DECLARATION OF JUDGE YUSUF

Nature and function of non-aggravation clauses in provisional measures — Non-aggravation clauses cannot extend jurisdiction of the Court — Nor the scope of application of provisional measures — The Court has never indicated a freestanding non-aggravation measure — The Court only indicated provisional measures in respect of rights claimed by Ukraine under CERD — Factual mistake regarding the scope and legal basis of the Order on provisional measures — The Court erroneously establishes a relationship between the non-aggravation and the recognition of the DPR and LPR and conflict in Ukraine — Those matters pertain to another dispute currently pending before the Court — They have nothing to do with this case.

I. Introduction

1. I disagree with the conclusions of the Court in paragraphs 396, 397 and 398 of the Judgment, as well as subparagraph 6 of the *dispositif* reflecting these conclusions. I have therefore voted against this operative paragraph. In the section on "General Background" in the Judgment, the Court states the following in paragraph 28 thereof:

> "The situation in Ukraine is very different today than it was when Ukraine submitted its Application in January 2017. The Parties are presently engaged in an intense armed conflict that has led to a tremendous loss of life and great human suffering. Nevertheless, with regard to the situation in eastern Ukraine and in the Crimean peninsula, the case before the Court is limited in scope and is brought only under the provisions of the ICSFT and CERD. *The Court is not called upon to rule in this case on any other issue in dispute between the Parties*" (emphasis added).

2. The last sentence of this paragraph makes it very clear that the Court will not rule in this case on any issue other than those described as the subject-matter of the dispute between the Parties (see *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, paras. 29-32). However, the Court does so in paragraphs 397 and 398, first by observing that the Russian Federation recognized the DPR and LPR as independent States and launched a "special military operation" against Ukraine, and secondly, by concluding, on the basis of this observation, that the Russian Federation violated the obligation in the Order of 19 April 2017 to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. By doing so, the Court has, as a matter of fact, ruled on issues that are unrelated to the dispute in this case, contrary to what was affirmed by it in paragraph 28 of the Judgment. Two questions might be raised in this connection. First, does the non-aggravation clause in the Court's Order on provisional measures of 19 April 2017 allow it to extend its jurisdiction to cover issues outside the ICSFT and CERD, such as the recognition by the Russian Federation of the DPR and LPR and the ongoing armed conflict between Russia and Ukraine? My answer is negative. Secondly, is it legally tenable to find that the Russian Federation violated its obligations under provisional measures indicated in respect of claims of Ukraine under CERD and the treatment of Crimean Tatars and ethnic Ukrainians due to the recognition of the DPR and LPR and the armed conflict with Ukraine? My answer here again is negative. I will elaborate on these answers below.

II. Misconception of the nature and function of non-aggravation clauses in provisional measures

3. The Court has, in its jurisprudence on provisional measures, pointed out on several occasions that, "when it is indicating provisional measures for the purpose of preserving specific rights, the Court, independently of the parties' requests, also possesses the power to indicate provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require" (e.g. *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the* Temple of Preah Vihear (Cambodia *v.* Thailand) *(Cambodia* v. *Thailand), Provisional Measures, Order of 18 July 2011, I.C.J. Reports 2011 (II)*, pp. 551-552, para. 59). It is clear from this statement of the Court, which may be found in several orders on provisional measures, that non-aggravation measures are to be distinguished from other provisional measures which are meant to preserve and protect the specific rights of the parties in accordance with Article 41 of the Statute of the Court.

4. Non-aggravation measures are subordinate to the substantive measures indicated by the Court. They have an ancillary character with respect to the main provisional measures which are specifically indicated for the purpose of preserving the rights of the parties pending a final judgment. Their function is to calm down tensions, avoid escalating and extending the dispute between the parties and allow the Court to settle such a dispute through the law. As such, they are an addendum to the main provisional measures and their function is auxiliary in nature. They are not free-standing and have never been indicated by the Court by themselves in an order on provisional measures. Even in the interim measures Order issued by the PCIJ on 5 December 1939, which is mistakenly referred to as a non-aggravation order, such a clause was not free-standing but was accompanied by a measure which called upon the State of Bulgaria, pending the judgment of the Court, to "ensure that no step of any kind is taken capable of prejudicing the rights claimed by the Belgian Government" (*Electricity Company of Sofia and Bulgaria, Order of 5 December 1939, P.C.I.J., Series A/B, No. 79*, p. 199). It was therefore, even in that case, subsidiary to a measure aimed at preserving the rights claimed by Belgium until such time as a final judgment was given by the Court.

5. Thus, non-aggravation measures never refer to rights to be preserved pending a final judgment nor are they meant to perform such a function. They refer to the dispute between the parties in general and require such parties to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. In the present case, the non-aggravation clause contained in the Order on provisional measures of 19 April 2017 was indicated in support of two provisional measures relating to alleged violations of obligations under CERD in Crimea. The Court did not indicate any provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT. It did so only in respect of the rights claimed by Ukraine on the basis of CERD. Therefore, the non-aggravation clause contained in that Order was subordinate to the provisional measures indicated by the Court in respect of the rights claimed by Ukraine on the basis of CERD. It had nothing to do with the dispute between the Parties relating to the provisions of the ICSFT or to eastern Ukraine.

6. It is therefore surprising, to say the least, that a non-aggravation clause which was included in an order on provisional measures relating to alleged violations of obligations under CERD in Crimea is now interpreted and applied as a measure which created obligations for the Russian Federation with regard to the recognition of the DPR and LPR and to the launching of a "special military operation" against Ukraine. The jurisdictional basis for the Order indicating provisional measures, including its non-aggravation clause, was CERD and did not and could not extend to cases of recognition of territorial entities as States or to armed conflict between two States. These issues were and remain outside the jurisdiction of the Court in the present case.

III. Factual mistakes regarding the scope and legal basis of the Order on provisional measures

7. In its Order of 19 April 2017, the Court concluded that the conditions required for the indication of provisional measures in respect of the rights alleged by Ukraine on the basis of the ICSFT were not met (*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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017*, p. 132, para. 76). It therefore refrained from indicating any provisional measures in relation to the allegations of terrorism financing in eastern Ukraine and to the activities of the DPR and LPR in that area. However, the Court found that the conditions required by the Statute for it to indicate provisional measures in respect of the claims of Ukraine under CERD were met. It was, therefore, in connection with these claims that, as an addendum to the measures indicated by the Court to preserve specific rights under CERD, the Court included in its Order a non-aggravation clause.

8. In the present Judgment, it is stated in paragraph 382, which summarizes the arguments of the Parties with respect to alleged violations of the Order of 19 April 2017, that Ukraine argued that "the Russian Federation aggravated the dispute by formally and retrospectively endorsing the acts undertaken by armed groups in eastern Ukraine, by recognizing the DPR and LPR, by providing them with financial and military assistance and by invading Ukraine's territory in 2022". It is in connection with this argument that the Court observes, in paragraph 397 of the Judgment, that, subsequent to the Order on provisional measures, the Russian Federation recognized the DPR and the LPR as independent States and launched a "special military operation" against Ukraine.

9. It then draws two conclusions from this: first, for the Court, these actions of the Russian Federation "severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve". Secondly, and as a result of those actions, the Court concludes that the Russian Federation violated its obligations under the Order not to aggravate the dispute. The Court, however, offers no evidence whatsoever on how the dispute was made more difficult to resolve in the present case.

10. By referring to the events which took place in February 2022 and which were argued by Ukraine as having aggravated the dispute between the Parties, and by identifying them as the basis of a violation by the Russian Federation of its obligation under the Order to refrain from any action which might aggravate the dispute, the Court establishes a relationship between the non-aggravation clause contained in that Order and the claims made by Ukraine with respect to the ICSFT, which concerned the DPR and LPR in eastern Ukraine. It should, however, be recalled that the Court did not indicate any provisional measures in respect of the rights claimed by Ukraine on the basis of the ICSFT because it was of the view that the conditions required for such indication were not met.

11. Moreover, the DPR and LPR, whose recognition by the Russian Federation has aggravated, according to the Judgment, the dispute between the Parties, are territorial entities that were created in eastern Ukraine and not in Crimea. Thus, the raison d'être, the legal basis and the scope of the non-aggravation clause indicated in the Order of 19 April 2017 had nothing to do with the claims made by Ukraine with respect to the ICSFT or with respect to the DPR and LPR or eastern Ukraine. Consequently, one may be forgiven for having the impression that the conclusions of the Court and the operative paragraph of the Judgment on the non-aggravation clause are based on mistaken identities, with Crimea and CERD being misunderstood for eastern Ukraine and the ICSFT, and non-aggravation measures being confused with provisional measures aimed at preserving specific rights.

IV. Conclusion

12. In light of the above analysis and considerations, I am of the view that there was no legal basis for the Court to conclude that the Russian Federation violated the obligation under the Order of 19 April 2017 to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. The events of February 2022, including the recognition of the DPR and LPR by the Russian Federation and the armed conflict between the Parties, to which the Judgment refers in support of its finding of such a violation, have nothing to do with the dispute before the Court in the present case. As a matter of fact, Ukraine has instituted proceedings before the Court on the dispute between the Parties relating to those specific events. That dispute is still under consideration by the Court and is being dealt with in a separate case entitled *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)*. It should also be observed that there is no evidence that the violation which the Court has found with regard to the non-aggravation clause has in any way extended the dispute before the Court in this case or made it more difficult to resolve. Indeed, if this was the case, the Court would not have been able to issue the present Judgment, which addresses all aspects of the dispute submitted to it, or would have at least indicated the nature of any obstacles created by one of the Parties in the resolution of the dispute. It is therefore difficult to fathom the basis for asserting that there is a violation of the non-aggravation clause contained in the Order of 19 April 2017. Such an assertion contradicts not only paragraph 28 of this Judgment on the scope of jurisdiction of the Court in the present case, but it also misreads and misunderstands the nature and function of non-aggravation clauses, as well as the scope and legal basis of the provisional measures indicated in the Order of 19 April 2017. It might also undermine the credibility and effectiveness of provisional measures, as well as non-aggravation clauses, in the future.

(Signed) Abdulqawi Ahmed YUSUF.
