that the invasion and the use of force breach State B's obligation under the Genocide Convention to act in good faith, reasonably and within the limits permitted by international law in any action that it takes to prevent or punish genocide. The Court finds that State B's invasion and its concomitant use of force are not capable of constituting violations of the Genocide Convention, and therefore fall outside the scope of the compromissory clause under Article IX of the Convention; consequently, the Court finds that it lacks jurisdiction *ratione materiae*.

5. By such a finding, the Court would expose a small, militarily weak State party to the Genocide Convention to the wanton might, use of force and, quite likely, impunity of a militarily stronger State party — with the latter justifying its conduct on the false basis that, by its use of force, it is discharging a duty under the Genocide Convention to prevent and punish genocide by the smaller and militarily weaker State.

6. There is no basis in law for this finding of a lack of jurisdiction. What is more, this finding is counterintuitive and defies common sense because the Court has rejected the very instrument, the Genocide Convention, that Russia weaponizes in settling its differences with Ukraine; this is rather like A using a weapon to injure B and the trial court determines that it has no jurisdiction over the crime committed using that weapon. What has happened in this illustration is that the law has become disengaged from reality — in this case, we witness the same outcome.

7. It is accepted that the Court cannot exercise jurisdiction over a State without its consent. A State's consent to the jurisdiction of the Court is most usually found in an article in a treaty (a compromissory clause) reflecting the agreement of the States parties to that treaty that disputes concerning its interpretation or application are to be submitted to the International Court of Justice. In this case, the compromissory clause is Article IX of the Genocide Convention, which provides:

> "Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute."

8. Determining whether a State has consented to the jurisdiction of the Court will on many occasions not be problematic. However, there are occasions when, as in this case, the exercise is fraught with difficulties. The question, therefore, is whether there is before the Court a dispute between Ukraine and the Russian Federation relating to the interpretation, application or fulfilment of the Genocide Convention. The majority find that there is no such dispute in relation to Ukraine's submissions *(c)* and *(d)* in paragraph 178 of its Memorial. For our part, we do not agree with this finding.

PART I

The incorporation of the principle of good faith in the Genocide Convention: failure to take account of the principle of good faith in determining jurisdiction *ratione materiae*

9. The Judgment shows that the majority do not sufficiently appreciate the significance of the principle of good faith in international law in general and its application to the circumstances of this case, in particular. Nonetheless, the Court's jurisprudence reveals a very clear and unambiguous understanding of this important principle.

10. In the *Nuclear Tests* cases, the Court held that "[o]ne of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith". The phrase "whatever their source" means that, irrespective of the source of the legal obligations, whether it is a treaty or custom or general principles of law, the principle of good faith is active and plays a role in the creation and discharge of those obligations. Although the principle is applicable to all areas of international law, it has a very specific and distinctive function in the law of treaties by virtue of Article 26 of the Vienna Convention on the Law of Treaties (VCLT) which provides: "Every treaty which is in force is binding upon the parties to it and must be performed by them in good faith."

11. The Court's jurisprudence supports the application of the principle of good faith in the interpretation and application of the Genocide Convention. In the *Gabčíkovo-Nagymaros* case, the Court described the legal effect of the principle of good faith in the performance of obligations under the treaty between Hungary and Slovakia (hereinafter the "Treaty") as follows:

> "Article 26 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." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 78-79, para. 142.)

12. In *Gabčíkovo-Nagymaros*, the Court does not explain how, in the absence of any express reference to the principle of good faith in the Treaty, the principle of good faith imposes an obligation on the parties to the Treaty to apply it in a reasonable way and in such a manner that its purpose can be realized. What is evident is that, in the Court's view, the principle of good faith does have the qualities that would enable it to impose such an obligation on the parties to the 1977 Treaty.

13. In *Gabčíkovo-Nagymaros*, the Court proceeded on the basis that the principle of good faith in Article 26 of the VCLT had become incorporated in the 1977 Treaty. But there is no magic in the term "incorporation" and there may even be an advantage in not using it. In *Immunities and Criminal Proceedings*, the Court expressly found that the principle of sovereign equality was not incorporated into the treaty between Equatorial Guinea and France (*Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 322, para. 96). The approach of the Court in that case differs from its approach in this case where it is hesitant in confronting the issue whether the principle of good faith has been incorporated into the Genocide Convention.

14. In the same way that the principle of good faith obliged the parties to apply the 1977 Treaty between Hungary and Slovakia "in a reasonable way and in such a manner that its purpose can be realized", it also obliges the States parties to the Genocide Convention to apply that Convention in a reasonable way and in such a manner that its purpose can be achieved. We arrive at this conclusion well aware that the facts in the *Gabčíkovo-Nagymaros* case are different from those in the present case. However, we believe that the dictum in paragraph 142 of that Judgment, as quoted in paragraph 11 of this opinion, is susceptible to general application. The first sentence — the "equal importance" of the two elements — is undoubtedly of general application. The third sentence specifically includes the phrase "in this case"; this signifies that the conclusion that the purpose of the Treaty and the intentions of the parties prevails over its literal application is confined to the *Gabčíkovo-Nagymaros* case. However, we believe that in the circumstances of this case, in accordance with the customary rule of interpretation in Article 31 of the VCLT, the purpose and intention of the parties must also prevail over the literal application of the Genocide Convention. The fourth, and last, sentence is the most important in the paragraph. It indicates the effect of the application of the principle of good faith in relation to the rights and obligations of the parties to the Treaty. This is certainly of general application. Consequently, in our view, the principle of good faith obliges the parties to the Genocide Convention to apply it in a reasonable way and in such a manner that its purpose can be achieved.

15. We also wish to emphasize the finding in the Court's dictum in *Gabčíkovo-Nagymaros* that the two elements of Article 26 of the VCLT are of "equal importance". The temptation to dumb down or undervalue the second element must be resisted. The Court's dictum makes clear that the obligation to perform a treaty in good faith is as important in the enjoyment of the rights and the discharge of the obligations of the parties to a treaty as its binding effect on the parties. When Article 38 of the Court's Statute lists international conventions as a source of law to be applied by the Court, it is not only referring to the binding character of a treaty, but also to the duty of the parties to a treaty to apply it in good faith. We find the dismissive attitude of the majority to the principle of good faith strange, considering that, in the Court's provisional measures Order in this case, it observed that the Contracting Parties to the Genocide Convention must implement the obligation to prevent and punish genocide under Article I "in good faith,

taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its preamble" (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 224, para. 56). Although findings in provisional measures proceedings do not bind the Court in subsequent proceedings, it is noteworthy that the majority have offered no reason for departing from that jurisprudence.

16. The noble purpose of the Genocide Convention is highlighted in well-known dicta from the Court's Advisory Opinion in 1951 on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*. The Court held that the "principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation", and that the Convention was adopted "for a purely humanitarian and civilizing purpose" (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951*, p. 23). In these findings, the Court makes clear the human rights basis of the Convention and its collective, communitarian purpose. The majority's unduly narrow and literal interpretation of the Genocide Convention is wholly inconsistent with its "high purposes" (*ibid.*) which, in accordance with the principle of good faith, require that the Genocide Convention is applied in a reasonable way. The absence of an express reference to the principle of good faith in the Convention is not a legal bar to its application in the relations between the States parties. The Court must interpret and apply the Genocide Convention consistently with its exalted, purely humanitarian and civilizing purposes.

17. We conclude that interpreting the terms of Article I of the Genocide Convention in their ordinary meaning, in their context and in light of the object and purpose of the Genocide Convention, yields the conclusion that a State party is required to act in good faith in any action that it takes to fulfil its obligation under Article I to prevent genocide.

18. The opinion now moves to a closer examination of the principle of good faith, as it is reflected in Article 26 of the VCLT.

19. Much of this case is about the relationship between a treaty and general international law; in particular, this case raises questions about the circumstances in which a rule of general international law becomes an integral part of a treaty. The present Judgment is conspicuously devoid of any discussion of these questions. The majority appear to take the view that the breach of a rule of general international law cannot at the same time be a breach of the Genocide Convention.

20. The majority undervalue the principle of good faith when in paragraph 142 they cite a dictum of the Court describing it as "a well-established principle of international law". The principle of good faith is much more than that: it is, at once, the overarching, central and undergirding provision in the VCLT.

21. The special, pivotal significance of the principle of good faith in the law of treaties in general, and the Genocide Convention in particular, provides an answer to the Russian Federation's argument that interpreting the Convention as including that principle "would have the effect of incorporating into the Convention an indefinite number of other rules of international law" (see paragraph 131 of the Judgment). It most certainly would not have that "floodgates" effect, because not every rule of international law is as special and uniquely important as the principle of good faith. Article 26 is different from the other articles in the VCLT, not only because it reflects the *pacta sunt servanda* rule — the most consequential obligation in the law of treaties — but also by virtue of its wording. The opening phrase — "[e]very treaty" — is not used elsewhere in the VCLT. It emphasizes that every party to a treaty is duty-bound to give effect to the obligation under Article 26 of the VCLT to discharge its obligations under a treaty in good faith, irrespective of whether the treaty in question has an express reference to the *pacta sunt servanda* rule. This duty is not *dehors* the Genocide Convention; it is inherent in and intrinsic to the Genocide Convention, because by virtue of Article 26, every treaty is to be read and applied as including that duty; moreover, it is distinct from any similar obligation in general international law. Article 26 of the VCLT is the *Grundnorm* in the law of treaties, and it is not difficult to see why it is generally accepted that States parties to a treaty are taken as having agreed to perform their obligations under a treaty in good faith. Therefore, a State party that does not act in good faith in discharging the conventional undertaking to prevent and punish

genocide is in violation of the Convention. This conclusion is supported by the finding of the Court in the *Gabčíkovo-Nagymaros* case.

22. As may be gathered from the *Gabčíkovo-Nagymaros* case, the essence of the good faith principle is the duty to act reasonably. In discharging its obligation to prevent and punish genocide under Article I of the Convention, the Russian Federation did not act reasonably, because it adopted the measure of an armed invasion of Ukraine when there was available to it the means set out in Articles VIII and IX of the Convention.

23. Under Article VIII, the Russian Federation could have called on the Security Council and the General Assembly "to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in article III". This means does not necessarily involve the use of force. In that respect, the Russian Federation breached Article I of the Genocide Convention. The Russian Federation also acted unreasonably in utilizing the measure of an armed invasion of Ukraine when there was available to it the possibility of instituting proceedings under Article IX against Ukraine for engaging in genocide in breach of Article I of the Convention. This is undoubtedly a peaceful means. In both situations, by employing the extreme measure of "a special military operation" as the first recourse, the Russian Federation breached its duty to act in good faith in taking measures to prevent and punish genocide.

24. Against this background, the opinion now proceeds to an examination of the majority's analysis of the principle of good faith in paragraphs 142 and 143 of the Judgment; in particular we wish to highlight the failure of the majority to address the substance of Ukraine's case.

1. PARAGRAPH 142

25. It is not clear what is gained by the majority's citation of the Court's dictum that "the principle of good faith 'is not in itself a source of obligation where none would otherwise exist' *(Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94)". For in this case, the principle of good faith qualifies a clear and independently extant obligation under Article I of the Genocide Convention to prevent and punish genocide.

26. Later, in this paragraph, the majority observe that what is important, for the purpose of establishing jurisdiction *ratione materiae*, is whether a "State could have violated a specific obligation incumbent upon it and whether the alleged violation falls within the scope of the Court's jurisdiction". We find nothing unusual or strange about this observation if it is understood that the "specific obligation" violated — such as the good faith principle — need not be expressly included in the treaty under consideration. This was the case in *Gabčíkovo-Nagymaros*. Ukraine argues that the principle of good faith has become a part of the Genocide Convention and, consequently, Russia's failure to perform the obligation to prevent and punish genocide in good faith is a breach of the Convention. If the reference to "a specific obligation" means that an obligation must be expressly mentioned, such an approach would be inconsistent with the Court's jurisprudence in *Gabčíkovo-Nagymaros* and would be tantamount to worshiping at the altar of literalism.

27. In the same paragraph, the majority argue that, "[i]n the present case, even if the Russian Federation had, in bad faith, alleged that Ukraine committed genocide and taken certain measures against it under such a pretext — which the Respondent contests — this would not in itself constitute a violation of obligations under Articles I and IV of the Convention". This argument in no way addresses Ukraine's case. It begs the question whether the principle of good faith has been incorporated in the Convention. The majority advance no reason why — if the principle of good faith is a part of, that is, has been incorporated into, the Convention — the armed invasion would not constitute a breach thereof. What is evident here is that the majority have not engaged with the substance of Ukraine's case that the undertaking in Article I to prevent and punish genocide is an undertaking to do so in good faith.

28. Notably, at no point in the Court's consideration of its jurisdiction *ratione materiae* in paragraphs 142 and 143 of its Judgment does the majority attempt to explain why the principle of good faith in general international law is not to be treated as an obligation to be observed by the parties to the Genocide Convention when they seek to discharge the conventional undertaking to prevent and punish genocide. This failure undermines the majority's reasoning.

29. The only way to address Ukraine's argument is to counter it by showing, as the Court did in *Immunities and Criminal Proceedings*, that the principle of good faith has not become a part of, that is, has not been incorporated into, the Genocide Convention. This the majority have failed to do. It is as though the majority are content to have the Russian Federation weaponize the Convention in its struggle with Ukraine relating to the Donetsk and Luhansk oblasts and yet remain immune from the Court's jurisdiction. Totally missing from the majority's analysis is any indication as to why such action by the Russian Federation would not be a violation of Article I on the basis of the case presented by Ukraine. That is why we characterize the majority's approach as misdirected. It is an approach that does not answer in any way Ukraine's case.

2. PARAGRAPH 143

30. The majority's uncertain and misdirected response in paragraph 142 is equally evident in paragraph 143. In this paragraph, the majority contend that,

> "while such an abusive invocation will result in the dismissal of the arguments based thereon, it does not follow that, by itself, it constitutes a breach of the treaty. In the present case, even if it were shown that the Russian Federation had invoked the Convention abusively (which is not established at this stage), it would not follow that it had violated its obligations under the Convention, and in particular that it had disregarded the obligations of prevention and punishment under Articles I and IV."

Here again, there is evidence of the majority's failure to engage with and confront the case presented by Ukraine. The principle of good faith is as relevant to the interpretation and application of the Genocide Convention as it was to the treaty between Hungary and Slovakia in *Gabčíkovo-Nagymaros*. Consequently, if it were shown that the Russian Federation had not invoked the Genocide Convention in good faith when it initiated its "special military operation" — a matter that would be addressed at the merits stage — it would follow that, in contrast to the conclusion arrived at by the majority, the Russian Federation had violated its obligations under the Convention and, in particular, that it had disregarded the obligations of prevention and punishment under Articles I and IV. Consequently, the invocation of the Convention in bad faith and the adoption of certain measures on such a pretext would result not only in the dismissal of the arguments based thereon, but also in a finding of a breach of the Convention.

31. It may therefore be concluded that the undertaking in Article I for States parties to prevent and punish genocide necessarily imposes an obligation on them to act in good faith in any action that they take to fulfil that undertaking. Ukraine's case is that the Russian Federation breached that conventional obligation when it claimed that Ukraine was committing genocide and, on that pretext, initiated an armed invasion of that country. The Russian Federation denies that claim. In this regard, the Russian Federation specifically argues that the dispute before the Court relates to its right of self-defence under Article 51 of the Charter of the United Nations — a claim over which the Court has no jurisdiction. However, the fact that certain conduct may give rise to a dispute that falls within the ambit of more than one treaty does not create an obstacle to the jurisdiction of the Court under the treaty invoked by the Applicant. The Court therefore had before it a dispute relating to the interpretation, application and fulfilment of the Genocide Convention. Consequently, it had jurisdiction to entertain Ukraine's claim that the use of force by way of the "special military operation" violated Article I of the Genocide Convention. The Court should have so found, leaving to the merits those issues appropriate for that stage of the proceedings.

PART II

The failure of the majority to take into account the obligation of States parties to the Genocide Convention to act reasonably and within the limits permitted by international law

32. The opinion now turns to the second ground of the dissent: the majority's failure to take account of the obligation of States parties to the Genocide Convention to act reasonably and within the limits permitted by international law in any act taken to fulfil their obligation to prevent and punish genocide.

33. Throughout its analysis, the majority have failed to address the substance of Ukraine's case. Simply put, Ukraine's case is that the Russian Federation breached the obligation inherent in Article I to act reasonably and

within the limits permitted by international law in any act that it takes to fulfil its undertaking to prevent and punish genocide. The analysis is — and we say so with respect — inconclusive, indeterminate, uncertain and, for the most part, misdirected. The opinion now proceeds to an examination of the majority's analysis in paragraph 146 of the Judgment.

1. PARAGRAPH 146

34. The majority are also indecisive and uncertain in addressing the argument by Ukraine that — in the *Bosnian Genocide* case (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 43) — the Court concluded that under the Genocide Convention States parties have a duty to act reasonably and within the limits permitted by international law in adopting measures to prevent and punish genocide.

35. In paragraph 146 of the Judgment, the majority seek to rebut the arguments advanced by Ukraine based on the Court's analysis in paragraph 430 of the *Bosnian Genocide* case. Significantly, in doing so, the majority fail to take into account the cautionary introduction of the Court in paragraph 429 of that Judgment, in which it explains what it is setting out to do in its subsequent analysis in paragraph 430. The Court is at pains to stress in paragraph 429 that it is not addressing the general situations in which a treaty, for example the Convention against Torture, imposes an obligation to prevent the commission of a prohibited act; rather, it is "confin[ing] itself to determining the specific scope of the duty to prevent in the Genocide Convention". However, it acknowledges that, in doing so, it may still be obliged "to refer, if need be, to the rules of law whose scope extends beyond the specific field covered by the Convention".

36. In paragraph 430 of the *Bosnian Genocide* case, the Court found that the obligation to prevent genocide requires the States parties to employ all means reasonably available to them, so as to prevent genocide as far as possible. It went on to find that, in specific cases, the notion of due diligence is important in determining whether a State has "manifestly failed to take all measures to prevent genocide which were within its power" in carrying out its analysis, as to whether a State has discharged its duty to prevent genocide under Article I of the Convention, the Court held that it had to take into account a State's "capacity to influence effectively the action of persons likely to commit, or already committing, genocide". In that regard, it also held that "[t]he State's capacity to influence must . . . be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law". Of these dicta, in our view, the second is not relevant to the present case.

37. The opinion will now address the first and third dicta.

38. In our view, the Russian Federation, in initiating its "special military operation" in Ukraine, has not employed all means reasonably available to it to prevent and punish genocide. We arrive at this conclusion because, instead of initiating the armed invasion of Ukraine, it was reasonably open to the Russian Federation to have recourse to the means available to it under Articles VIII and IX of the Genocide Convention. Under Article VIII, it was reasonably open to the Russian Federation to call upon the Security Council and the General Assembly of the United Nations to take action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide. This means does not necessarily involve the use of force. It was also reasonably open to the Russian Federation to initiate the dispute settlement procedures under Article IX by bringing to the Court an application alleging that Ukraine had breached its obligation under the Convention not to commit genocide. This is undoubtedly a peaceful means. By confining itself to the extreme measure of an armed invasion of Ukraine, and by ignoring the measures under Articles VIII and IX of the Convention, the Russian Federation has breached the obligation to employ all means *reasonably* available to it to prevent and punish genocide. In our opinion these are precisely the arguments and considerations that Ukraine rightly makes to demonstrate that the dispute between the Parties falls within the scope of Article IX of the Genocide Convention. The Court itself earlier held that the Russian Federation's allegation — that its "special military operation" in Ukraine is based on its right to self-defence under Article 51 of the Charter of the United Nations — does not preclude the validity of Ukraine's claims under the Genocide Convention.

39. We turn now to the third dictum of the Court in paragraph 430 of the *Bosnian Genocide* Judgment that "it is clear that every State may only act within the limits permitted by international law".

40. In paragraph 146 of the present Judgment, the Court finds that the scope of the duty to prevent in Article I of the Genocide Convention includes the duty of States parties to the Genocide Convention to act within the limits permitted by international law. Whether in launching an armed invasion of Ukraine, the Russian Federation has so acted is a matter to be determined at the merits stage.

41. In paragraph 430 of the *Bosnian Genocide* Judgment, the Court has carried out an interpretative analysis of the scope of the duty to prevent genocide under Article I of the Genocide Convention. In this analysis, it has set out what Article I means for the States parties to the Genocide Convention. The effect of this dictum is to qualify any act taken by a State party to fulfil its obligation under Article I to prevent and punish genocide; it makes clear that such action must conform with the limits set by international law.

42. Against that background, we now proceed to an examination of the Court's treatment of paragraph 430 of the *Bosnian Genocide* Judgment. To begin with, the majority make no mention at all of the Court's cautionary introductory statement in paragraph 429 that it was focusing on the scope of the obligation to prevent genocide in Article I of the Convention.

43. In paragraph 146, the majority make three statements, each of which is problematic and calls for comment.

44. In this paragraph, the majority contend that "[t]he Court did not intend, by its 2007 ruling, to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force". But we do not have to speculate as to what the Court intended by its ruling in 2007 because it stated quite unequivocally what it was doing: in outlining the scope of the duty to prevent under the Genocide Convention, the Court held that States parties to the Convention "may only act within the limits permitted by international law" in any action that they take to prevent and punish genocide. The Court's formulation — "may only act" — is confining, decisive, categoric and jussive in the instruction that it conveys to States parties to the Genocide Convention. The majority's conjecture as to the intention of the Court in *Bosnian Genocide* is therefore wholly unwarranted. In this paragraph, therefore, the Court is addressing what a State party may and may not do in fulfilling its duty to prevent and punish genocide. Significantly, no mention is made by the majority in this Judgment of the Court's explanatory statement in paragraph 429 of the *Bosnian Genocide* case. This statement makes clear that in paragraph 430, the Court was outlining the scope of the duty to prevent genocide under Article I of the Genocide Convention.

45. In paragraph 146 of the Judgment, the majority also maintained that by its ruling in the *Bosnian Genocide* case, the Court "sought to clarify that a State is not required, under the Convention, to act in disregard of other rules of international law". Again, this finding misses the point. Ukraine has not argued that the Russian Federation is required by the Convention to act in disregard of other rules of international law. Ukraine's case is that under the Convention, the Russian Federation has an obligation to act within the limits permitted by international law. This obligation, Ukraine argues, is breached by the "special military operation" initiated by the Russian Federation. This obligation is not, as argued by the majority, extrinsic to the Convention; rather, it is inherent in and intrinsic to the Convention, because it derives from an interpretation of a State party's duty under Article I of the Convention to prevent genocide.

46. At paragraph 146, the majority also argue that even if it is assumed that the Russian Federation's "special military operation" is "contrary to international law, it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to . . . the use of force". No reason is given for this conclusion. If the obligation to prevent and punish genocide under Article I of the Convention includes the duty to act within the limits permitted by international law, then the Russian Federation would have breached the obligation under the Convention for a State party to act within the limits permitted by international law in discharging its conventional obligation to prevent genocide.

47. In sum, the scope of the duty to prevent and punish genocide under Article I of the Genocide Convention includes the duty to act within the limits permitted by international law. Ukraine's case is that, by its "special military operation", the Russian Federation did not act within the limits permitted by international law. The Court therefore has jurisdiction to entertain Ukraine's claim that the Russian Federation breached the requirement under Article I to

act within the limits permitted by international law in any act taken to prevent or punish genocide. The majority should therefore have concluded that the Court has the jurisdiction to entertain Ukraine's claim and should leave for the merits the determination whether by conducting its "special military operation" the Russian Federation had acted within the limits permitted by international law.

48. This conclusion should not be seen as a surprise because, in the provisional measures Order in this case, the Court found that "Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine" (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 225, para. 60).

CONCLUSION

49. If this were a case before a Commonwealth Caribbean Court, we would be required to avoid what Lord Wilberforce called "the austerity of tabulated legalism" (*Minister of Home Affairs* v. *Fisher* [1980] A.C. 319, 328). However, the Court's approach to the interpretation of human rights instruments is not very different from that of Lord Wilberforce. We are enjoined to give the terms of a treaty their ordinary meaning in their context and in light of a treaty's object and purpose. As for the latter, years before Lord Wilberforce's dictum, this Court held that the Genocide Convention was adopted "for a purely humanitarian and civilizing purpose" and to "confirm and endorse the most elementary principles of morality". The Court ought to have interpreted and applied the Convention in accordance with its "high purposes".

50. One of the astonishing results of this Judgment is that Ukraine is left without any reparations for the loss of life, injuries and damage to property resulting from the invasion. We find this very regrettable.

51. Ukraine bears the burden of establishing that the Russian Federation did not act in good faith, reasonably and within the limits permitted by international law in discharging its conventional duty to prevent and punish genocide. In our view, Ukraine has discharged this burden.

52. This case has come before the Court at a time when it has its busiest docket ever. It has twenty-two cases, including three requests for advisory opinions. It is fair to conclude therefore that the international community has confidence in the Court. We are concerned that by this Judgment, this confidence may be dampened. The Court as the principal judicial organ of the United Nations should stand up and exercise its jurisdiction when acts such as the invasion are committed by a respondent State under the pretext of preventing or punishing an alleged genocide. The Court is rightly sensitive to the question whether in a particular case, the disputant States have consented to its jurisdiction. In this case, both Ukraine and Russia have consented to the Court's jurisdiction. The Court has too narrowly construed its jurisdiction in respect of submissions *(c)* and *(d)* in paragraph 178 of Ukraine's Memorial.

53. In this opinion, we have not addressed Ukraine's claim in submission *(d)* in paragraph 178 of its Memorial, in which it requested the Court to adjudge and declare that the Russian Federation's recognition of the independence of the so-called "Donetsk People's Republic" and "Luhansk People's Republic" on 21 February 2022 violates Article I and IV of the Genocide Convention. We have focused instead on Ukraine's submission *(c)* in which Ukraine asks the Court to adjudge and declare that the Russian Federation's use of force against Ukraine violates Articles I and IV of the Genocide Convention. We believe that this is by far the more urgent and pressing submission and for that reason we have focused our attention on it.

(Signed)
Julia SEBUTINDE.

(Signed)
Patrick L. ROBINSON.

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Separate opinion of Judge Iwasawa

It is ill-advised to describe Ukraine's submission (b) *as a "non-violation complaint" because this term has a special meaning in WTO law — The practices of the WTO provide no assistance to the Court because they are based on particular provisions of the DSU.*

There are three elements required for the application of the principle of res judicata*, namely identity of the "parties", the "object" and the "ground" — Some tribunals have focused on "the question at issue", without distinguishing "object" and "ground" as two separate elements.*

An abusive invocation of a treaty does not, by itself, constitute a breach of the treaty — In the Bosnia Genocide *case, in stating that "it is clear that every State may only act within the limits permitted by international law", the Court was merely emphasizing that a State party is not required by Article I of the Genocide Convention to take measures which go beyond the limits permitted by international law.*

1. In this opinion, I will address three topics. First, I will offer my views on WTO law. I will explain why it is ill-advised to refer to Ukraine's submission *(b)* as a "non-violation complaint", and elaborate on the Court's reasons for concluding that the practices of the WTO provide no assistance to the Court in the present case. Second, I will explain the circumstances in which a claim is covered by the *res judicata* effect of a judgment. Third, I will examine the acts complained of by Ukraine in submissions *(c)* and *(d)*, and affirm that they are not capable of constituting violations of obligations under the Genocide Convention.

I. WTO law

2. The Russian Federation argues that Ukraine's request for a declaration that it did not breach its obligations under the Genocide Convention is inadmissible. The Respondent refers to Ukraine's request as a "reverse compliance request". It contends that requests of such a kind are extremely rare in inter-State dispute settlement and that they are currently reserved for the WTO, whose practices are not transposable to the Court (see Judgment, paragraph 82).

3. The Court notes a significant variation in the terms employed by the Parties and some intervening States to describe Ukraine's request. While the Russian Federation refers to it as a "reverse compliance request", Ukraine uses terms such as a request for "a declaration of conformity", "a declaration of compliance", and "a non-violation declaration". The intervening States have employed terms such as "non-violation complaints" and requests for "negative declarations". The Court does not find it necessary to explore the legal significance of the various terms used (Judgment, paragraph 93).

4. In my view, the term "non-violation complaint", used by Ukraine and many intervening States (Austria-Czechia-Slovakia, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Ireland, Italy, Latvia, Luxembourg, Malta, and Sweden), is misleading and should be avoided because it has a special meaning in WTO law.

5. Under Article XXIII, paragraph 1, of GATT 1994, a member of the WTO can submit a complaint under the WTO dispute settlement procedures when any benefit accruing to it under the WTO Agreement is being nullified or impaired as a result of "*(a)* the failure of another contracting party to carry out its obligations under [the WTO] Agreement" or "*(b)* the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the WTO] Agreement". In WTO law, the former are referred to as "violation complaints" and the latter as "non-violation complaints" (see Article 26 of the Dispute Settlement Understanding ("DSU"), Annex 2 of the WTO Agreement). Thus, a member of the WTO can submit a complaint under the WTO dispute settlement procedures, claiming that its benefits are being nullified or impaired by another member's measure, even if that measure does not violate the WTO Agreement. Given the special meaning attributed to the term "non-violation complaints" in WTO law, it is confusing and ill-advised to describe Ukraine's submission *(b)* as a "non-violation complaint".

6. As for the Respondent's contention that the practices of the WTO are not transposable to the Court, the Court merely states that "the practices of the WTO provide no assistance to the Court for determining the

admissibility of Ukraine's request because they are based on particular provisions of the [WTO] Agreement" (Judgment, paragraph 95). I will elaborate on the reasons why the practices of the WTO provide no assistance to the Court.

7. Under the WTO dispute settlement procedures, a panel or the Appellate Body examines a dispute and issues a report containing findings and recommendations. If the Dispute Settlement Body ("DSB") adopts the report, the parties to that dispute are required to implement the recommendations and rulings of the DSB. After the respondent has taken measures to implement those recommendations and rulings, a disagreement may arise between the parties as to whether such measures are consistent with the WTO Agreement. Article 21.5 of the DSU allows the parties to have recourse to the WTO dispute settlement procedures to resolve this disagreement. These proceedings are referred to as a "compliance review" in the WTO.

8. Article 21.5 of the DSU provides that

> "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel".

It is not clear from this provision whether a respondent of the original dispute can have recourse to a compliance review. In practice, however, respondents of the original disputes have requested compliance reviews regarding disagreements on the consistency with the WTO Agreement of measures they have taken to implement the recommendations and rulings of the DSB. Article 6 of the DSU provides that, if the complaining party so requests, "a panel shall be established" at the latest at the second meeting of the DSB, "unless at that meeting the DSB decides by consensus not to establish a panel". In accordance with this provision, if a respondent of the original dispute requests the establishment of a panel for a compliance review, a panel "shall be established" at the second meeting of the DSB. Thus, in practice, both applicants and respondents of the original disputes have had recourse to compliance reviews, and panels have been established to conduct such reviews[1].

9. The DSU specifically provides for a compliance review (Article 21.5) and stipulates that a panel for a compliance review shall be established at the second meeting of the DSB, even when the review is requested by the respondent of the original dispute (Article 6). The practices of the WTO provide no assistance to the Court because they are based on these particular provisions of the DSU (see Judgment, paragraph 95).

II. *Res judicata*

10. In the present case, the Russian Federation contends that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties, arguing that Ukraine could obtain an undue advantage by virtue of the principle of *res judicata*. The Court dismisses this objection summarily. It points out that, "whenever a dispute is settled by the Court by way of a judgment, there is a possibility that a future claim is covered by the *res judicata* effect of that judgment". It then concludes that this possibility, however, does not per se provide a basis for finding that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties (Judgment, paragraph 105). I will elaborate on the circumstances in which "a future claim is covered by the *res judicata* effect of [a] judgment".

11. It is widely accepted both in international law and in national law that there are three elements required for the application of the principle of *res judicata*. In international law, this idea can be traced to Judge Anzilotti's dissenting opinion in *The Chorzów Factory: Interpretation* cases, in which he explained:

> "The first object of Article 60 being to ensure, by excluding every ordinary means of appeal against them, that the Court's judgments shall possess the formal value of *res judicata*, it is evident that that article is closely connected with Article 59 which determines the material limits of *res judicata* when stating that 'the decision of the Court has no binding force except between the Parties and in respect of that particular case': we have here the three traditional elements for identification, *persona, petitum, causa petendi*, for it is clear that 'the particular case' (*le cas qui a été décidé*) covers both the object and the grounds of the claim."

> ("L'article 60, dont le premier objet est d'assurer aux arrêts de la Cour la valeur formelle de la chose jugée, en excluant tout moyen ordinaire de recours, est de toute évidence étroitement lié à l'article 59, qui détermine les limites matérielles de la chose jugée en disant que 'la décision de la Cour n'est obligatoire que pour les Parties en litige et dans le cas qui a été décidé': ce sont les trois éléments traditionnels d'identification, *persona, petitum, causa petendi*, car il est certain que 'le cas qui a été décidé' comprend aussi bien la chose demandée que la cause de la demande.") (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, dissenting opinion of Judge Anzilotti, p. 23. See also *Interpretation of the Statute of the Memel Territory*, *Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, dissenting opinion of Judge Anzilotti, p. 350.)

These three elements were endorsed by the arbitral tribunal in the *Trail Smelter* case, which referred to the identification of "parties, object, and cause"[2]. In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, the Court referred to "les mêmes parties (the same parties)", "le même objet (the same object)", and "la même base juridique (the same legal ground)" (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 59)[3].

12. The first element, *persona* or identity of the parties, is not especially complicated in inter-State disputes; it requires that the same "parties" (States) are involved in two proceedings. For the second element, Judge Anzilotti used the Latin term, *petitum*, which means the "relief sought". On this basis, the second element is generally thought to require that the same relief is sought in two proceedings[4]. However, in the subsequent part of his opinion, Judge Anzilotti described *petitum* as "la chose demandée" in French and "the object of the claim" in English. The term "object" has an ambiguous meaning in English. Some tribunals and authors have understood the "object" of the claim to mean the "subject-matter" of the dispute or the "issue" in dispute[5]. As for the third element, *causa petendi*, Judge Anzilotti described it as "la cause de la demande" in French and "the grounds of the claim" in English. Thus, the third element, which is often explained as identity of "cause" or "ground", is thought to require that the same "legal grounds" are relied on by the parties in two proceedings.

13. Some tribunals have considered that the principle of *res judicata* applies where there is identity of the parties and of "the question at issue", without distinguishing "object" and "ground" as two separate elements. For example, the tribunal in the *Pious Fund Arbitration* stated that *res judicata* applies where "there is not only identity of parties to the suit, but also identity of *the subject-matter*"[6]. In *Re S. S. Newchwang*, the tribunal declared that "the doctrine of *res judicata* applies only where there is identity of the parties and of *the question at issue*"[7]. The Permanent Court of International Justice took the view that "the doctrine of *res judicata* [applies when] not only the Parties but also *the matter in dispute* [are] the same" (*Polish Postal Service in Danzig, Advisory Opinion*, *1925, P.C.I.J., Series B, No. 11*, p. 30; emphasis added)[8]. Indeed, although Judge Anzilotti in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* explained that "'the particular case' (*le cas qui a été décidé*) covers both the object and the grounds of the claim" (*Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, dissenting opinion of Judge Anzilotti, p. 23), he subsequently used the phrase "the subject of the dispute (objet du différend)" in the sense of "*petitum et causa petendi*" in *Interpretation of the Statute of the Memel Territory* (*Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, dissenting opinion of Judge Anzilotti, p. 350). Thus, "object" and "ground" could be considered as a subdivision of identity of "the question at issue"[9].

14. In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, the Court further explained that for the application of the principle of *res judicata*, it is not sufficient to ascertain that the case at issue involves the same parties, the same object, and the same legal ground. It is also necessary to determine the content of the decision whose finality is to be ensured. The Court cannot be satisfied merely by the fact that successive claims submitted to it by the same parties are identical. It must determine whether and to what extent the first claim has already been definitively settled. If a matter has not in fact been determined, expressly or by necessary implication, no force of *res judicata* attaches to it. A general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 59).

III. The alleged violations by the Respondent of the Genocide Convention

15. In the present case, the Applicant seeks to found the Court's jurisdiction on Article IX of the Genocide Convention. As the Court points out, "when the Court is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State party for the breach of obligations under the treaty", it has jurisdiction only if "'the violations of the [t]reaty . . . pleaded . . . fall within the provisions of the [t]reaty' [the *Oil Platforms* case]" (Judgment, paragraph 135).

16. Ukraine contends that "Russia's abuse and misuse of the [Genocide] Convention violates the Convention" (Written Statement of Ukraine, paras. 122-128; see also CR 2023/14, p. 78, para. 48 (Thouvenin); Memorial of Ukraine, paras. 91-92). The Applicant cites several decisions of the Court and a report of the WTO Appellate Body to support such a contention[10]. However, the cases cited by Ukraine do not support its contention. I agree with the Court that, although "[i]t is certainly not consistent with the principle of good faith to invoke a treaty abusively", an abusive invocation does not, "by itself, [] constitute[] a breach of the treaty" (Judgment, paragraph 143), even if it may breach other rules of international law. "In the present case, even if it were shown that the Russian Federation had invoked the Convention abusively . . ., it would not follow that it had violated its obligations under the Convention" (*ibid.*).

17. Ukraine also argues that Articles I and IV of the Genocide Convention contain an implicit obligation to act within the limits of international law when preventing and punishing genocide. By taking actions which go beyond the limits permitted by international law based on a false allegation of genocide, the Respondent has violated Articles I and IV of the Genocide Convention (Memorial of Ukraine, paras. 94-100, 126; Written Statement of Ukraine, paras. 129-142; see also CR 2023/14, pp. 79-80, paras. 51-56 (Thouvenin)). In support of this contention, Ukraine relies on the Court's statement in the *Bosnia Genocide* case that "it is clear that every State may only act within the limits permitted by international law" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430). Some intervening States have expressed similar views.

18. The Court's statement in the *Bosnia Genocide* case should not be taken out of context. The Court made this statement when it was analysing the obligation to prevent genocide under Article I of the Genocide Convention, with a view to determining its specific scope. The Court explained that the obligation to prevent genocide is one of conduct and not one of result; the obligation is "to employ all means reasonably available to [the States parties], so as to prevent genocide so far as possible". A State must "take all measures to prevent genocide which [are] within its power". The Court then observed that "it is clear that every State may only act within the limits permitted by international law" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I)*, p. 221, para. 430). With this statement, the Court was merely emphasizing that a State party is not *required* by Article I of the Genocide Convention to take measures which go beyond the limits permitted by international law. The Court explains the meaning of this statement in a similar manner in the present Judgment (paragraph 146).

19. For these reasons, I agree with the Court that, even assuming that the actions taken by the Respondent are contrary to international law, "it is not the [Genocide] Convention that the Russian Federation would have violated but the relevant rules of international law" (Judgment, paragraph 146). It is clear that States may not act beyond the limits of international law when preventing and punishing genocide. However, Articles I and IV of the Convention do not contain an implicit obligation to act within the limits of international law. "Those limits are not defined by the Convention itself but by other rules of international law" (*ibid.*).

(Signed)
IWASAWA Yuji.

ENDNOTES

1 See e.g. *European-Communities – Regime for the Importation, Sale and Distribution of Bananas – Recourse to Article 21 5 by the European-Communities*, Report of the Panel, adopted 6 May 1999, WT/DS27/RW/EEC.

2 *Trail Smelter (United States of America/Canada)*, Award of 11 March 1941, United Nations, *Reports of International Arbitral Awards*, Vol. III, p. 1952.

3 Other tribunals have also endorsed the three-element test. *Helnan International Hotels A/S* v. *Arab Republic of Egypt*, ICSID Case No ARB/05/19, Award of 7 June 2008, para. 126. See also Iran-US Claims Tribunal, *Islamic Republic of Iran* v. *United States of America*, IUSCT Award No. 601-A3/A8/A9/A14/B61-FT, Partial Award of 17 July 2009, para. 114; *Apotex* v. *United States of America*, ICSID Case No ARB(AF)/12/1, Award of 25 August 2014, para. 7.13.

4 E.g. *Helnan*, *supra* fn. 3, para. 126; *Apotex*, *supra* fn. 3, para. 7.14.

5 E.g. *CME Czech Republic B.V.* v. *Czech Republic*, Final Award of 14 March 2003, para. 435; *Helnan*, *supra* fn. 3, para. 126; Vaughan Lowe, "*Res Judicata* and the Rule of Law in International Arbitration", *African Journal of International and Comparative Law*, Vol. 8, 1996, p. 40.

6 *Pious Fund of the Californias (Mexico/United States)*, 14 October 1902, James Brown Scott (ed.), *The Hague Court Reports*, 1916, p. 5 (emphasis added).

7 *In Re S. S. Newchwang (Great Britain* v. *United States of America)*, Decision of 9 December 1921, *American Journal of International Law*, Vol. 16, p. 324 (emphasis added).

8 See also *Waste Management Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of 26 June 2002 on Mexico's Preliminary Objection, para. 39; *Petrobart Limited* v. *Kyrgyz Republic*, Stockholm Chamber of Commerce, No. 126/2003, Arbitral Award of 29 March 2005, p. 64; *Vivendi* v. *Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction of 14 November 2005, para. 72; *Inceysa-Vallisoletana S.L.* v. *El-Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 214; *EURAM Bank* v. *Slovakia*, PCA Case No. 2010-17, Award on Jurisdiction of 22 October 2012, para. 394; *Apotex*, *supra* fn. 3, para. 7.15-7.16; *Iran* v. *United States*, *supra* fn. 3, para. 114.

9 See e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, pp. 340, 343, 346; Leonardo Nemer Caldeira Brant, *L'autorité de la chose jugée en droit international public*, 2003, pp. 114-123.

10 *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30. *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment of 30 March 2023*, para. 93. *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 323, para. 73. *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appellate Body, adopted 6 November 1998, WT/DS58/AB/R, pp. 61-62, para. 158.

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Separate opinion of Judge Charlesworth

Subject of the dispute — Indivisibility of the two "aspects" of the dispute.

Jurisdiction ratione materiae *— Enquiry whether acts "fall within" the treaty containing the compromissory clause — Distinction from the enquiry whether acts are capable of constituting violations of the treaty — Relationship between the Genocide Convention and extrinsic rules — Interpretation of Article I as a question for the merits — Incomplete nature of the Court's enquiry — Jurisdiction under compromissory clauses encompassing questions not involving violation of a treaty.*

Particular circumstances of the case — Consistency of the reasoning concerning the existence of a dispute with the Court's jurisprudence — Irrelevance of any delay prior to the seisin of the Court — Absence of jurisdictional preconditions in Article IX of the Genocide Convention.

Requests for a declaration of compliance with obligations under a treaty — Compatibility of such requests with the Court's judicial function — Admissibility of such requests under Article IX of the Genocide Convention.

1. I have voted in favour of almost all of the subparagraphs of the operative clause of the Judgment. This separate opinion explains why I have voted against upholding the Russian Federation's second preliminary objection. It also reflects on the Court's references to the particularity or specificity of the circumstances of this case.

2. This is the first time in the history of the Court and its predecessor that a large number of States have decided to participate in the proceedings invoking the right to intervene under Article 63 of the Statute. As in previous cases of intervention under Article 63, the intervening States' arguments are presented only briefly in today's Judgment. They nevertheless enriched the Court's consideration of the Parties' arguments.

I. The subject of the dispute

3. The concept of a dispute is central to contentious cases before the Court as, under its Statute, the Court's function is to decide disputes[1]. In the present case, the jurisdictional basis invoked — Article IX of the Genocide Convention — also hinges on the existence of a dispute. The subject of the dispute is the point of reference for the determination, among other things, of whether a dispute exists between the parties[2]; whether the Court has jurisdiction to entertain it[3]; and whether the parties' claims, to the extent that they evolve during the proceedings, are admissible[4]. In short, a contentious case gravitates around the dispute and its subject.

4. Therefore, identification of the subject of a dispute is a consequential exercise, and the task of the Court itself. In this regard, the Court is required, by virtue of its judicial function, to pay close attention to the instrument instituting proceedings, because the Court's mandate covers "such disputes *as are submitted to it*" and not others[5]. In line with this, the Rules of Court require that the subject of the dispute be indicated in the Application instituting proceedings or in the notification of the special agreement[6]. In its jurisprudence, the Court has confirmed that, for the purpose of determining the subject of the dispute "on an objective basis", it relies on the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant and to the facts identified as the basis for its claim[7].

5. The Court today concludes that the subject of the dispute relates to the question "whether acts of genocide attributable to Ukraine had been committed in the Donbas region and [of] the lawfulness of the Russian Federation's actions allegedly undertaken on the basis of such an accusation" (Judgment, para. 51). The subject of the dispute thus framed, it is not evident that the dispute comprises two aspects "the essential characteristics of which are distinct" (Judgment, para. 53), even less so that the two aspects are "fundamentally different in nature" (Judgment, para. 56). A dispute may comprise multiple "aspects" when, for example, the applicant alleges that the respondent's conduct violates multiple sets of rules[8]. Here, however, the two questions that the Court identifies both arise out of the same factual and legal matrix put forward by the Applicant. As evidenced by the Court's formulation of the dispute, Ukraine claims that the Russian Federation's actions were taken *on the basis* of its accusation that genocide was being committed and that they were unlawful *because* this accusation was false. In other words, the second question — the lawfulness of the Russian Federation's conduct — is premised on the first — the allegation of

genocide being false[9]. Indeed, in a way, Ukraine's contention that the allegation against it was false is little more than a proposition in support of its claim that the Russian Federation's conduct is unlawful. Such propositions are often included in the parties' submissions[10], and sometimes even in the Court's own operative paragraph[11], but they have never been treated as distinct aspects of the dispute brought before the Court.

6. The only difference between the two questions identified in the Judgment consists in the fact that the second "aspect" of the dispute, as identified in the Judgment, involves the invocation by the Applicant of the Respondent's responsibility for alleged internationally wrongful acts (Judgment, para. 56). This fact alone does not suffice to divide the dispute into two aspects. The bifurcation of the dispute becomes more confusing in light of the Court's reasoning in relation to the Russian Federation's fifth preliminary objection. There, the Judgment concludes that requests for a declaration of compliance, such as the one contained in the first aspect of the present dispute, may be entertained no less than requests for a declaration of a violation, such as the one contained in the second aspect of the present dispute. If the two types of requests do not pose fundamentally different legal questions for the Court, it is difficult to see why they are fundamentally different in nature.

7. In my view, the division of the dispute into two aspects, which are in turn defined with reference to Ukraine's submissions, complicates the Court's reasoning unnecessarily. It also affects the Court's discussion of its jurisdiction *ratione materiae*, to which I now turn.

II. THE COURT'S JURISDICTION

8. The compromissory clause relied on by Ukraine grants the Court jurisdiction over disputes "relating to the interpretation or fulfilment of the [Genocide] Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". The Court must therefore ascertain whether the dispute brought by Ukraine relates to the interpretation, application or fulfilment of the Genocide Convention.

9. The Judgment describes the Court's enquiry as follows:

> "it must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty." (Judgment, para. 136.)

As I try to explain below, this enquiry deviates from the Court's jurisprudence (A); it is not applied correctly in the present case (B); and it does not squarely address the circumstances of the present case (C).

A. THE COURT'S ENQUIRY

10. The question whether a given act "falls within" a provision, which is at the heart of the Court's enquiry, is a metaphor[12]: it does not signal the type of relationship between the conduct (which is essentially a fact) and the legal rule that would allow the conclusion that the former "falls within" the latter. The Court observes today, as it has done in the past, that this enquiry may require, to a certain extent, the interpretation of the relevant treaty containing the compromissory clause (Judgment, para. 136). At the same time, the Court must not engage in too intensive an interpretation of the treaty at hand because, if this interpretation is a matter of dispute, this is precisely the type of question over which the Court enjoys jurisdiction under the compromissory clause. So, the Court has to navigate carefully between the interpretation of the treaty for the purposes of determining its jurisdiction *ratione materiae* and the same task to be performed for the purposes of resolving the dispute on the merits[13].

11. In its recent jurisprudence, the Court has charted this course by stating that, for the purposes of determining its jurisdiction *ratione materiae*, it will interpret "the provisions that define the scope of the treaty" in question[14]. By contrast, the Court has assigned to the merits phase the task of interpreting provisions "relat[ing] to the scope of certain obligations relied upon by the [a]pplicant"[15]. The wisdom of this solution lies in the fact that it defers the interpretation of substantive provisions to the stage at which the Court will have heard full argument by both parties, as well as by any intervening States — namely to the stage of the merits. In my view, today's Judgment goes off course when it adds that, for the purposes of the jurisdictional enquiry, the Court will also interpret the provisions that are alleged by the applicant to have been violated in a given case (Judgment, para. 136).

12. In any event, according to the Judgment, the aim at the jurisdictional stage is to ascertain whether "the facts at issue, if established, are capable of constituting violations of obligations under the treaty" (Judgment, para. 136). So, in the present case, if the facts put forward by the Applicant could constitute violations of the Respondent's obligations under the Genocide Convention, the Court has jurisdiction *ratione materiae* to hear the case on the merits. Then, at the stage of the merits, the Court will decide whether the Russian Federation's conduct would, or would not, violate the Convention. Following the same logic, the Court's jurisdiction *ratione materiae* must be denied if the Court concludes that the Russian Federation's conduct could not ever violate the Genocide Convention. In other words, the conclusion that the Court does not have jurisdiction *ratione materiae* assumes that the Russian Federation's conduct can in no circumstances violate the Genocide Convention.

B. APPLICATION IN THE PRESENT CASE

13. In this case, the Court's conclusion on its jurisdiction is surprising. This is best illustrated in the discussion of what the Judgment labels as the contention that the Russian Federation's measures allegedly "go beyond the limits permitted by international law" (Judgment, para. 141). There, the Judgment observes that an act in breach of international law is not, for this reason alone, in breach of the Genocide Convention (Judgment, para. 146). But it is perfectly possible that an act is in breach of the Genocide Convention and of other rules of international law at the same time. As the Court has noted, any given conduct may engage multiple sets of rules[16]. The Court will likely not have jurisdiction to decide the lawfulness of that conduct with reference to all of the applicable sets of rules, but it does not follow that the Court is without jurisdiction to decide its lawfulness with reference to any set of rules despite the presence of an applicable compromissory clause[17].

14. Moreover, there is no reason to assume that a specific type of conduct (for example, the use of force) is incapable by its nature of violating the Genocide Convention[18]. So, the observation that the Russian Federation's conduct might violate rules of international law beyond the Genocide Convention does not suffice to conclude that the same conduct "is "not governed by the Genocide Convention" (Judgment, para. 146).

15. It may be, of course, that the violation of the extrinsic rule is linked — or claimed by the applicant to be linked — to the violation of the obligations under the treaty containing the compromissory clause. In this connection, it is useful to compare the present case with *Immunities and Criminal Proceedings* and with *Certain Iranian Assets*. In both those cases, the applicants contended that certain provisions of the relevant treaty invoked incorporated, by way of renvoi, obligations arising under rules extrinsic to the treaty[19]. On that basis, the applicants argued that a breach of the latter obligations entailed, in and of itself, violation of the treaty in question by virtue of the alleged incorporation[20]. In both cases, the Court at the stage of preliminary objections interpreted the provisions relied on by the applicant with a view to ascertaining whether they contained the alleged renvoi[21].

16. The Applicant's argument in the present case takes a different direction. Ukraine does not argue that the provisions of the Genocide Convention were violated *because* the rules of general international law on the recognition of States and the use of force were violated[22]. Rather, Ukraine argues that the Genocide Convention, properly interpreted, contains a rule prohibiting certain types of conduct as means for the prevention or punishment of genocide, at least in certain circumstances — namely where there is insufficient evidence of genocide[23]. So, on my understanding, Ukraine's argument does not invite the Court to apply the rules on the recognition of States and the use of force and, upon finding that they are violated, declare that the Genocide Convention has also been violated. Instead, Ukraine's argument invites the Court to interpret the Genocide Convention (notably Article I) in a manner that prohibits certain types of conduct (or indeed any conduct) in certain circumstances, and then to find that these circumstances are present in the case before it. This contention by the Applicant, which is resisted by the Respondent, raises questions of interpretation and application of the Genocide Convention, specifically of the substantive obligations stipulated in Article I. Therefore, in my view, it attracts the Court's jurisdiction under Article IX.

17. A variation of this argument was first put forward in Ukraine's Application, which submitted that the Russian Federation's conduct "had no basis" in the Genocide Convention[24]. I understand this as a contention that the Genocide Convention does not authorize conduct for the prevention and punishment of genocide where no genocide occurs. In this connection, I support the finding that the submissions in the Memorial clarify and specify Ukraine's claims (Judgment, para. 128). Indeed, both in the Application and in the Memorial, Ukraine contests

the compatibility of the Russian Federation's conduct with the Genocide Convention. The only difference is that, in the Application, the alleged incompatibility arises out of the absence in the Convention of a rule authorizing (or perhaps prescribing) the Russian Federation's conduct, while in the Memorial the alleged incompatibility arises out of the existence of a rule prohibiting such conduct. In other words, "[w]hat has changed is the legal basis being advanced for the claim" but not the claim itself or the subject of the dispute[25]. For that reason, I think that the Court should have ascertained its jurisdiction to entertain the question whether the Genocide Convention authorizes conduct such as that undertaken by the Russian Federation in alleged discharge of its obligations thereunder. Given the object and purpose of the Genocide Convention, as well as the time of its adoption, it cannot be ruled out that the Convention regulates, at least in part, the modalities for the invocation of a State party's responsibility for failure to prevent or punish genocide[26].

18. On either variant of the Applicant's argument, the question whether the interpretation put forward by the Applicant — and supported by many intervening States — is sound, and whether it can be applied to the facts of this case, is a matter for the merits. In particular, the merits are the appropriate stage for the Court to determine the interpretative means that ought to be used for the interpretation of Article I of the Genocide Convention[27]. This may entail a decision about which rules, if any, shed light on the interpretation of that provision pursuant to the interpretative tool reflected in Article 31, paragraph 3 *(c)*, of the Vienna Convention on the Law of Treaties[28]. This is a decision that the Court has invariably taken at the stage of the merits, because it is precisely the type of exercise that involves the interpretation of the applicable treaty in question[29]. Certainly, the Court may not rule on breaches of rules of international law beyond the Genocide Convention at the stage of the merits[30]. At the same time, the potential relevance of other rules of international law does not prevent the Court from proceeding to the merits[31]. Put simply, the Court's approach as to which rules should be taken into account for interpretative purposes has no bearing on the scope of its jurisdiction.

19. It is striking that the Judgment, despite suggesting in paragraph 136 that it will interpret the provisions claimed by the Applicant to have been violated, reaches its conclusion without engaging explicitly in the interpretation of the provisions in question — namely Articles I and IV of the Genocide Convention. I am also troubled by the fact that, although the Judgment announces that it will set out to explore whether the Russian Federation's conduct *could* violate the Genocide Convention, its conclusion reveals that it examines whether the Russian Federation's conduct *would* constitute a violation of the Convention (Judgment, para. 139). To borrow Judge Higgins's language in *Oil Platforms*, I think that this shift from "could" to "would" "would seem to go too far", because it is only at the merits stage that "could" may be converted to "would"[32].

C. BEYOND TREATY VIOLATIONS

20. Even if correctly applied, the enquiry that the Court selects in order to determine its jurisdiction in the present case — whether the Russian Federation's conduct is capable of constituting a violation of the Genocide Convention — seems wanting for an additional reason. As the Judgment concedes, this enquiry applies "when the Court is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State for the breach of obligations under the treaty" (Judgment, para. 135). Here, however, Ukraine's claims are not confined to an allegation of a breach of specific obligations under the Genocide Convention.

21. Instead, the Applicant here also contends — and the Respondent disputes — that the obligation to prevent and punish genocide is inapplicable in the circumstances. In this connection, the Judgment points out that, in light of Ukraine's contention that no genocide has been committed, it is difficult to see how the Russian Federation's obligations to prevent and punish genocide could have been violated (Judgment, para. 140). Although this may be true, it does not follow that the Court is without jurisdiction under Article IX. Not all disputes concerning the interpretation or application of a treaty need to involve an alleged breach of the obligations arising under it[33]. The Court's predecessor has affirmed that its jurisdiction under a compromissory clause covers disputes concerning "the extent of the sphere of application" of the provisions of the treaty containing the compromissory clause[34]. And this Court has held that the question whether a treaty governs a specific event is a question concerning the interpretation and application of that treaty[35]. Here, the Parties disagree with respect to the question whether the circumstances triggering the Russian Federation's obligation to prevent genocide are present — the Russian Federation claims

that these circumstances are present, whereas Ukraine denies it[36]. The Parties' dispute over this question relates to the interpretation and application of the Genocide Convention[37]; it is not deprived of this character even if we accept that, regardless of the answer to the question, the Russian Federation has not breached its obligation to prevent and punish genocide.

22. The same is true for Ukraine's invocation of the notion of good faith performance of treaty obligations. The Judgment notes that performance of the Genocide Convention in bad faith does not in itself constitute a violation of obligations under Article I and IV of the Convention (Judgment, para. 142). Even if this is correct, it does not imply that Article IX excludes jurisdiction over disputes concerning the performance of the Genocide Convention in good faith. In the comparable case of *Appeal Relating to the Jurisdiction of the ICAO Council*, the Court held that a dispute concerning the lawful suspension of a treaty is a dispute concerning the interpretation or application of that treaty[38]. This is so because, in order to decide this dispute, the interpretation and application of the treaty in question is inevitable[39]. Of course, the Court in that case was dealing with the jurisdiction of a different body, rather than its own jurisdiction, but, as several Members of this Court have observed, this is immaterial[40]. I think that the same conclusion must apply in relation to a dispute, such as the one in the present case, concerning the performance of the Genocide Convention in good faith[41].

23. For the purposes of determining its jurisdiction *ratione materiae*, the Court today understands the Applicant's claims as being confined to allegations of breach of the Genocide Convention. This, in my view, caused it to shift its focus from the enquiry that governs the question of its jurisdiction under Article IX — whether the dispute at hand relates to the interpretation, application or fulfilment of the Convention — to a much narrower question: whether the conduct complained of by the Applicant would necessarily amount to a violation of the Convention. The answer to the latter question may be debated. What is clear, however, is that a negative answer to the latter does not entail a negative answer to the former.

III. THE PARTICULAR CIRCUMSTANCES OF THIS CASE

24. At times in its Judgment, the Court emphasizes the "particular" or "specific" circumstances of this case. Every judgment of course addresses specific factual circumstances, but its decision may only rest on the application of legal principle. For this reason, the references to "specific circumstances" in this Judgment do not affect the legal significance of its reasoning.

A. THE EXISTENCE OF A DISPUTE

25. When discussing the Russian Federation's first preliminary objection, the Court makes reference to the "specific circumstances" of the case (Judgment, para. 50). Despite this, the Court's reasoning concerning the existence of a dispute largely tracks the Court's jurisprudence. As reflected in paragraphs 47-49, at the time that Ukraine's Application was filed, the Parties held opposite views on the subject-matter of the Application and the Respondent was aware or could not have been unaware that its views were opposed by the Applicant. In particular, the Russian Federation's position emerges from its conduct before the statement issued by Ukraine on 26 February 2022 and the ensuing institution of proceedings before the Court. The positions of both Parties have remained largely unchanged since then. In such circumstances, seisin of the Court "without further delay" is available to the applicant (Judgment, para. 50), because such a delay would not have affected the Court's jurisdiction.

26. At most, a delay might have allowed for the prospective respondent's views to be confirmed, whether through its explicit response or through its silence, as happened in *The Gambia* v. *Myanmar*[42]. However, such confirmation is legally irrelevant where these views are otherwise clear and where there is no suggestion that they have changed. The Court has rejected the view that the prospective respondent must have articulated its views individually to the prospective applicant prior to the seisin of the Court[43]. Besides, the Court's jurisdiction under Article IX of the Genocide Convention, unlike under other compromissory clauses, is not dependent on an unsuccessful attempt at negotiations or other means of dispute settlement. So, when two States parties to the Genocide Convention hold opposing views in relation to its interpretation, application or fulfilment, neither is required to accept the other's offer to resolve the dispute through means other than judicial settlement: the Court is open to both of them under Article IX.

B. ADMISSIBILITY OF REQUESTS FOR A DECLARATION OF COMPLIANCE WITH OBLIGATIONS UNDER A TREATY

27. While the Judgment rejects the contention of inadmissibility of Ukraine's request for a declaration that it did not breach its obligations under the Genocide Convention, it may give the impression that this conclusion is based on the "particular circumstances" of the present case (Judgment, para. 109). Yet such requests are not uncommon and, in my view, they do not pose any particular issues of admissibility. The Judgment acknowledges that requests such as that made by Ukraine do not contradict the principles of judicial propriety and the equality of the parties (Judgment, para. 106). This has been implicitly affirmed by the Court in various other cases in which such requests were put forward, including in *Rights of Nationals of the United States of America in Morocco*[44]. In this regard, the fact that the respondent, the United States, did not raise a preliminary objection in that case seems immaterial, because it would not cure any potential inadmissibility in France's request[45]. If a request for a declaration of conformity posed questions about the Court's judicial function or the general admissibility of claims, then the Court would have been required to raise those questions even in the absence of a specific objection by the litigant parties[46].

28. Today's Judgment also holds that such requests are not precluded by the terms of the compromissory clause invoked (Judgment, para. 99)[47]. This is consistent with the Court's observation in *The Gambia* v. *Myanmar* that the Genocide Convention does not attach conditions on the admissibility of claims additional to those generally applicable[48].

29. Against this background, I understand the reference to the particular circumstances in which Ukraine's request was made (Judgment, paras. 107-109) as confirming rather than qualifying the Court's preceding reasoning. In circumstances where there is a dispute between two States concerning the compliance by one of them under a treaty in force between them, both have a legal interest in the resolution of the dispute, and clauses such as Article IX of the Genocide Convention give them an avenue for it.

(Signed)
Hilary CHARLESWORTH.

ENDNOTES

1 Art. 38, para. 1, of the Statute of the Court; see *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 510, para. 88.

2 See *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, pp. 13-14.

3 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

4 *Certain Phosphate Lands in Nauru (Nauru* v. *Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 267, para. 69; also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2022 (I)*, p. 294, para. 47. Because the Court's jurisdiction is determined with reference to a dispute rather than to specific claims, once the jurisdiction is affirmed, the parties are free to amend their claims and submissions to the extent that those amendments do not transform the character (or subject) of the dispute.

5 Art. 38, para. 1, of the Statute (emphasis added).

6 Art. 38, para. 1, and Art. 39, para. 2, of the Rules of Court.

7 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 26, para. 53; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia* v. *Chile), Preliminary Objection, Judgment, I.C.J. Reports 2015 (II)*, p. 602, para. 26.

8 See, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, pp. 315-316, paras. 68-70; also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 577, para. 32.

9 See CR 2023/19, p. 77, para. 13 (Zionts); see also Memorial of Ukraine, para. 73.

10 See *Fisheries (United Kingdom* v. *Norway), Judgment, I.C.J. Reports 1951*, p. 126. See also *Temple of Preah Vihear (Cambodia* v. *Thailand), Merits, Judgment, I.C.J. Reports 1962*, p. 11; *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 14, para. 14; *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 625, para. 25.

11 See, for example, *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Judgment, I.C.J. Reports 2020*, p. 338, para. 126, point (1), and compare *ibid.*, p. 310, para. 24.

12 As is the French expression that the conduct "entre dans les prévisions du traité".

13 See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, p. 828: "The more limited [interpretative] function is undertaken by the Court in exercise of its *compétence de la compétence*; the more definitive function is undertaken in exercise of its substantive jurisdiction."

14 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 584, para. 57; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, pp. 31-32, para. 75.

15 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021,* pp. 33-34, para. 82; see also *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 586, paras. 62-63.

16 *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2021*, p. 27, para. 56; see also *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 223, para. 46.

17 *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2019 (II)*, p. 576, para. 28: "The fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met." See already *United States Diplomatic and Consular Staff in Tehran (United States of America* v. *Iran), Judgment, I.C.J. Reports 1980*, p. 20, para. 37; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 439-440, para. 105; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 92, para. 54. This view is shared by several intervening States: see, for example, Written Observations of Austria, Czechia and Slovakia, para. 38; Written Observations of Belgium, para. 12; Written Observations of Canada and the Netherlands, para. 18; Written Observations of Sweden, para. 12; Written Observations of New Zealand, para. 32.

18 See *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, pp. 811-812, para. 21: "A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation . . . by any other means." This view is supported by several intervening States: see, for example, Written Observations of Lithuania, para. 9; Written Observations of Norway, para. 24.

19 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 318, para. 81; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 26, paras. 50-51.

20 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 318, para. 81; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 22, para. 33.

21 *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 322, para. 96; *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Preliminary Objections, Judgment, I.C.J. Reports 2019 (I)*, p. 26, para. 52.

22 CR 2023/14, p. 80, para. 55 (Thouvenin); see also Written Observations of Ukraine, para. 138.

23 Memorial of Ukraine, para. 119; CR 2023/19, p. 68, para. 28 (Thouvenin).

24 Application of Ukraine, para. 30 *(c)-(d)*, cited in Judgment, para. 24.

25 *Territorial and Maritime Dispute (Nicaragua* v. *Colombia), Judgment, I.C.J. Reports 2012 (II)*, p. 665, para. 111.

26 See Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 116, para. 5 (Commentary to Part Three, Chap. I).

27 To the same effect, Written Observations of the United Kingdom, para 44.

28 Vienna Convention on the Law of Treaties (concluded 23 May 1969; entered into force 27 January 1980), United Nations, *Treaty Series*, Vol. 1155, p. 331.

29 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2003*, p. 182, para. 41; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti* v. *France), Judgment, I.C.J. Reports 2008*, p. 219, para. 113.

30 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 68, para. 153; see also *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, pp. 46-47, para. 66; *Jadhav (India* v. *Pakistan), Judgment, I.C.J. Reports 2019 (II)*, pp. 454-455, para. 135.

31 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment,*

I.C.J. Reports 2015 (I), p. 68, para. 153; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates* v. *Qatar), Judgment, I.C.J. Reports 2020*, p. 101, para. 49.

32 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Higgins, p. 856, para. 33.

33 *Interpretation of the Statute of the Memel Territory, Preliminary Objection, Judgment, 1932, P.C.I.J., Series A/B, No. 47*, p. 248; *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, pp. 18-19.

34 *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 16. Several intervening States concur: Written Observations of Australia, paras. 18-19; Written Observations of Cyprus, paras. 19-20; Written Observations of Slovenia, para. 30.

35 *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 18, para. 25.

36 In this connection, Ukraine contends that the obligation to prevent genocide is only triggered where there exists "reasonable basis to conclude that a genocide or serious risk of genocide is occurring" (Memorial of Ukraine, para. 79). Some of the intervening States support this interpretation: for example, Written Observations of Germany, para. 10; Written Observations of Poland, para. 42; Written Observations of Romania, para. 30.

37 The Court has entertained similar disputes in the past: see, among others, *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 649, para. 102; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine* v. *Russian Federation), Merits, Judgment of 31 January 2024*, para. 91.

38 *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* p. 66, para. 36.

39 *Ibid.*

40 *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, p. 826; *ibid.*, separate opinion of Judge Higgins, p. 855, para. 31. See also *Appeal Relating to the Jurisdiction of the ICAO Council (India* v. *Pakistan), Judgment, I.C.J. Reports 1972,* p. 61, para. 27: "As has already been seen in the case of the competence of the Court, *so with that of the Council*, its competence must depend on the character of the dispute submitted to it and on the issues thus raised" (emphasis added).

41 Several intervening States concur: see, for example, Written Observations of France, para. 42; Written Observations of Norway, para. 32; Written Observations of Sweden, para. 48; Written Observations of the United Kingdom, paras. 42-43.

42 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 507, para. 76.

43 *Ibid.*, p. 505, para. 71.

44 *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 176. For a more recent example, see the applicant's final submissions *(b)* and *(c)* in *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 628, para. 27.

45 In any event, the character of France's request was not transformed by the fact that the United States positively opposed it in its own submissions. If it were so, then there would be many more examples of cases involving requests for declarations of compliance, because such requests are a common submission by respondent States in the face of claims of violation: see, among others, *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay), Judgment, I.C.J. Reports 2010 (I)*, p. 31, para. 24; *Questions relating to the Obligation to Prosecute or Extradite (Belgium* v. *Senegal), Judgment, I.C.J. Reports 2012 (II)*, p. 430, para. 14.

46 *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment*, *I.C.J. Reports 1963*, p. 29: "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."

47 This view is shared by various intervening States: see, among others, Written Observations of Australia, para. 15; Written Observations of Austria, Czechia and Slovakia, para. 20; Written Observations of Belgium, para. 21; Written Observations of Bulgaria, para. 21; Written Observations of Canada and the Netherlands, para. 25; Written Observations of Germany, para. 21; Written Observations of France, para. 23; Written Observations of Malta, para. 21; Written Observations of Norway, para. 22; Written Observations of Poland, para. 29; Written Observations of Romania, para. 37; Written Observations of Slovenia, para. 14; Written Observations of Spain, para. 58; Written Observations of the United Kingdom, para. 38.

48 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 517, para. 110.

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Déclaration de M. le juge Brant

1. J'ai voté en faveur du rejet de la cinquième exception préliminaire de la Fédération de Russie, fondée sur l'irrecevabilité d'une demande tendant à ce qu'il soit déclaré que la demanderesse n'a pas violé ses obligations au titre de la convention (paragraphe 151, point 6 du dispositif de l'arrêt). Bien que je sois, dans les grandes lignes, en accord avec le raisonnement qui conduit la Cour à une telle décision, je crois qu'il serait utile d'amener quelques précisions sur un aspect particulier dudit raisonnement qui aurait pu, à mon avis, faire l'objet de quelques développements supplémentaires de la part de la Cour.

2. À l'appui de sa cinquième exception préliminaire, la défenderesse a notamment soutenu que la demande formulée par l'Ukraine au chef de conclusions figurant au point *b)* du paragraphe 178 de son mémoire est contraire aux principes d'« opportunité judiciaire » et d'égalité des parties. Selon la Fédération de Russie, l'autorité de la chose jugée qui s'attacherait à un arrêt rendu au stade du fond de la présente affaire pourrait avoir pour conséquence qu'elle se verrait privée du droit d'invoquer ultérieurement la responsabilité de l'Ukraine. La défenderesse soutient que s'il était permis à un État d'obtenir de manière préventive et, selon elle, « prématurée » une décision en sa faveur sur la base d'éléments de preuve incomplets, celui-ci se trouverait protégé contre toute action intentée contre lui par la suite, et ce, même si de nouvelles preuves irréfutables venaient à se faire jour (voir les paragraphes 86 et 104 de l'arrêt).

3. La Cour répond à cet argument au paragraphe 105 de l'arrêt. Elle souligne d'abord le caractère hypothétique des questions soulevées par l'argument de la Fédération de Russie et dit avec raison qu'il ne lui « appartient pas . . . de se perdre en conjectures sur ces questions ». Puis elle admet la possibilité qu'une éventuelle demande ultérieure de la Fédération de Russie soit couverte par l'effet de chose jugée de l'arrêt que la Cour pourrait être amenée à rendre au fond dans la présente affaire. Elle conclut néanmoins qu'« [e]n soi, cette éventualité ne permet toutefois pas de conclure que le chef de conclusions formulé par l'Ukraine au point *b)* est contraire aux principes d'"opportunité judiciaire" et d'égalité des parties », sans expliciter les raisons qui l'amène à une telle conclusion.

C'est ce point que je souhaite approfondir par quelques considérations qui, à mon avis, permettent de compléter cet aspect du raisonnement de la Cour.

4. Trois ordres de considérations interdisent à mon avis d'estimer que la demande de l'Ukraine met en cause les principes d'« opportunité judiciaire » et d'égalité des parties.

5. Premièrement, s'agissant du caractère prétendument « prématuré » de la demande de l'Ukraine, il y a lieu de souligner que, comme la Cour l'a noté à juste titre au paragraphe 44 de l'arrêt, « [l]'existence d'un différend entre les parties est une condition pour que la Cour ait compétence en vertu de l'article IX de la convention sur le génocide »[1].

En l'espèce, la Cour s'est appuyée sur deux éléments pour conclure que cette condition est remplie. D'une part, elle a constaté que certains organes de la Fédération de Russie ayant qualité pour représenter cet État dans les relations internationales avaient formulé des allégations selon lesquelles certains faits attribuables à l'Ukraine étaient constitutifs d'un génocide (paragraphe 47 de l'arrêt). D'autre part, elle a noté que l'Ukraine a constamment rejeté de telles accusations (paragraphe 48 de l'arrêt). La Cour a donc estimé à bon droit que la réunion de ces deux éléments établit l'existence d'un différend relatif à la convention sur le génocide, à la date de l'introduction de l'instance par l'Ukraine (paragraphe 51 de l'arrêt).

Les deux éléments retenus par la Cour peuvent être considérés comme nécessaires et suffisants aux fins de l'établissement de l'existence d'un tel différend. Autrement dit, en l'absence de l'un ou l'autre d'entre eux, la Cour n'aurait pas été en mesure de faire un tel constat et aurait donc dû décliner sa compétence pour connaître de l'affaire soumise par l'Ukraine. Si la Fédération de Russie souhaitait se prémunir contre l'éventualité de l'introduction d'une instance sur la base de la convention sur le génocide avant qu'elle n'eût réuni les éléments de preuve pertinents, il lui aurait donc suffi de s'abstenir de formuler de telles accusations à l'encontre de l'Ukraine ou de les différer jusqu'au moment où elle se serait estimée en possession des éléments de preuve adéquats.

En conséquence, je considère que la condition de l'existence d'un différend protège adéquatement les droits des États parties à la convention sur le génocide contre des requêtes « prématurées ». Il leur suffit, aux fins de se prémunir contre de telles requêtes, d'agir avec prudence et de s'abstenir de proférer des accusations, en particulier des accusations d'une telle gravité, avant d'avoir réuni les preuves qui permettent de les étayer. L'on ne saurait donc considérer que le caractère soi-disant prématuré de la demande de l'Ukraine contrevient aux principes d'« opportunité judiciaire » et d'égalité des parties.

6. Deuxièmement, s'agissant du caractère soi-disant « incomplet » des éléments de preuve qui seront soumis à la Cour dans la présente affaire, il y a lieu de relever que la découverte, par la Fédération de Russie, de faits nouveaux « de nature à exercer une influence décisive et qui, avant le prononcé de l'arrêt, étai[en]t inconnu[s] de la Cour et de la [Fédération de Russie], sans qu'il y ait, de sa part, faute à l[es]ignorer » ouvrirait la voie à l'introduction d'une demande en revision, conformément à l'article 61 du Statut de la Cour. Il est vrai que l'introduction d'une telle demande est soumise à certaines conditions restrictives, en particulier en matière de délais : d'une part, « [l]a demande en revision devra être formée au plus tard dans le délai de six mois après la découverte du fait nouveau » (paragraphe 4 de l'article 61 du Statut); et, d'autre part, « [a]ucune demande de revision ne pourra être formée après l'expiration d'un délai de dix ans à dater de l'arrêt » (paragraphe 5 de l'article 61 du Statut). Si l'on tient compte du fait que les premières accusations de génocide ont été formulées par le comité d'enquête de la Fédération de Russie dès 2014, il apparaît que cette dernière aura eu à sa disposition une période relativement longue afin de réunir les éléments de preuve permettant d'étayer ses accusations.

J'estime donc que le droit de la Fédération de Russie de présenter tous les éléments de preuve pertinents à l'appui des accusations qu'elle a formulées à l'encontre de l'Ukraine est suffisamment préservé par l'article 61 du Statut, de sorte que l'on ne peut pas considérer que, sous cet angle, la demande de l'Ukraine mette en cause les principes d'« opportunité judiciaire » et d'égalité des parties.

7. Troisièmement, s'agissant de l'autorité de la chose jugée qui s'attachera à un arrêt rendu au stade du fond de la présente affaire, je considère que la Cour a fait preuve de prudence en se limitant à dire qu'« il est possible qu'une demande ultérieure [de la Fédération de Russie] soit couverte par l'effet de chose jugée de cet arrêt ». Il n'y a toutefois pas de certitude sur ce point. Ce serait, le cas échéant, à la Cour qu'il reviendrait de décider, conformément à sa jurisprudence, si le principe de l'autorité de la chose jugée aurait pour effet de rendre irrecevable une requête de la Fédération de Russie introduite ultérieurement à l'arrêt au fond dans la présente affaire[2]. Cela impliquerait notamment de déterminer si l'objet d'une telle demande serait identique à la demande qui figure au paragraphe *b)* du paragraphe 178 du mémoire de l'Ukraine. Il ne serait pas inédit que la Cour se prononce plus d'une fois au sujet de différents aspects du même différend par des arrêts successifs rendus dans des affaires distinctes. On peut notamment songer à cet égard aux affaires du *Droit d'asile* et *Haya de la Torre* qui ont opposé la Colombie et le Pérou dans le contexte de l'asile diplomatique octroyé à M. Haya de la Torre par les autorités colombiennes. Dans l'arrêt rendu en l'affaire *Haya de la Torre*, la Cour a été amenée à affirmer ce qui suit, au sujet de l'autorité de la chose jugée de l'arrêt rendu dans l'affaire antérieure :

> « [L]'arrêt du 20 novembre [1950] n'a pas statué sur la question de la remise du réfugié. Cette question est nouvelle; elle a été soulevée par le Pérou dans sa note à la Colombie en date du 28 novembre 1950 et soumise à la Cour par la requête de la Colombie en date du 13 décembre 1950. Par conséquent, il n'y a pas chose jugée en ce qui concerne la question de la remise. »[3]

On ne saurait donc exclure *a priori* qu'une éventuelle demande ultérieure de la Fédération de Russie ait un objet différent de la demande de l'Ukraine dans la présente affaire, notamment parce qu'elle pourrait porter sur des questions nouvelles, qui n'auraient pas fait l'objet de l'arrêt rendu dans la présente instance. Tel pourrait notamment être le cas si la Fédération de Russie ne se limitait pas à demander un jugement déclaratoire constatant la responsabilité de l'Ukraine pour des violations alléguées de la convention sur le génocide, mais demandait à la Cour de tirer toutes les conséquences qui découlent de telles violations, notamment en termes de réparation. La Fédération de Russie ne se verra donc pas nécessairement privée de la possibilité d'introduire une instance contre l'Ukraine du fait du prononcé d'un arrêt au stade du fond sur la demande de l'Ukraine. Compte tenu de ces considérations, je ne crois pas que

l'autorité de la chose jugée conférée à l'arrêt rendu dans la présente affaire soit de nature à mettre en cause les principes d'« opportunité judiciaire » et d'égalité des parties.

8. En somme, bien que je sois en accord avec la position de la Cour selon laquelle il ne lui « appartient pas . . . de se perdre en conjectures sur ces questions », je tiens à souligner que là n'est pas à mes yeux la raison principale qui justifie de ne pas accueillir favorablement l'argument de la Fédération de Russie. Ce qui me paraît décisif, c'est que le cadre juridique applicable à l'action judiciaire devant la Cour, et donc à la présente affaire ainsi qu'à une hypothétique nouvelle demande ultérieure de la Fédération de Russie, permet de sauvegarder les droits de cette dernière de manière pleinement satisfaisante, sans que les principes d'« opportunité judiciaire » et d'égalité des parties ne soient mis en cause.

(Signé)
Leonardo Nemer Caldeira BRANT.

ENDNOTES

1 Arrêt, par. 44, citant *Application de la convention pour la prévention et la répression du crime de génocide (Gambie c. Myanmar), exceptions préliminaires, arrêt, C.I.J. Recueil 2022 (II)*, p. 502, par. 63.

2 Voir notamment *Question de la délimitation du plateau continental entre le Nicaragua et la Colombie au-delà de 200 milles marins de la côte nicaraguayenne (Nicaragua c. Colombie), exceptions préliminaires, arrêt, C.I.J. Recueil 2016 (I)*, p. 126, par. 59.

3 *Haya de la Torre (Colombie c. Pérou), arrêt, C.I.J. Recueil 1951*, p. 80.

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Opinion individuelle de M. le juge *ad hoc* Daudet

1. Je suis en accord avec la totalité des réponses données par la Cour aux exceptions d'incompétence et d'irrecevabilité présentées par la Russie et je souscris à l'ensemble des raisonnements qui les sous-tendent. Je souhaite cependant y ajouter quelques éléments de réflexion.

2. Dès l'abord, j'observe que cette affaire est quelque peu déconcertante par son caractère « inversé ». En effet, dans les affaires relatives au crime de génocide, la norme veut que l'État accusant un autre État de commettre un génocide soit le demandeur devant la Cour. La convention sur le génocide elle-même, dont l'objet et le but sont de prévenir et punir le génocide, répond à ce cas de figure et a probablement été pensée dans cet esprit. Selon cette configuration classique, puisque la Russie allègue que l'Ukraine commet un génocide, on l'imaginerait occuper la position de demanderesse contre l'Ukraine, elle-même défenderesse accusée de violations de la convention. Or, ici, c'est l'inverse qui se produit et c'est l'Ukraine, victime de l'accusation — mensongère selon elle — que porte la Russie à son encontre, qui est la demanderesse devant la Cour où la Russie se trouve défenderesse.

3. L'Ukraine a saisi la Cour sur la base de la convention sur le génocide. Le pouvoir de juger de la Cour dans la présente affaire est donc limité à ce qui est couvert dans ladite convention. S'il ne fait pas de doute que le comportement de la Russie viole le droit international, la question ne peut être traitée qu'à l'aune de la convention sur le génocide. La compétence de la Cour est ainsi restreinte à un champ matériel défini par les limites de la convention. Enfin, en vertu de son Statut, notamment l'article 36, la Cour ne peut se prononcer que sur le différend, et uniquement sur celui-là, que les Parties lui soumettent en vertu de la clause compromissoire de l'article IX de la convention.

4. La requête de l'Ukraine fait suite au déclenchement par la Russie de l'« opération spéciale » destinée à mettre fin à un génocide qui, selon elle, serait commis par l'Ukraine dans le Donbas. L'Ukraine nie catégoriquement avoir procédé à un quelconque génocide et demande à la Cour de le dire. L'Ukraine prétend aussi que l'accusation mensongère de la Russie n'est qu'un faux prétexte pour justifier son recours illicite à la force.

5. L'affaire, telle que l'Ukraine l'introduit, présente ainsi deux aspects mis en relief par l'arrêt (paragraphe 53). Le premier consiste à demander à la Cour de dire qu'elle n'a nullement commis de génocide, contrairement aux allégations mensongères de la Russie. Il porte donc sur sa non-responsabilité, tandis que le second aspect « vise à invoquer la responsabilité internationale de la Fédération de Russie, en lui imputant des comportements internationalement illicites » (paragraphe 56).

6. Au titre du premier aspect, la cinquième exception préliminaire de la Russie tend à obtenir de la Cour qu'elle déclare l'irrecevabilité de ce qu'elle qualifie de « demande inversée en constatation de conformité » de l'Ukraine par rapport à la convention sur le génocide. L'Ukraine, qui préfère employer l'expression de « déclaration de conformité » (paragraphe 87), attend de la Cour qu'elle dise ne rien voir de « judiciairement inapproprié à ce que la Cour déclare qu'un État respecte bien ses obligations » (paragraphe 89) ni de « problématique à ce que [l'arrêt] ait l'autorité de la chose jugée » (paragraphe 91).

7. La question de la compatibilité d'une telle demande ukrainienne avec la fonction judiciaire de la Cour est embarrassante et délicate. Dans sa jurisprudence, la Cour a indiqué que « [c]'est à la Cour elle-même et non pas aux parties qu'il appartient de veiller à l'intégrité de la fonction judiciaire de la Cour » (*Cameroun septentrional (Cameroun c. Royaume-Uni), exceptions préliminaires, C.I.J. Recueil 1963*, p. 29) en des termes dont, en y faisant référence dans son arrêt en l'affaire du *Différend frontalier (Burkina Faso/Niger)*, la Cour a considéré qu'ils avaient « une portée générale » (*C.I.J. Recueil 2013*, p. 69, par. 45) les rendant « parfaitement transposables » à l'affaire en cause *(ibid.*, par. 46) dans laquelle le Burkina Faso sollicitait la Cour « d'incorporer dans le dispositif de son arrêt le tracé de la frontière commune dans les deux secteurs au sujet desquels les Parties se sont entendues, de telle sorte que ce tracé soit revêtu de l'autorité de la chose jugée » (*ibid.*, p. 66, par. 37). Ce que la Cour a refusé de faire. La Cour est ainsi très attentive à ce que sa « fonction judiciaire » de règlement des différends reste intacte, ne se transforme pas en une fonction d'« authentification » ou de « certification » et soit au contraire fidèle à sa mission telle qu'elle est définie à l'article 38 de son Statut.

8. C'est donc une question très importante à mes yeux parmi les exceptions d'irrecevabilité présentées par la Russie. Ici, selon la Russie, l'Ukraine demanderait à la Cour de lui délivrer un certificat de comportement conforme à la convention sur le génocide ce que, selon elle, la Cour ne pourrait pas faire car ce serait étranger à sa fonction judiciaire, notamment faute, à ce stade, de l'existence d'un différend, condition indispensable au prononcé de la Cour.

9. Mais la thèse de l'Ukraine est différente. Elle considère, et en rejetant la première exception préliminaire de la Russie la Cour lui donne raison, qu'il existe bien un différend entre elle et la Russie relatif à la convention sur le génocide, levant ainsi l'obstacle soulevé par la Russie.

10. La condition de l'existence d'un différend entre les Parties étant ici remplie, pour autant, l'Ukraine peut-elle saisir la Cour de ce « recours inverse » ? Je n'ai pas vu de raison décisive de le lui refuser en retenant la cinquième exception de la Russie. En effet, s'il est vrai que la convention ne prévoit pas cette situation, elle ne l'interdit pas non plus et, sans attacher une importance considérable à l'expression « à la requête d'une partie au différend » que certains lisent comme une clause de style, je constate néanmoins que celle-ci a été très débattue lors des travaux préparatoires de la convention, ce qui ne se produit pas lors de l'insertion dans un texte d'une simple « clause de style ». Je ne vois donc pas de raison sérieuse pour ne pas considérer que cette expression rend possible tout recours répondant par ailleurs aux autres conditions de validité, au profit de n'importe laquelle des parties au différend. La Cour a longuement analysé les arguments des Parties et y a répondu point par point. Il n'est pas besoin d'y revenir ici, sinon pour insister sur un élément de politique judiciaire.

11. Au paragraphe 107, la Cour se montre prudente à l'égard de ces demandes en « déclaration de conformité » qui, si elles n'étaient pas assorties de conditions strictes, pourraient se multiplier à la demande d'États désireux de faire reconnaître une situation comme « authentifiée » ou « garantie » par l'autorité de la Cour, ce que celle-ci, comme il a été dit ci-dessus, ne peut accepter de faire. La Cour doit donc encadrer et contenir strictement de telles demandes. À cet égard, elle estime que la question de la recevabilité de la demande d'un État tendant à obtenir une déclaration indiquant qu'il n'a pas violé ses obligations au regard de la convention sur le génocide est fonction des circonstances particulières dans lesquelles une telle demande est formulée. En l'espèce, la demande de l'Ukraine s'inscrit dans le contexte d'un conflit armé entre les Parties. La Cour précise que « [l]e conflit armé . . . se poursuit encore jusqu'à ce jour ». Assurément, les circonstances sont « particulières » et graves.

12. Je regrette toutefois que la Cour n'ait pas jugé utile d'exprimer la même idée par une formulation plus générale. Au lieu de situer la violation d'une obligation de manière précise « au regard de la convention sur le génocide » ainsi spécifiquement visée, la Cour aurait pu la traiter sous la forme d'un *dictum* de la violation d'une obligation, sans préciser au regard de quel texte et donc s'exprimant en général. À la suite de ce *dictum*, la Cour aurait pu ajouter que tel était précisément le cas dans la situation présente, afin de rendre clair que le *dictum* s'appliquait bien à l'affaire en cause.

13. Aurait été enfin souligné que les circonstances devaient être « particulières », selon la formule employée dans l'arrêt au paragraphe 109, mais que pour ma part j'aurais de surcroît marquées d'un caractère de gravité, comme c'est le cas en l'espèce. J'aurais même été favorable à faire référence à une situation extrême.

14. J'en viens au second aspect de l'affaire et, plus particulièrement, à la troisième exception préliminaire d'incompétence *ratione materiae* de la Cour soulevée par la Russie.

15. Il s'agit de la question centrale et difficile dont il faut reconnaître qu'elle a été passablement obscurcie par les différences de rédaction ou, comme le dit la Cour, par l'absence d'« identité entre le libellé des demandes présentées par l'Ukraine dans sa requête et de celles qui sont formulées dans le mémoire ». Je souhaite m'arrêter quelques instants sur ces points.

16. Dans la requête, il est dit

> « *c)* de dire et juger que la reconnaissance, par la Fédération de Russie, de l'indépendance des prétendues "République populaire de Donetsk" et "République populaire de Louhansk", le 22 février 2022, est fondée sur une allégation mensongère de génocide et ne trouve donc *aucune justification* dans la convention sur le génocide;

d) de dire et juger que l'"opération militaire spéciale" annoncée et mise en œuvre par la Fédération de Russie à compter du 24 février 2022 est fondée sur une allégation mensongère de génocide et ne trouve donc *aucune justification* dans la convention sur le génocide »[1].

17. Dans le mémoire, l'Ukraine demande

« *c)* de dire et juger que l'emploi de la force auquel la Fédération de Russie recourt depuis le 24 février 2022 en Ukraine et contre celle-ci emporte *violation des articles premier et IV* de la convention sur le génocide;

d) de dire et juger que la reconnaissance des prétendues "République populaire de Donetsk" et "République populaire de Louhansk" le 21 février 2022 emporte *violation des articles premier et IV* de la convention sur le génocide. »[2]

18. À l'évidence, il n'est pas identique de demander à la Cour de juger qu'un acte ne « trouve aucune justification dans la convention » et de lui demander de dire que le même acte « emporte violation de la convention », ne serait-ce que parce que l'absence de justification ne signifie pas nécessairement violation. Surtout, ces différences de formulation dans le passage de la requête au mémoire emportent une extension de la compétence matérielle de la Cour.

19. Les textes du Statut et du Règlement n'imposent pas de limites aux modifications et la jurisprudence de la Cour est libérale à ce sujet puisqu'elle admet assez largement des changements qui peuvent être ainsi apportés. La limite de « tolérance » à cet égard est que « le différend porté devant la Cour par requête ne se trouve pas transformé en un autre différend dont le caractère ne serait pas le même » (*Activités militaires et paramilitaires au Nicaragua et contre celui-ci (Nicaragua c. États-Unis d'Amérique), compétence et recevabilité, arrêt, C.I.J. Recueil 1984*, p. 427, par. 80; *Frontière terrestre et maritime entre le Cameroun et le Nigéria (Cameroun c. Nigéria), exceptions préliminaires, arrêt, C.I.J. Recueil 1998*, p. 318-319, par. 98-99).

20. Dans la mesure où les demandes, en dépit de leur évolution, se rapportent toujours à l'interprétation de la convention pour déterminer d'abord si certains éléments y trouvent leur place et ensuite, et par voie de conséquence, s'ils constituaient des violations, mais cette fois en ciblant précisément les articles premier et IV, il me semble que la situation correspond à ce que la Cour admet comme entrant dans la latitude dont disposent les États pour développer et compléter ce qui a été exposé dans la requête. Certes, la Cour a indiqué à ce sujet qu'il ne suffit pas « que des liens de nature générale existent entre ces demandes. Il convient que la demande additionnelle soit implicitement contenue dans la requête . . . ou découle "directement de la question qui fait l'objet de cette requête" ». (*Certaines terres à phosphates à Nauru (Nauru c. Australie), exceptions préliminaires, arrêt, C.I.J. Recueil 1992*, p. 266, par. 67). Or, dans le cas présent, il me semble précisément que l'on peut soutenir qu'on se trouve dans une forme de *continuum* entre la requête et le mémoire. Décider autrement m'aurait semblé être excessivement formaliste.

21. La Cour considère ainsi (paragraphe 128) que les conclusions du mémoire « précisent et clarifient » les demandes de l'Ukraine. Je partage ce point de vue mais je m'interroge sur la question de savoir pourquoi l'Ukraine n'a pas conservé au final l'ensemble des demandes en soulignant l'aspect complémentaire qu'elles présentent, ce qui aurait, au passage, évité de semer trouble et interrogations sur la question de savoir si l'extension de la demande était ou non constitutive d'une demande nouvelle, l'Ukraine étant à mon avis allée jusqu'aux limites de l'acceptable. Les lignes de crête ne sont pas les plus faciles à suivre.

22. Sur la question de l'incompétence *ratione materiae* elle-même que la Russie soulève dans sa deuxième exception préliminaire, la Cour retient cette exception à l'issue d'une motivation particulièrement claire et précise, s'appuyant sur une jurisprudence convergente qui, selon des termes qui peuvent présenter quelques différences, consiste en somme à se demander si l'on est en présence de violations d'obligations qui découlent du traité et non pas d'autres règles de droit international.

23. J'ai peu à ajouter au raisonnement exposé dans l'arrêt et que je partage en tous points pour aboutir à l'admission de l'exception d'incompétence *ratione materiae* soulevée par la Russie.

24. Il m'a en effet été difficile de suivre l'Ukraine dans cet aspect du différend et d'identifier une disposition de la convention que la Russie aurait violée. S'il ne fait pas de doute que la Russie a usé de manière abusive de la convention sur le génocide pour justifier son « opération spéciale », cela ne constitue pas en soi la violation d'obligations au titre des articles premier et IV de la convention comme le prétend l'Ukraine. Si le comportement de la Russie constitue indéniablement une méconnaissance d'autres règles de droit international général, la convention n'a pas donné compétence à la Cour concernant leur violation. La compétence de celle-ci reste limitée en vertu de l'article IX à l'interprétation, l'application et l'exécution des obligations découlant directement de la convention.

25. Bien entendu, la décision de la Cour sur sa compétence ne préjuge en rien de la question du caractère contraire au droit international du comportement de la Russie.

(Signé)
Yves DAUDET.

ENDNOTES

1 Les italiques sont de moi.

2 *Ibid.*