INTERNATIONAL COURT OF JUSTICE

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

(UKRAINE V. RUSSIAN FEDERATION)

PRELIMINARY OBJECTIONS
SUBMITTED BY THE RUSSIAN FEDERATION

VOLUME I

1 OCTOBER 2022

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I. INTRODUCTION

1. On 26 February 2022, Ukraine submitted an Application instituting proceedings against the Russian Federation (the "Application") invoking Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention" or the "Convention"). On 1 July 2022, Ukraine submitted its Memorial (the "Memorial"), almost three months ahead of the time-limit fixed by the Court in its Order dated 23 March 2022. Pursuant to Article 79bis(1) of the Rules of Court, the Russian Federation hereby submits its Preliminary Objections to the jurisdiction of the Court and admissibility of the Application (the "Preliminary Objections") and requests the Court to decide on these objections at the preliminary objections stage of the proceedings.

2. Ukraine's objective in these proceedings is clear. It requests the Court, in essence:

   (a) to determine that the Russian Federation has violated several rules of conventional and customary international law relating to the prohibition of the use of force, *jus in bello*, territorial integrity, self-determination and recognition of States; and

   (b) to declare that the Russian Federation is internationally responsible for those alleged violations, and that reparation must be made.

3. Ukraine has artificially invoked the Genocide Convention to achieve these objectives and seeks to disguise its real claims as those falling under its provisions. For the reasons developed in these Preliminary Objections, the Court must reject this attempt to distort the Convention and to circumvent the fundamental principle of consent to the Court's jurisdiction.

4. The Preliminary Objections are structured as follows:

   (a) in **Chapter II**, the Russian Federation gives relevant factual background to the Preliminary Objections;

   (b) in **Chapter III**, the Russian Federation sets out its first preliminary objection that there is no dispute between the Parties under the Genocide Convention;

   (c) in **Chapter IV**, the Russian Federation sets out its second preliminary objection that the Court lacks jurisdiction *ratione materiae*;

(d) in **Chapter V**, the Russian Federation sets out its preliminary objections that Ukraine's claims are inadmissible; and

(e) in **Chapter VI**, the Russian Federation formulates its submissions to the Court.

II. FACTUAL BACKGROUND

A. THE MAIDAN PROTESTS AND ENSUING VIOLENCE IN UKRAINE; PROCLAMATION OF INDEPENDENCE OF THE DPR AND LPR

5. The armed conflict in Ukraine did not start on 24 February 2022, as Ukraine suggests,[1] but in 2014, and was launched by Kiev against the Donetsk People's Republic and the Lugansk People's Republic (the "DPR" and "LPR"). Ukraine has severely misrepresented the facts and context within which it instituted the present proceedings, and the Russian Federation finds it necessary, as a preliminary matter, to set the record straight.

6. The Memorial describes the situation after "2014, the year of Ukraine's Revolution of Dignity and its peaceful demonstrations against Russian interference in its domestic affairs"[2] and continues with "a conflict that began when Russian-sponsored illegal armed groups seized territory in eastern Ukraine".[3] According to the Memorial, "[i]n response, Ukraine did what any responsible government would have done: namely, it sought to restore law, order, and respect for human rights throughout its sovereign territory."[4] The Memorial recognises that "Ukraine has undertaken military activity in the Donbas region" in 2014, but argues that the purpose was "to resist aggression and reclaim Ukraine's sovereign territory from illegal armed groups such as the DPR and LPR".[5]

7. In this context, it is important to explain what is meant by "Ukraine's Revolution of Dignity"; what the real course of the "peaceful demonstrations" was; at whom they were directed; how the "military activity" launched by Kiev unfolded; what is implied by the declared goal "to restore law, order, and respect for human rights throughout its sovereign

[1] Memorial, ¶23.

[2] *Ibid.*, ¶2.

[3] *Ibid.*, ¶106.

[4] *Ibid.*, ¶107.

[5] *Ibid*.

territory"; and what the DPR and LPR, branded by Ukraine as illegal armed groups and "terrorist organizations" in other proceedings before this Court[6], represent in reality.

8. What Ukraine now calls a peaceful "Revolution of Dignity" was known in 2014 as the *Maidan*. It was a series of protests that took place in Kiev at the end of 2013 – the beginning of 2014 and gathered broad support from a number of Western countries. A pretext for this long face-off between the Ukrainian Government and its opposition was a decision by the former to suspend preparations to sign an Association Agreement with the European Union in order to explore further steps in this process. The real problem was, however, created by the opposition in Ukraine, which sought to confront Ukrainian people with a stark but fictitious choice: Ukraine moves ahead either with Europe or with the Russian Federation.

9. As the Russian Federation previously explained to the Court,[7] this false choice largely split the country. The predominantly Russian-speaking population of Eastern Ukraine wished to secure its historic, economic and cultural ties with the Russian Federation. Ukraine's West, by that time dominated by Ukrainian nationalists, instead wished to sever relations with the Russian Federation. In early 2014, a wave of violence started in the west of Ukraine and spread over the entire country. Extremist armed groups that supported the opposition seized administrative buildings, police stations and military arsenals, and overthrew local authorities in Western Ukraine.[8]

10. Extremist armed groups also arrived in Kiev. Protesters besieged the Cabinet of Ministers of Ukraine and attempted to storm the Office of the President of Ukraine. The leading force behind the violence were extremist organisations, such as the Right Sector and the Svoboda, that find their origins in Ukraine's Nazi collaborators, notorious as perpetrators' accomplices in the heinous crimes of the Second World War. Many of the fighters of

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[6] *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)*, Memorial submitted by Ukraine, 12 June 2018, p. 364, ¶654(b).

[7] *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)*, Verbatim Record, 7 March 2017, p. 13, ¶7 (Kolodkin).

[8] The Guardian, *Ukraine's Western Pro-European Cities Warn They Could Break Away* (21 February 2014), available at: https://www.theguardian.com/world/2014/feb/21/ukraine-western-pro-european-cities-lviv (Annex 40).

these organisations had criminal records and/or combat experience.[9] The Right Sector formed the core of the so-called "Maidan Self-Defence" (*Samooborona Maidanu*).[10] Organised violence against the police became widespread; thousands of radicals were throwing Molotov cocktails, and policemen were getting burnt and injured.[11]

11. Soon thereafter sniper-shootings started, leaving around 100 people dead, including at least 13 police officers, and hundreds wounded. Many expressed the view that the above-mentioned radicals were behind the violence. These tragic events were demonstrated in *Ukraine on Fire*, a documentary film released in 2016 by the US Academy Award winning film director and Vietnam War veteran Oliver Stone.[12] However, the Ukrainian

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[9] YouTube, *The "Right Sector": Who Are They?* (3 February 2014), available at: https://www.youtube.com/watch?v=2UmxU6y2KsI (Annex 122).

[10] The Guardian, *Ukraine Civil War Fears Mount as Volunteer Units Take Up Arms* (15 May 2014), available at: https://www.theguardian.com/world/2014/may/15/ukraine-civil-war-fears-mount-volunteer-units-kiev-russia (Annex 41); YouTube, *Yarosh: The "Right Sector" Will Not Lay Down Its Arms* (21 February 2014), available at: https://www.youtube.com/watch?v=d-SWDQbCgfY (Annex 123); SRB Podcast, *Interview with Dmytro Yarosh, Leader of Right Sector* (7 February 2014), available at: https://srbpodcast.org/2014/02/07/interview-dmytro-yarosh-leader-right-sector/ (Annex 42).

[11] The Washington Post, *In Violent Turn, Ukraine Fighting Kills at Least 25* (19 February 2014), available at: https://www.washingtonpost.com/world/ukraine-protests-once-more-turn-violent-four-reported-dead/2014/02/18/ba9173f4-98af-11e3-80ac-63a8ba7f7942_story.html (Annex 43); Kommersant, Photos of the police officers attacked and wounded by the Maidan protesters (2014), available at: https://im.kommersant.ru/Issues.photo/CORP/2014/02/18/KMO_088197_175983_1_t218_184947.jpg; https://im.kommersant.ru/Issues.photo/CORP/2014/02/18/KMO_139990_00014_1_t218_191616.jpg (Annex 124); YouTube, *Maidan atrocities. Captive Berkut soldier had his eye knocked out and was left to die* (25 February 2014), available at: https://www.youtube.com/watch?v=FUdh5n2yhgE (Annex 125).

[12] I. Lopatonok, O. Stone, *Ukraine on Fire*, Documentary (2016), available at: https://watchdocumentaries.com/ukraine-on-fire/ (Annex 126). *See* also The World, *Who Were the Maidan Snipers?* (14 March 2014), available at: https://theworld.org/stories/2014-03-14/who-were-maidan-snipers (Annex 44); BBC News Ukraine, *The Maidan Shooting: a Participant's Account* (13 February 2015), available at: https://www.bbc.com/ukrainian/ukraine_in_russian/2015/02/150213_ru_s_maidan_shooting (Annex 45); Reuters, *Leaked Audio Reveals Embarrassing U.S. Exchange on Ukraine, EU* (7 February 2014), available at: https://www.reuters.com/article/us-usa-ukraine-tape-idUSBREA1601G20140207 (Annex 46); YouTube, *Breaking: Estonian Foreign Minister Urmas Paet and Catherine Ashton Discuss Ukraine Over the Phone* (5 March 2014), available at: https://www.youtube.com/watch?v=ZEgJ0oo3OA8 (Annex 127).

Ukrainian blogger and politician Anatoly Shariy supported the version that the shooting was planned by the radicals. *See* YouTube, *The Prosecutor's Office Knows Who Was Shooting on Maidan* (13 November 2019), available at: https://www.youtube.com/watch?v=nB8c3anble4 (Annex 128).

Former Head of Ukraine's Security Service Alexander Yakimenko concluded that the fatal shots were fired from the Kiev Conservatory building occupied by Maidan activists. He also noted that the snipers were directed by "the Commander of Maidan" Andrey Parubiy, a co-founder of the Social-National Party of Ukraine that was later transformed into the "all-Ukraine Union Svoboda": *See* Russia Today, *Kiev Snipers Shooting From Bldg Controlled by Maidan Forces – Ex-Ukraine Security Chief* (13 March 2014), available at: http://www.rt.com/news/ukraine-snipers-security-chief-438/ (Annex 47).

authorities never properly investigated or prosecuted the Maidan shootings despite calls from within the country and beyond.[13] Moreover, the protesters involved in violent acts were later amnestied.[14]

12. On 21 February 2014, Ukraine's President Viktor Yanukovich and the opposition leaders signed an agreement to settle the crisis. This agreement provided, among other things, for the vacation of illegally seized governmental buildings, a political transition and new elections.[15] Representatives of Poland, Germany and France co-signed the agreement as guarantors of its implementation.[16]

Another journalist investigation over the matter is available at: http://www.globalresearch.ca/who-was-maidan-snipers-mastermind/5384599 (Annex 48). Italian journalist Gian Micalessin from Il Giornale supported this version as well. *See* YouTube, Gian Micalessin, *Finally the Truth About the Beginning of the Civil War in Ukraine?* (16 November 2017), available at: https://www.youtube.com/watch?v=gwoV03ijSoI (Annex 129).

[13] The UN Human Rights Monitoring Mission in Ukraine concluded in its Briefing note dated 19 February 2019 that "Five years after the end of the Maidan protests accountability for the killings and violent deaths of 84 protestors, a man who did not participate in the protests, and 13 law enforcement officers is yet to be achieved. The investigation into the killing of 17 protestors and 13 law enforcement officers has still to identify individual perpetrators. Only one person has been found guilty of unintentional killing of a protestor. Two others were found guilty of hooliganism in relation to an incident that resulted in the killing of another protestor… HRMMU notes that investigations into the killing of the law enforcement officers during Maidan protests have been particularly ineffective… The trials in the Maidan-related proceedings are protracted… Government of Ukraine is doing too little to ensure the prompt, independent and impartial investigation and prosecution of the killings perpetrated during Maidan protests". *See* UN Human Rights Monitoring Mission in Ukraine, Briefing note Accountability for Killings and Violent Deaths during the Maidan Protests, 20 February 2019, pp. 2-4, ¶¶4, 13-14, 16, available at: https://ukraine.un.org/en/108759-briefing-note-accountability-killings-and-violent-deaths-during-maidan-protests.

The International Advisory Panel established by the Secretary General of the Council of Europe to oversee investigations of the crimes committed during Maidan also concluded that new Ukrainian government failed to promptly conduct the Maidan investigations: "The Panel considers that substantial progress has not been made in the investigations into the violent incidents during the Maidan demonstrations… As has been widely acknowledged, there has been a clear lack of public confidence in Ukraine in any such investigation. On the contrary, there has been a widespread perception of impunity on the part of the law enforcement agencies and of an unwillingness or inability on the part of the investigatory authorities to bring to justice those responsible for the deaths and injuries". *See* Report of the International Advisory Panel on its review of the Maidan Investigations, 31 March 2015, p. 94, ¶535, 536, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016802f038b.

[14] Law of Ukraine No. 743-VII "On Preventing the Prosecution and Punishment of Persons in Connection with the Events that Occurred during Peaceful Assemblies and on Invalidating Certain Laws of Ukraine", 21 February 2014, available at: https://zakon.rada.gov.ua/go/743-18 (Annex 1).

[15] The New York Times, *U.S. Points to Russia as Diplomats' Private Call Is Posted on Web* (6 February 2014), available at: https://www.nytimes.com/2014/02/07/world/europe/us-points-to-russia-as-diplomats-private-call-is-posted-on-web.html (Annex 49).

[16] The Guardian, *Agreement on the Settlement of Crisis in Ukraine - Full Text* (21 February 2014), available at: https://www.theguardian.com/world/2014/feb/21/agreement-on-the-settlement-of-crisis-in-ukraine-full-text (Annex 50).

13. However, the protesters escalated the hostilities further. On the night of 22 February 2014, they stormed the government premises. President Yanukovich was forced to abandon Kiev and headed to Kharkov,[17] where thousands of parliamentarians from local councils in south-eastern Ukraine were to gather and give their assessment of what was happening in Kiev. Threatened by the *coup d'État* leaders, the Ukrainian parliament unconstitutionally removed President Yanukovich from power and appointed the Maidan leader Alexander Turchinov as Ukraine's Acting President. Instead of trying to establish a coalition government to de-escalate tensions, the new *de facto* authorities fostered division within the country and created a *government of the victors*. Representatives of the European Union and the US, including the guarantors of the agreement of 21 February 2014, publicly supported the leaders of this *coup d'État*.[18] Western envoys started making plans for the future organisation of power in Ukraine.[19] The then President of the US, Barack Obama, openly admitted that Washington "had brokered a deal to transition power in Ukraine".[20]

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[17] YouTube, Gian Micalessin, *Finally the Truth about the Beginning of the Civil War in Ukraine?* (16 November 2017), available at: https://www.youtube.com/watch?v=gwoV03ijSoI (Annex 129).

[18] For example, on 1 February 2014 the US Secretary of State John Kerry met Ukrainian coup leaders Vitaly Klichko, Arseny Yatsenyuk and Petr Poroshenko at the Munich Security Conference and assured them that they have the backing of the US. *See* Time, *Kerry: We Stand With Ukraine's People* (1 February 2014), available at: https://time.com/3602/ukraine-john-kerry-opposition-protests/ (Annex 51). After the coup Mr Kerry confirmed that the US will support the new government. *See* Remarks by Secretary of State John Kerry in Ukraine, 4 March 2014, available at: https://id.usembassy.gov/remarks-by-secretary-of-state-john-kerry-in-ukraine/ (Annex 15). *See* also Agence Europe, *EU Recognises Legitimacy of New Government* (1 March 2014), available at: https://agenceurope.eu/en/bulletin/article/11029/3 (Annex 52. *See* also Radoslaw Sikorski, Chair of Polish Sejm, "No coup in Kiev. Gov. buildings got abandoned..." Twitter, 22 February 2014, available at: https://twitter.com/sikorskiradek/status/437229992117035009 (Annex 16).

[19] In early February 2014, a telephone conversation between the US Assistant Secretary of State Victoria Nuland and the US Ambassador to Ukraine Geoffrey Pyatt appeared on YouTube. Mr Pyatt said: "I think we're in play. The Klitschko piece is obviously the complicated electron here. Especially the announcement of him as deputy prime minister and you've seen some of my notes on the troubles in the marriage right now so we're trying to get a read really fast on where he is on this stuff. But I think your argument to him, which you'll need to make, I think that's the next phone call you want to set up, is exactly the one you made to Yats. And I'm glad you sort of put him on the spot on where he fits in this scenario. And I'm very glad that he said what he said in response." Ms Nuland responded, "I don't think Klitsch should go into the government. I don't think it's necessary, I don't think it's a good idea." Mr Pyatt reacted: "Yeah. I guess... in terms of him not going into the government, just let him stay out and do his political homework and stuff…". *See* BBC News, *Ukraine crisis: Transcript of Leaked Nuland-Pyatt Call* (7 February 2014), available at: https://www.bbc.com/news/world-europe-26079957 (Annex 53).

U.S. Secretary of State John Kerry visited Kiev on 4 March 2014 to discuss the future organisation of power in Ukraine with the Maidan opposition leaders. *See* Gettyimages, *UKRAINE-UNREST-POLITICS-US-KERRY* (04 March 2014), available at: https://www.gettyimages.ae/detail/news-photo/secretary-of-state-john-kerry-oleksandr-turchynov-news-photo/476633249 (Annex 130).

[20] CNN, *PRES OBAMA on Fareed Zakaria GPS* (1 February 2015), available at: https://cnnpressroom.blogs.cnn.com/2015/02/01/pres-obama-on-fareed-zakaria-gps-cnn-exclusive/ (Annex 54).

14. One of the very first steps of the new Ukrainian parliament was to strip the Russian language of its official status, previously guaranteed by law, in half of Ukraine's regions. The Organisation for Security and Co-operation in Europe (the "OSCE") instantly criticised this move as heavily divisive,[21] and Acting President Turchinov ultimately vetoed this action. However, the imposition of gradual restrictions on the use of the Russian language continued over the years, as the Russian Federation explained in the Counter-Memorial submitted in another case before the Court.[22]

15. The *coup d'État* in Kiev provoked further division in the Ukrainian society. A large portion of the population, especially in the eastern regions of Ukraine with historically close ties with Russia, did not support the nationalist takeover, ensuing violence or political turmoil. On 22 February 2014, for example, more than three thousand parliamentarians from local councils in south-eastern Ukraine gathered in Kharkov,[23] qualified the events in Kiev as a *coup d'État* and expressed their readiness to take responsibility for maintaining constitutional order.[24] Protests took place in these regions, demanding larger autonomy in the form of federalism. Yet, their dissent was brutally repressed by right-wing radicals.[25]

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[21] Keynote presentation by Astrid Thors, OSCE High Commissioner on National Minorities to the OSCE Parliamentary Assembly Autumn Meeting, 3 October 2014, p. 4, available at: https://www.oscepa.org/en/documents/autumn-meetings/2014-geneva/speeches-13/2630-speech-by-astrid-thors-osce-high-commissioner-on-national-minorities-3-oct-2014/file.

[22] *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)*, Counter-Memorial submitted by the Russian Federation, pp. 12-18, ¶¶41, 43-51.

[23] Interfax, *Congress of Deputies from South-Eastern Regions of Ukraine and Crimea Begins in Kharkov. Yanukovich Is Not There Yet* (22 February 2014), available at: https://www.interfax.ru/world/360368 (Annex 55); RIA, *Congress of Deputies of the South-Eastern Regions of Ukraine opened in Kharkov* (22 February 2014), available at: https://ria.ru/20140222/996411276.html (Annex 56).

[24] Channel One Russia, *Congress of South-Eastern Regions of Ukraine and Crimea Took Place in Kharkov* (22 February 2014), available at: https://www.1tv.ru/news/2014-02-22/52503-v_harkove_proshyol_s_ezd_yugo_vostochnyh_oblastey_ukrainy_i_kryma (Annex 57).

[25] Time, *Right-Wing Thugs Are Highjacking Ukraine's Liberal Uprising* (28 January 2014), available at: http://world.time.com/2014/01/28/ukraine-kiev-protests-thugs (Annex 58); Time, *Exclusive: Leader of Far-Right Ukrainian Militant Group Talks Revolution with Time* (4 February 2014), available at: http://time.com/4493/ukraine-dmitri-yarosh-kiev (Annex 59); The Conversation, *Far-Right Party Jeopardises Ukraine's Path to Democracy* (7 March 2014), available at: http://theconversation.com/far-right-party-jeopardises-ukraines-path-to-democracy-23999 (Annex 60); The Guardian, *Ukraine Protests are no Longer Just about Europe* (22 January 2014), available at: https://www.theguardian.com/commentisfree/2014/jan/22/ukraine-protests-europe-far-right-violence (Annex 61).

16. On 7 April 2014, Acting President Turchinov announced the so-called Anti-Terrorist Measures in Donbass.[26] In response to this security threat, the gathering of people of Donetsk proclaimed the establishment of the People's Council of Donetsk, which adopted a Declaration on sovereignty of the DPR and an Act of state independence of the DPR.[27] Similarly, on 27 April 2014, at a meeting in Lugansk, sovereignty of the newly formed LPR was also declared. Subsequently, these declarations were supported at the May 2014 referendums.[28] Thereafter, the leaders of the DPR and LPR called on Kiev to start talks regarding the peaceful settlement of the conflict.[29]

17. Notably, Ukraine used an argumentation similar to that of the DPR and LPR when it proclaimed its own independence in 1991. It was stated in the preamble of the Act of Independence of Ukraine that the Supreme Soviet (*Verkhovnaya Rada*) of the Ukrainian Soviet Socialist Republic had proclaimed the independence of Ukraine because of "the deadly danger hanging over Ukraine after the *coup d'État* in the USSR of 19 August 1991".[30]

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[26] Interfax.ua, *Anti-Terrorist Measures to be Taken Against Separatists – Turchynov* (7 April 2014), available at: https://en.interfax.com.ua/news/general/199466.html (Annex 62). *See* also YouTube, *Turchinov Announced Anti-Terrorist Measures Against Armed Separatists* (7 April 2014), available at: https://www.youtube.com/watch?v=myjnfelp_V0 (Annex 131).

[27] Interfax-Russia, *Donetsk Proclaims Itself Sovereign Republic* (7 April 2014), available at: https://www.interfax-russia.ru/south-and-north-caucasus/sobytiya-na-ukraine/doneck-provozglasil-sebya-suverennoy-respublikoy (Annex 63); MK, *Russian Spring in Documents. Acts Adopted by the Donetsk People's Republic* (7 April 2014), available at: https://www.mk.ru/politics/article/2014/04/07/1010161-russkaya-vesna-v-dokumentah-kakie-aktyi-prinyala-donetskaya-narodnaya-respublika.html (Annex 64).

[28] TASS, *Federalization Supporters in Luhansk Proclaim People's Republic* (28 April 2014), available at: https://tass.com/world/729768 (Annex 65); TASS, *People of Donetsk, Lugansk Republics Chose Independence — Duma Speaker* (11 May 2022), available at: https://tass.com/world/1449361 (Annex 66); Reuters, *Results Show 96.2 Percent Support for Self-Rule in East Ukraine Region: RIA* (12 May 2014), available at: https://www.reuters.com/article/us-ukraine-crisis-referendumidUSBREA4B06Q20140512 (Annex 67); Al-Jazeera, *Leaders of Eastern Donetsk and Luhansk Regions Declare Independence After Claiming Victory in Sunday's Self-Rule Vote* (12 May 2014), available at: https://www.aljazeera.com/news/2014/5/12/ukraine-separatists-declare-independence (Annex 68); YouTube, *Proclamation of the Act of Independence of the Lugansk People's Republic* (27 April 2014), available at: https://www.youtube.com/watch?v=TJ4wcq5hqyk (Annex 132).

[29] Nationalia, *Donetsk, Luhansk offer to maintain links with Ukraine in exchange for recognition as republics* (2 September 2014), available at: https://www.nationalia.info/new/10331/donetsk-luhansk-offer-to-maintain-links-with-ukraine-in-exchange-for-recognition-as-republ (Annex 69).

[30] Resolution of the Supreme Soviet of the Ukrainian SSR on Declaration of Independence of Ukraine, 24 August 1991, available at: https://zakon.rada.gov.ua/laws/show/1427-12 (Annex 2).

B. THE UKRAINIAN CIVIL WAR IN DONBASS STARTED IN 2014

18. On 14 April 2014, Acting President Turchinov signed a decree on the so-called Anti-terrorist operation (the "ATO") against the DPR and LPR, thereby starting a tragic full-scale civil war in Donbass.[31] Within the ATO framework, Ukraine's Armed Forces (the "UAF") started to use not only all kinds of small arms, but also different types of heavy artillery and aviation.

19. On several occasions, the UAF used heavy artillery and multiple launch rocket systems (the "MLRS") as well as "Tochka-U" tactical missiles with cluster warheads against civilians. Starting with the shelling of residential areas in Slavyansk in May 2014, many civilians were killed or wounded by the UAF, while residential buildings, hospitals and infrastructure were destroyed or damaged.[32] Horrific civilian casualties in the territory

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[31] Decree of the Acting President of Ukraine No. 405/2014 "On the Decision of the National Security and Defence Council of Ukraine dated 13 April 2014 "On Urgent Measures to Overcome the Terrorist Threat and Preserve the Territorial Integrity of Ukraine", 14 April 2014, available at: https://zakon.rada.gov.ua/laws/show/405/2014#text (Annex 3). *See* also BBC News, *Ukraine Crisis: Turchynov Announces Anti-Terror Operation* (13 April 2014), available at: https://www.bbc.com/news/av/world-europe-27013169 (Annex 70).

[32] Russia Today, *3 Civilians Killed in Shelling of Slavyansk Residential Area* (26 May 2014), available at: https://www.rt.com/news/161572-ukraine-slavyansk-shelling-civilian/ (Annex 71); Russia Today, *"Slaughterhouse": Civilians Die in Kiev's Ruthless Military Attacks* (27 May 2014), available at: https://www.rt.com/news/161772-eastern-ukraine-attack-deaths/ (Annex 72); The Financial Times, *Kiev Anti-Terror Operation Takes Toll on Slavyansk Residents* (11 June 2014), available at: https://www.ft.com/content /d8aa9386-f0b9-11e3-9e26-00144feabdc0 (Annex 73); Russia Today, *Shells Hit Hospital as Ukrainian Army Resumes Strike on Slavyansk* (30 May 2014), available at: https://www.rt.com/news/162456-slavyansk-shelling-ukraine-army/ (Annex 74); The Daily Mail, *Inside Homes Shattered by Ukraine's Unofficial Civil War: Destruction from Weeks of Fighting Revealed as Country's Richest Man Calls for End to Violence* (20 May 2014), available at: http://www.dailymail.co.uk/news/article-2633775/Inside-homes-shattered-Ukraines-unofficial-civil-war-Destruction-days-fighting-revealed-countrys-richest-man-calls-end-violence.html (Annex 75).

On 2 June 2014 the UAF launched an airstrike against the building of the Lugansk Regional State Administration, leaving 8 people dead and 28 wounded. *See* CNN, *Air Attack on Pro-Russian Separatists Kills 8, Stuns Residents* (3 June 2014), available at: https://edition.cnn.com/2014/06/03/world/europe/ukraine-luhansk-building-attack /index.html (Annex 76). Kiev authorities denied their involvement in this violent attack, hypocritically stating that the people were killed in an air conditioner explosion. *See* Radio Liberty, *Despite Denials, All Evidence for Deadly Explosion Points to Kyiv* (4 June 2014), available at: https://www.rferl.org/a/ukraine-unspun-luhansk-blast/25410384.html (Annex 77).

On 11-12 July 2014 the UAF shelled the city of Maryinka (the DPR) and Petrovskiy district of Donetsk using Grad and Uragan MLRS. *See* The New York Times, *Civilians Pay a Price for Gains of Ukraine Forces* (12 July 2014), available at: https://www.nytimes.com/2014/07/13/world/europe/gains-of-ukraine-forces-come-at-a-price-for-civilians.html (Annex 78).

On 13 July 2014, the UAF shelled a school in Lugansk (at least 3 people were killed). *See* Radio Liberty, *Several Dead in Latest Violence in Luhansk* (14 July 2014), available at: https://www.rferl.org/a/ukraine-luhansk-violence/25456604.html (Annex 79). On 14 July 2014, the UAF shelled Lugansk again with 17 killed. *See* BBC

of the DPR and LPR were confirmed, *inter alia*, by reports of the OSCE Special Monitoring Mission in Ukraine (the "SMM").[33]

20. In addition to Ukraine's regular armed forces, the ATO involved the use of irregular *volunteer battalions*, including the Azov and the Right Sector,[34] whose atrocities feature constantly in the reports of the international organisations concerned, including the Office of the UN High Commissioner for Human Rights (the "OHCHR").[35] A former fighter of another nationalist battalion, the Aidar, admitted: "I don't deny people were looting there (in eastern Ukraine)."[36]

21. Another aspect of illegal treatment of Donbass by the Ukrainian authorities was a blockade, which included not only a trade embargo but also a total discontinuation of all social payments, including retirement benefits, as well as interruption of banking services.[37] Thus, senior residents of Donetsk and Lugansk had to cross the contact line between Ukraine and the DPR and LPR to collect their payments in cash. For many

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News, *Ukraine Conflict: Russian Aid or Trojan Horse?* (22 August 2014), available at: https://www.bbc.com/news/world-europe-28752878 (Annex 80).

On 15 July 2014, the UAF shelled the city of Snezhnoye in the DPR, leaving 11 killed. *See* The Washington Post, *Airstrike Kills 11 Civilians in Rebel-Held Town in Eastern Ukraine* (15 July 2014), available at: https://www.washingtonpost.com/world/airstrike-kills-11-civilians-in-rebel-held-town-in-eastern-ukraine/2014/07/15/043add26-0c44-11e4-b8e5-d0de80767fc2_story.html (Annex 81); Office of the United Nations of Human Rights, report on the situation of human rights in Ukraine, 15 December 2014, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/OHCHR_eighth_report_on_Ukraine.pdf.

On 22 January 2015, the UAF shelled a bus stop in Donetsk with 13 killed. *See* BBC News, *Ukraine Crisis: Shell hits Donetsk Trolleybus* (22 January 2015), available at: https://www.bbc.com/news/av/world-europe-30929261 (Annex 82).

[33] The OSCE SMM thematic report on civilian casualties in Eastern Ukraine in 2016 shows that 281 casualties out of 442 were recorded in the DPR- and LPR-controlled areas. *See* Civilian casualties in Eastern Ukraine, 2016. OSCE Thematic report, September 2017, available at: https://www.osce.org/files/f/documents/a/a/342121.pdf; The second OSCE SMM thematic report on civilian casualties covering period from 1 January 2017 to 15 September 2020 draws a much more eloquent picture: 657 casualties in the DPR and LPR versus 270 in Kiev-controlled areas. *See* Civilian Casualties in Conflict-Affected Regions of Eastern Ukraine (1 January 2017 — 15 September 2020), November 2020, available at: https://www.osce.org/files/f/documents/f/b/469734.pdf.

[34] Pictures of former members of Maidan Self-Defence, who joined the newly created National Guard of Ukraine, are available at: https://pictures.reuters.com/archive/UKRAINE-CRISIS--GM1EA3V1ME601.html (Annex 133).

[35] OHCHR Report on the human rights situation in Ukraine (16 May to 15 August 2015), 8 September 2015, pp. 29-30, ¶123, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/11thOHCHRreportUkraine.pdf.

[36] The Insider, *Ukraine's Maverick Battalions Are Becoming a Problem* (29 July 2015), available at: https://www.businessinsider.com/r-special-report-ukraine-struggles-to-control-maverick-battalions-2015-7 (Annex 83).

[37] Decision of the National Security and Defence Council of Ukraine "On Urgent Additional Measures to Counter Hybrid Threats to the National Security of Ukraine", 15 March 2017, available at: https://zakon.rada.gov.ua/go/n0002525-17 (Annex 4).

people this procedure was impossible due to their age or health condition. The Ukrainian authorities even sought to put obstacles on access to drinking water. In particular, the Donetsk filtration station had to suspend its work due to continuous shelling by the UAF.[38] In 2017, Kiev decided to discontinue electricity supply to the LPR.

22. As a result, around 1 million Ukrainians fled to the Russian Federation.[39]

23. Against this background, on 11 May 2014, a referendum was conducted, and the DPR and LPR officially declared their independence.[40] On 14 May 2014, the Supreme Council of the DPR adopted the Constitution of the Republic. On 18 May 2014, the same was done by the Republican Assembly of the LPR.[41] At that time, the Russian Federation acted as mediator and encouraged direct dialogue between Kiev and the DPR and LPR.[42]

C. THE MINSK AGREEMENTS AND OTHER EFFORTS TO STOP THE CIVIL WAR IN DONBASS REPUDIATED BY UKRAINE

24. Ukraine's Memorial omits the civil war in Donbass that Kiev launched in 2014. Similarly, one cannot find in Ukraine's narrative any reference to the Package of Measures for the Implementation of Minsk Agreements (the "Minsk agreements") or any other relevant documents and efforts to find a political solution to the crises either.

25. On the very day of the announcement of the ATO, the Russian Federation called an emergency meeting of the UN Security Council and implored the international community to "require the Maidan henchmen who seized power in Kyiv to cease their

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[38] Press Statement of Special Representative of OSCE Chairperson-in-Office Sajdik after Meeting of Trilateral Contact Group, 18 April 2018, available at: https://www.osce.org/ukraine/378127; BBC News, *Ukraine Crisis: Donetsk Without Water After Shelling* (19 November 2014), available at: https://www.bbc.com/news/world-30116126 (Annex 84).

[39] BBC News, *Ukraine Conflict: UN Says Million People Have Fled* (2 September 2014), available at: https://www.bbc.com/news/world-europe-29029060 (Annex 85).

[40] Russia Today, *Referendum Results in Donetsk and Lugansk Regions Show Landslide Support for Self-Rule* (11 May 2014), available at: https://www.rt.com/news/158276-referendum-results-east-ukraine/ (Annex 86).

[41] TASS, *Federalization Supporters in Luhansk Proclaim People's Republic* (28 April 2014), available at: https://tass.com/world/729768 (Annex 65); *Proclamation of the Act of Independence of the Lugansk People's Republic* (27 April 2014), available at: https://www.youtube.com/watch?v=TJ4wcq5hqyk (Annex 132); TASS, *People of Donetsk, Lugansk Republics Chose Independence — Duma Speaker* (11 May 2022), available at: https://tass.com/world/1449361 (Annex 66).

[42] Nationalia, *Donetsk, Luhansk offer to maintain links with Ukraine in exchange for recognition as republics* (2 September 2014), available at: https://www.nationalia.info/new/10331/donetsk-luhansk-offer-to-maintain-links-with-ukraine-in-exchange-for-recognition-as-republ (Annex 69)

war against their own people", describing Acting President Turchinov's decree which designated "sending Ukraine's military forces to suppress the protests" as "criminal".[43]

26. Ukraine, in turn, accused Russia of "aggression" and labelled the protesters in Donbass as "terrorists".[44] It became a pattern for Ukrainian officials to constantly accuse the Russian Federation of aggression and to continue with the use of military force against the DPR and LPR – where almost 4 million people live.[45] To legitimise its use of force, Kiev sought to present the DPR and LPR as "terrorist organisations", even before this Court in other proceedings.[46]

27. In order to prevent escalation of the civil war in Ukraine, the Russian Federation, the US and the European Union worked on a Joint Statement on the situation in Ukraine, which was signed on 17 April 2014 in Geneva.[47] However, fifteen days later Acting President Turchinov officially announced the continuation of the ATO,[48] and on 2 May 2014 the UAF undertook a full-scale military operation with the use of air forces against the city of Slavyansk.[49]

28. Also on 2 May 2014, the right-wing radicals, whom Kiev refused to disarm pursuant to the Geneva Joint Statement, burned down around 46 civilians, who called for the

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[43] Security Council, 69th year: 7154th meeting, 13 April 2014, p. 3, 14, available at: https://digitallibrary.un.org/record/768584?ln=ru.

[44] *Ibid*., p. 12.

[45] Concept Note of Economic Development of Donetsk and Luhansk Oblasts, adopted by Decree of the Cabinet of Ministers of Ukraine No. 1660-p, 23 December 2020, p. 2, available at: https://www.minre.gov.ua/sites/default/files/annex_2_-_concept_note_of_economic_development_of_donetsk_and_luhansk_1_1.pdf (Annex 5).

[46] *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)*, Memorial submitted by Ukraine, p. 128-129, ¶196.

[47] Joint Statement on Ukraine, ref. No. 140417/01, 17 April 2014, available at: https://eeas.europa.eu/archives/docs/statements/docs/2014/140417_01_en.pdf.

[48] Address of the Acting President of Ukraine, Chairman of the Verkhovnaya Rada of Ukraine Alexander Turchinov to compatriots, 02 May 2014, available at: https://www.rada.gov.ua/news/Povidomlennya/92195.html (Annex 17).

[49] Unian, *Full-fledged ATO in Slavyansk: Checkpoints Taken, Two Helicopters Shot Down, Fatalities (to be updated)* (2 May 2014), available at: https://www.unian.net/politics/913887-v-slavyanske-prohodit-polnomasshtabnaya-ato-blokpostyi-vzyatyi-sbityi-dva-vertoleta-est-pogibshie-obnovlyaetsya.html (Annex 87).

establishment of a federal system in Ukraine, in the building of trade unions in Odessa.[50] On 9 May 2014, radicals killed several people in Mariupol who wished to celebrate the Victory Day in Ukraine (Victory over the Nazis in World War II). These crimes remain unpunished until this day.[51] Many leaders of public opinion who advocated for a peaceful solution for Donbass were attacked or killed.[52] In October 2014, a lustration law was adopted, which openly allowed the new authorities to suppress opposition to their course.[53]

29. Another attempt supported by the Russian Federation to achieve peace in Eastern Ukraine was the Minsk agreements that the representatives of Kiev and the DPR and LPR signed with the participation of the Russian Federation and the OSCE. The Minsk agreements were endorsed by the OSCE and the leaders of the so-called "Normandy format", which

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[50] OHCHR Report on the Human Rights Situation in Ukraine, 15 May 2014, p. 10, ¶36, available at: https://www.ohchr.org/sites/default/files/Documents/Countries/UA/HRMMUReport15May2014.pdf. *See* also OSCE, *Latest from the Special Monitoring Mission to Ukraine - Based on Information Received up until 02 May 2014, 19:00*, available at: https://www.osce.org/ukraine-smm/118292; Russia Today, *39 People Die After Radicals Set Trade Unions House on Fire in Ukraine's Odessa* (2 May 2014), available at: https://www.rt.com/news/156480-odessa-fire-protesters-dead/ (Annex 88). International Advisory Panel established by the Secretary General of the Council of Europe found that on 2 May 2014 Ukrainian police "made little, if any, effort to intervene and stop the violence" and made no attempt to prevent the tragedy in the Trade Union Building until 41 persons had already died. Ukraine's investigations of the crimes were criticised as poorly organised, deficient and insufficient. *See* Report of the International Advisory Panel on its Review of the Investigations into the Events in Odesa on 2 May 2014, 4 November 2015, pp. 12, 14-15, 65-66, ¶¶20, 30, 286, 288, 291, 292, 294, available at: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168048610f.

[51] Further information on the matter can be found in the film *Ukraine on Fire*, available at: https://watchdocumentaries.com/ukraine-on-fire/ (Annex 126).

[52] On 16 April 2015, killers in masks shot a prominent journalist Oles Buzina. *See* BBC News, *Ukraine Conflict: Pro-Russia Journalist Oles Buzyna Killed* (16 April 2015), available at: https://www.bbc.com/news/world-europe-32337621 (Annex 89). The investigators failed to find and punish perpetrators of this crime. A day earlier a former member of parliament for Yanukovich's Party of Regions Oleg Kalashnikov was killed in a similar attack at his home. *See* NBC News, *Pro-Russian Journalist Oles Buzina Shot Dead in Kiev, Ukraine* (16 April 2015), https://www.nbcnews.com/storyline/ukraine-crisis/pro-russian-journalist-oles-buzina-shot-dead-kiev-masked-gunmen-n342661 (Annex 90). On the night from 12 to 13 April 2015, killers murdered a native of Ukraine's Donbas region journalist Sergey Sukhobok. *See* The Interpreter, *Ukrainian Journalist Sergei Sukhobok Murdered in Kiev* (2015), available at: https://pressimus.com/Interpreter_Mag/press/7937 (Annex 91). On 20 July 2016, a Russian, Belorussian and Ukrainian journalist Pavel Sheremet was killed in Kiev by a group of nationalists and former ATO participants for his moderate (not even pro-Russian) statements regarding Donbass on the air of Vesti radio station. Opposition to the new Maidan authorities came under attack. In May 2014, elections of the President of Ukraine were conducted. However, opposition candidates were threatened and even physically attacked. The Donbass region therefore did not participate in the elections.

[53] Law of Ukraine No. 1682-VII "On Government Cleansing (Lustration Law)", 16 September 2014, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-REF(2014)046-e (Annex 6); Interim Opinion No. 788/2014 on the Law on Government Cleansing (Lustration law) of Ukraine, adopted by the European Commission for Democracy through Law (Venice Commission), 16 December 2014, p. 20-21, ¶¶101-105, available at: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)044-e.

included Germany, France, Ukraine and the Russian Federation. The Russian Federation also initiated the adoption of the Resolution of the UN Security Council 2202 (2015) that endorsed the Minsk agreements.[54] The settlement process under the Minsk agreements was expected to be finalised by the end of 2015.[55]

30. However, Ukrainian authorities openly admitted that they had no intention to fulfil the Minsk agreements.[56] In particular, Ukrainian President Petr Poroshenko repeatedly declared that the Minsk agreements gave Ukraine time for military build-up and also described them as an instrument which the anti-Russian sanctions depend on.[57]

31. According to the Minsk agreements, Kiev should have sought a consensus with the DPR and LPR on the modalities for local elections and on the specifics of the status of certain areas of the Donetsk and Lugansk regions.[58] Kiev, however, never started that dialogue. The Head of the DPR, Alexander Zakharchenko, who was one of the signatories to the

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[54] Euronews, *UN Adopts Russian-drafted Resolution on Ukraine Crisis* (17 February 2015), available at: https://www.euronews.com/2015/02/17/un-adopts-russian-drafted-resolution-on-ukraine-crisis (Annex 92).

[55] Package of Measures for the Implementation of the Minsk Agreements, 12 February 2015, ¶9, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf: "Reinstatement of full control of the state border by the government of Ukraine throughout the conflict area, starting on day 1 after the local elections and ending after the comprehensive political settlement (local elections in certain areas of the Donetsk and Lugansk regions on the basis of the Law of Ukraine and constitutional reform) to be finalized by the end of 2015, provided that paragraph 11 has been implemented in consultation with and upon agreement by representatives of certain areas of the Donetsk and Lugansk regions in the framework of the Trilateral Contact Group."

[56] On 20 October 2016, Ukraine's Defence Minister Stepan Poltorak stated that "any agreements with the aggressor are not even worth the paper on which they are signed." *See* Telegraf, *Poltorak on Disengagement: Agreements with Aggressor are Worth Nothing* (20 October 2016), available at: https://telegraf.com.ua /ukraina/politika/2917869-poltorak-o-razvedenii-dogovorennosti-s-agressorom-nichego-ne-stoyat.html (Annex 93). On 10 July 2020, Ukraine's Deputy Prime Minister Alexei Reznikov said that the Minsk agreements are not "carved in stone" and contain "a lot of things that no longer work". *See* Ukrinform, *Reznikov: Only Normandy Four Leaders Can Change Minsk Agreements* (11 July 2020), available at: https://www.ukrinform.net/rubric-polytics/3061245-reznikov-only-normandy-four-leaders-can-change-minsk-agreements.html (Annex 94).

[57] Ukrinform, *Poroshenko Says Minsk Agreements Partially Fulfilled Their Goal* (13 December 2019), available at: https://www.ukrinform.net/rubric-polytics/2837640-poroshenko-says-minsk-agreements-partially-fulfilled-their-goal.html (Annex 95); Russia Today, *Minsk Deal Was Used to Buy Time – Ukraine's Poroshenko* (17 June 2022), available at: https://www.rt.com/russia/557307-poroshenko-comments-minsk-agreement/ (Annex 96).

[58] Package of Measures for Implementation of the Minsk Agreements, 12 February 2015, ¶4, available at: https://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2202.pdf.

Minsk agreements, was assassinated through a targeted killing on 31 August 2018.[59] On 7 February 2022, Ukraine's Foreign Minister Dmitry Kuleba stated that there will be "no negotiations with the militants."[60] During all this time, the Russian Federation, as a mediator constantly called for a peaceful dialogue between Ukraine and the DPR and LPR.[61]

32. Importantly, Kiev's use of force against Donbass and lack of willingness to engage in dialogue went against the will of Ukrainian people. In July 2018, the Ukrainian newspaper Government Courier (*Uryadovy kuryer*) published the results of a nation-wide survey on the future of Donbass. Only 17% of Ukrainian people spoke in favour of using military force for gaining control over the south-eastern region. In contrast, 70% respondents considered it possible to reach a political compromise with the DPR and LPR.[62]

33. Paragraph 4 of the Minsk agreements prescribed that Kiev must promptly, and no later than 30 days after their signature, adopt a resolution through its Parliament specifying the area in Donbass enjoying a special regime and adopt a law on special status of these areas.[63] On 16 September 2014, the Ukrainian Parliament formally passed a law "On the Special Procedure for Local Self-Government in Certain Areas of Donetsk and Lugansk Regions". Its validity was, however, limited to one year with a possible prolongation,

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[59] The Guardian, *Rebel Leader Alexander Zakharchenko Killed in Explosion in Ukraine* (31 August 2018), available at: https://www.theguardian.com/world/2018/aug/31/rebel-leader-alexander-zakharchenko-killed-in-explosion-in-ukraine (Annex 97); Deutsche Welle, *Alexander Zakharchenko: The Latest Ukrainian Rebel Leader to Face an Abrupt Death* (2 September 2018), available at: https://www.dw.com/en/alexander-zakharchenko-the-latest-ukrainian-rebel-leader-to-face-an-abrupt-death/a-45323653 (Annex 98).

[60] European Pravda, *No Pressure over Concessions: Kuleba on Negotiations with Germany's Foreign Minister* (7 February 2022), available at: https://www.eurointegration.com.ua/rus/news/2022/02/7/7133666/ (Annex 99).

[61] For example, on 18 February 2022, President of the Russian Federation Vladimir Putin emphasised during his joint press-conference with President of Belarus Alexander Lukashenko that "Kiev is not complying with the Minsk Agreements and, in particular, is strongly opposed to a direct dialogue with Donetsk and Lugansk. Kiev is essentially sabotaging the agreements on amending the Constitution, on the special status of Donbass...All Kiev needs to do is sit down at the negotiating table with representatives of Donbass and agree on political, military, economic and humanitarian measures to end the conflict." *See* The Kremlin, News conference following Russian-Belarusian talks (18 February 2022), available at: http://en.kremlin.ru/events/president/news/67809 (Annex 18).

[62] Uryadovy Kuryer, *On the Future of Donbass in Terms of Numbers* (21 July 2018), available at: https://ukurier.gov.ua/uk/articles/pro-majbutnye-donbasu-movoyu-cifr/ (Annex 100).

[63] Package of Measures for the Implementation of the Minsk Agreements, 12 February 2015, ¶4, available at: https://peacemaker.un.org/sites/peacemaker.un.org/files/UA_150212_MinskAgreement_en.pdf.

and its effect was circumscribed by Article 10 that contained a number of conditions that were not consistent with the Minsk agreements.[64]

34. Article 10 provided, among other things, that the special regime of self-government would be available only for the local authorities elected at extraordinary local elections. This was inconsistent with the first part of paragraph 4 of the Minsk agreements, which prescribed that the modalities of local elections in Donbass should be negotiated in dialogue between Kiev, Donetsk and Lugansk. However, representatives of Kiev systematically refrained from such dialogue in the Minsk Contact group formed under the Minsk agreements. Moreover, in 2020 Kiev decided to exclude Donbass from the political framework of Ukraine by prohibiting local elections in the DPR and LPR, as well as in 18 districts controlled by Kiev.[65] Thus, this law never became operational as envisaged by the Minsk agreements.

35. Moreover, on 18 January 2018, a law "On the Peculiarities of the State Policy on Ensuring Ukraine's State Sovereignty over Temporarily Occupied Territories in Donetsk and Lugansk Regions", also known as "the law on Reintegration of Donbass", was adopted, which formally confirmed that the ATO was a military operation, and in effect excluded any possibility of political settlement within the framework of the Minsk agreements.[66] A number of laws further constraining the use of the Russian language were adopted and became effective, which contradicted paragraph 11 of the Minsk agreements.[67]

36. The most blatant part of the non-implementation of the Minsk agreements was the constant violation of its first paragraph – the immediate and comprehensive ceasefire. As

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[64] Law of Ukraine No. 1680-VII "On the Special Procedure for Local Self-Government in Certain Areas of Donetsk and Lugansk Regions", 16 September 2014, Article 10, available at: https://zakon.rada.gov.ua/laws/show/1680-18#n5 (Annex 7).

[65] Interfax-Ukraine, *Rada Appoints Next Elections to Local Self-Govt Bodies for Oct 25* (15 July 2020), available at: https://en.interfax.com.ua/news/general/674837.html (Annex 101); O. Huss, *Nations in Transit (2021): Ukraine*, Freedomhouse.org, available at: https://freedomhouse.org/country/ukraine/nations-transit/2021 (Annex 134). *See* also Resolution of the Verkhovnaya Rada of Ukraine No. 795-IX "On Calling Regular Local Elections in 2020", 15 July 2020, available at: https://zakon.rada.gov.ua/laws/show/795-IX#Text (Annex 8).

[66] Law of Ukraine No. 2268-VIII "On the Peculiarities of the State Policy on Ensuring Ukraine's State Sovereignty Over Temporarily Occupied Territories in Donetsk and Lugansk Regions", 18 January 2018, available at: https://zakon.rada.gov.ua/laws/show/2268-19#Text (Annex 9).

[67] *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),* Counter-Memorial submitted by the Russian Federation, p. 12-18, ¶¶41, 43-51.

of 21 July 2020, the SMM recorded more than 1.5 million ceasefire violations.[68] The situation became particularly alarming starting from August 2021. On 22 December 2021, another attempt was undertaken to stop the armed conflict at the meeting of the Trilateral Contact Group in Minsk, where the parties "expressed their strong determination to fully adhere to the Measures to Strengthen the Ceasefire agreement of 22 July 2020".[69] However, in January 2022 there were already twice as many ceasefire violations with the use of heavy weapons per day compared to the same period in 2021, as well as a rise in civilian casualties as a result of shelling and small arms fire.

D. RECOGNITION OF THE DPR AND LPR AND THE SPECIAL MILITARY OPERATION

37. Against this background, the Russian Federation decided, on 21 February 2022, to recognise the DPR and LPR as sovereign independent States. The grounds for the recognition were explained in the relevant Decrees of the President of the Russian Federation as follows:

> "Taking into consideration the will of the people of the [Donetsk/Luhansk] People's Republic and Ukraine's refusal to resolve the conflict peacefully in accordance with the Minsk Agreements…"[70]

38. That same day, the President of the Russian Federation made a statement regarding the recognition of the DPR and LPR, where he underlined that Kiev had repudiated the Minsk agreements:

> "the ruling Kiev elites never stop publicly making clear their unwillingness to comply with the Minsk Package of Measures to settle the conflict and are not interested in a peaceful settlement. On the contrary, they are trying to orchestrate a blitzkrieg in Donbass as was the case in 2014 and 2015."[71]

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[68] OSCE Thematic Report "Impact of the Conflict on Educational Facilities and Children's Access to Education in Eastern Ukraine", July 2020, p. 8, available at: https://www.osce.org/files/f/documents/4/1/457690.pdf

[69] Press Statement of Special Representative Kinnunen after the regular Meeting of Trilateral Contact Group on 22 December 2021, available at: https://www.osce.org/chairmanship/509006.

[70] The Kremlin*, Signing documents on recognition of the Donetsk and Lugansk Peoples Republics,* 21 February 2022, available at: http://en.kremlin.ru/events/president/news/67829 (Annex 19); Decree of the President of the Russian Federation On the Recognition of the Donetsk People's Republic, 21 February 2022, available at: http://publication.pravo.gov.ru/Document/View/0001202202220002 (Annex 10); Decree of the President of the Russian Federation On the Recognition of the Lugansk People's Republic, 21 February 2022, available at: http://publication.pravo.gov.ru/Document/View/0001202202220001 (Annex 11).

[71] Address by the President of the Russian Federation, 21 February 2022, available at: http://en.kremlin.ru/events/president/news/67828 (Annex 20).

39. The President further emphasised that Donbass continued to be under attack by the UAF:

> "Not a single day goes by without Donbass communities coming under shelling attacks. The recently formed large military force makes use of attack drones, heavy equipment, missiles, artillery and multiple rocket launchers. The killing of civilians, the blockade, the abuse of people, including children, women and the elderly, continues unabated … Russia has done everything to preserve Ukraine's territorial integrity. All these years, it has persistently and patiently pushed for the implementation of UN Security Council Resolution 2202 of February 17, 2015, which consolidated the Minsk Package of Measures of February 12, 2015, to settle the situation in Donbass."[72]

40. It was also explained that the volatile situation in Ukraine had significantly worsened by the supply of weapons from Western countries as well as regular NATO war games on the territory of Ukraine.[73]

41. In this regard, the Permanent Representative of the Russian Federation to the UN pointed out the following:

> "After the Ukrainian military adventures foundered upon the resolve of the Donbas and Lugansk people to defend their land, the Minsk agreements were signed and the package of measures was adopted to implement them. There was once again hope for peace and the prudence of the Maidan authorities, which had burnt themselves on their desire to drown Donetsk and Luhansk in blood. In particular, much hope was placed in the 2019 election of the new president of Ukraine, who promised to finally establish peace in Donbass.
>
> …Kyiv not only quickly returned to its bellicose rhetoric and continued to shell peaceful civilians, but it also did everything it could to sabotage and ultimately undermine the Minsk agreements. Most important is Kyiv's stubborn refusal to speak directly with the representatives of Donetsk and Luhansk, despite the fact that that requirement is a central structural element of the package of measures.
>
> …
>
> Over the weekend, the intensity of Ukrainian shelling of residential areas in the Luhansk People's Republic and Donetsk People's Republic increased sharply. Reportedly, up to 1,600 projectiles were launched, killing civilians. Several subversive groups penetrated into the territory of the Republics, who have carried out or attempted to sabotage critical infrastructure. As I

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[72] *Ibid.*

[73] *Ibid.*: "Obviously, such undertakings are designed to be a cover-up for a rapid buildup of the NATO military group on Ukrainian territory. This is all the more so since the network of airfields upgraded with US help in Borispol, Ivano-Frankovsk, Chuguyev and Odessa, to name a few, is capable of transferring army units in a very short time. Ukraine's airspace is open to flights by US strategic and reconnaissance aircraft and drones that conduct surveillance over Russian territory. I will add that the US-built Maritime Operations Centre in Ochakov makes it possible to support activity by NATO warships, including the use of precision weapons, against the Russian Black Sea Fleet and our infrastructure on the entire Black Sea Coast."

> mentioned, there have been civilian casualties. General mobilization has been announced in the Luhansk People's Republic and Donetsk People's Republic. Refugees have poured into Russia, not Ukraine, over the past several days, amounting to approximately 70,000 women, elderly people and children. Russia is hosting them and providing them with shelter and support. Towns in Russian territory close to the border area were even shelled. It has therefore become clear that Donbas is on the verge of a new Ukrainian military adventure, as it already was in 2014 and 2015. We cannot allow that to happen."[74]

42. On 22 February 2022, the Russian Federation concluded Treaties on Friendship, Cooperation and Mutual Assistance with the DPR and LPR (the "Friendship Treaties"). Under the terms of the Friendship Treaties,

> "Article 3
>
> The Contracting Parties shall closely cooperate with each other in defending the sovereignty, territorial integrity and security of the Russian Federation and the Donetsk People's Republic. They shall consult each other without delay whenever, in the opinion of one of the Contracting Parties, there is a threat of attack against it, in order to ensure their common defence and to maintain peace and mutual security. Such consultations shall determine the necessity, types and extent of the assistance which one Contracting Party will render to the other Contracting Party for the purpose of helping to eliminate the threat which has arisen."[75]
>
> "Article 4
>
> The Contracting Parties shall jointly take all measures within their power to eliminate any threat to peace or any breach of peace and to counter acts of aggression on the part of any state or a group of states and shall render each necessary assistance, including military assistance, in the exercise of their right of individual or collective self-defence in accordance with Article 51 of the Charter of the United Nations."[76]

43. On 22 February 2022, the DPR and LPR approached the Russian Federation with a formal request for military assistance under Articles 3 and 4 of the Friendship Treaties.

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[74] Security Council, 77th year, 8970th meeting, 21 February 2022, p. 11, available at: https://undocs.org/Home/Mobile?FinalSymbol=S%2FPV.8970&Language=E&DeviceType=Desktop&LangRequested=False.

[75] Article 3 of the Treaty on Friendship, Cooperation and Mutual Assistance with the DPR, 21 February 2022, available at: http://publication.pravo.gov.ru/Document/View/0001202202280001 (Annex 12). A similar provision is contained in the Treaty on Friendship, Cooperation and Mutual Assistance with the LPR, 21 February 2022, available at: http://publication.pravo.gov.ru/Document/View/0001202202280002 (Annex 13).

[76] *Ibid.*, Article 4.

44. On 24 February 2022, the President of the Russian Federation announced the start of a special military operation and explained the legal basis for the operation as follows:

> "The people's republics of Donbass have asked Russia for help.
>
> In this context, in accordance with Article 51 (Chapter VII) of the UN Charter, with permission of Russia's Federation Council, and in execution of the treaties of friendship and mutual assistance with the Donetsk People's Republic and the Lugansk People's Republic, ratified by the Federal Assembly on 22 February, I made a decision to carry out a special military operation."[77]

45. In this context, the President also recalled the growing threat posed by NATO expansion into the territory of Ukraine and the lack of prospect of any agreement with NATO:

> "It is a fact that over the past 30 years we have been patiently trying to come to an agreement with the leading NATO countries regarding the principles of equal and indivisible security in Europe. In response to our proposals, we invariably faced either cynical deception and lies or attempts at pressure and blackmail, while the North Atlantic alliance continued to expand despite our protests and concerns. Its military machine is moving and, as I said, is approaching our very border.
>
> …
>
> Even now, with NATO's eastward expansion the situation for Russia has been becoming worse and more dangerous by the year. Moreover, these past days NATO leadership has been blunt in its statements that they need to accelerate and step up efforts to bring the alliance's infrastructure closer to Russia's borders. In other words, they have been toughening their position.
>
> …
>
> Any further expansion of the North Atlantic alliance's infrastructure or the ongoing efforts to gain a military foothold of the Ukrainian territory are unacceptable for us.
>
> …
>
> Despite all that, in December 2021, we made yet another attempt to reach agreement with the United States and its allies on the principles of European security and NATO's non-expansion. Our efforts were in vain. The United States has not changed its position. It does not believe it necessary to agree with Russia on a matter that is critical for us. The United States is pursuing its own objectives, while neglecting our interests."[78]

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[77] Address by the President of the Russian Federation, 24 February 2022, available at: http://en.kremlin.ru/events/president/news/67843 (Annex 21).

[78] *Ibid.*

46. On 23 February 2022 (New York time), the Permanent Representative of the Russian Federation to the UN described, in a speech before the UN Security Council, the situation in Donbass and the legal basis of the special military operation as follows:

> "I can state with regret only that, ultimately, Ukraine did not heed our message to Kyiv concerning the need to stop provocations against the Luhansk People's Republic and the Donetsk People's Republic. It appears that our Ukrainian colleagues, whom certain States have supported and egged on recently, remain under the illusion that, with the blessing of Western sponsors, they can secure a military solution to the problem of Donbas. It is otherwise difficult to explain the increase in shelling and acts of sabotage on the territory of the Republics.
>
> Over the past 24 hours, the Organization for Security and Cooperation in Europe Special Monitoring Mission to Ukraine has recorded nearly 2,000 ceasefire violations, including almost 1,500 explosions. The residents of Donetsk and Luhansk continue to shelter in basements. Refugees continue to flow into Russia. In a word, the nature of provocations by Ukraine's Armed forces has not changed. Members would prefer to ignore that fact and repeat Ukraine's fairy tales that those living in Donetsk are bombing themselves.
>
> …
>
> [t]he leadership of the Luhansk and Donetsk People's Republics have asked us to provide military support in accordance with the bilateral cooperation agreements concluded at the time as of their recognition. That is a logical step and a consequence of the actions of the Ukrainian regime. During the course of this meeting, Russian President Vladimir Putin made an address in which he said that he had decided to launch a special military operation in Donbas.
>
> …
>
> That decision was made in accordance with Article 51 of the Charter of the United Nations, the approval of the Federation Council of the Russian Federation and pursuant to the Treaty of Friendship and Mutual Assistance signed with the Donetsk and Luhansk People's Republics."[79]

47. On 24 February 2022, the legal basis for the military operation was also communicated to the UN Secretary-General and the UN Security Council by the Permanent Representative of the Russian Federation through a notification under Article 51 of the UN Charter. The letter addressed to the UN Secretary-General with the request to circulate it as a document of the UN Security Council included "the address of the President of the Russian Federation H.E. Mr. Vladimir Putin to the citizens of Russia

[79] Security Council, 77th year, 8974th meeting, 23 February 2022, pp. 11-12, available at: https://digitallibrary.un.org/record/3959147?ln=en.

informing them of the measures taken in accordance with Article 51 of the UN Charter in exercise of the right of self-defence".

48. On 7 March 2022, the Russian Federation reaffirmed in a letter to this Court that:

> "The special military operation conducted by Russia in the territory of Ukraine has basis in the United Nations Charter, its Article 51 and customary international law. The legal basis for the military operation was communicated on 24 February 2022 to the Secretary-General of the United Nations and the United Nations Security Council by the Permanent Representative of the Russian Federation to the United Nations in the form of notification under Article 51 of the United Nations Charter.
>
> …
>
> The recognition of the Donetsk and Lugansk Peoples' Republics is a sovereign political act of the Russian Federation. It is related to the right of self-determination of peoples under the United Nations Charter and customary international law as reflected in the statements of the President of the Russian Federation and the Permanent Representative of the Russian Federation to the United Nations, who in this regard specifically quoted from the principle of self-determination of peoples as reflected in the 1970 Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations."[80] [Emphasis added]

49. Thus, there can be no doubt regarding the legal basis of the decisions and actions taken by the Russian Federation.

50. In its Memorial, Ukraine admits that "the Russian Federation invoked Article 51 of the U.N. Charter to justify its use of force".[81] Ukraine also concludes that this invocation was triggered by the Russian Federation exercising collective self-defence with the DPR and LPR: "President Putin… referenced Article 51 after stating that "[t]he people's republics of Donbas have asked Russia for help."[82]

51. Ukraine then proceeds to offer its own views regarding the interpretation of Article 51 of the UN Charter.[83] This clearly demonstrates the real object of Ukraine's claim, which

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[80] Letter from the Ambassador of the Russian Federation in the Kingdom of the Netherlands, 7 March 2022 ("Letter dated 7 March 2022"), p. 4-5, ¶¶15, 17.

[81] Memorial, ¶129.

[82] *Ibid*.

[83] *Ibid*.

has nothing to do with the Genocide Convention. In the following Chapters the Russian Federation will demonstrate that this matter falls outside the Court's jurisdiction.

52. Bearing this in mind, the Russian Federation will not engage in discussions on Article 51 of the UN Charter.[84] It suffices to say, as this Court has clearly held, that "in the language of Article 51 of the United Nations Charter, the inherent right (or "droit naturel") which any State possesses in the event of an armed attack, covers both collective and individual self-defence…"[85] It is well known that the inherent nature of the right to self-defence "means that, contrary to what the wording of Article 51 might suggest, it is also vested in states other than UN members, and that UN members may give assistance to a non-member falling victim to an armed attack".[86] [Emphasis added]

E. UKRAINE RESPONDED WITH CONTINUED ATTACKS ON CIVILIANS IN DONBASS AND ELSEWHERE

53. Currently, the Russian Federation is the country that hosts the largest number of Ukrainian refugees in the world.[87]

54. While blaming Russia for "aggression",[88] the Ukrainian leadership initially announced its readiness to negotiate a diplomatic solution to the ongoing conflict.[89] Soon after, however, Ukraine withdrew and made it clear that Ukraine intended to "win on the battlefield".[90]

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[84] *Ibid*.

[85] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, p. 102, ¶193.

[86] B. Simma, H. Mosler et al. (eds.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, (OUP, 1994), p. 666.

[87] Operational Data Portal, Ukraine Refugee Situation, available at: https://data.unhcr.org/en/situations/ukraine.

[88] Speech by the President of Ukraine at the 58th Munich Security Conference, 19 February 2022, available at: www.president.gov.ua/en/news/vistup-prezidenta-ukrayini-na-58-j-myunhenskij-konferenciyi-72997 (Annex 22).

[89] Address by the President of Ukraine, 25 February 2022, available at: https://www.president.gov.ua/en/news/zvernennya-prezidenta-ukrayini-73165 (Annex 23).

[90] RBC Ukraine, *Zelensky on War in Ukraine: We Will Win on the Battlefield and then End It at the Negotiations Table* (21 April 2022), available at: https://www.rbc.ua/rus/news/zelenskiy-voyne-ukraine-pobeda-budet-boyu-1653119307.html (Annex 102).

55. Until this day, Kiev continues targeting civilians in the territory of the DPR and LPR. For example, on 14 March 2022, a "Tochka-U" tactical missile with a cluster warhead was fired by the UAF at a residential block in the centre of Donetsk from the territory controlled by Kiev, with 23 civilians dead and 37 wounded.[91] On 8 April 2022, the Ukrainian military carried out a "Tochka-U" air strike from the area of Dobropol'e (45 kilometres southwest of Kramatorsk) against the Kramatorsk railway terminal, killing 50 people, including five children, and injuring at least 98 people.[92] On 19 September 2022, the UAF shelled Kuybyshevsky district of Donetsk, leaving 13 killed.[93] On 22 September 2022, UAF shelled the Central Market in Donetsk with 6 killed.[94]

56. Kiev also started covert operations targeting civilians on the territory of the Russian Federation, as well as in the territories of the DPR and LPR and in other areas. An odious example is the assassination of a young journalist and activist Daria Dugina, who died in a car explosion in the Moscow region on 20 August 2022.[95] Many local administrative officials in Kharkov, Kherson and Zaporozhye regions were assassinated or faced assassination attempts by Ukrainian secret services.[96]

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[91] Euronews, *Shelling of Donetsk: Dozens of Casualties and Wounded* (14 March 2022), available at: https://ru.euronews.com/2022/03/14/ukraine-topstory-monday-update (Annex 103); Statement by the Ministry of Defence of the Russian Federation, 14 March 2022, available at: https://eng.mil.ru/en/news_page/country/more.htm?id=12412962@egNews (Annex 24).

[92] Statement by the Ministry of Defence of the Russian Federation, 8 April 2022, available at: https://eng.mil.ru/en/news_page/country/more.htm?id=12416625@egNews (Annex 25).

[93] BBC News, *Deadly Donetsk Blasts Hit Separatist-Run City in Ukraine* (19 September 2022), available at: https://www.bbc.com/news/world-europe-62952641 (Annex 104); TeleSur, *Ukrainian Shelling of Donetsk Leaves 13 Dead* (19 September 2022), available at: https://www.telesurenglish.net/news/Ukrainian-Shelling-of-Donetsk-Leaves-13-Dead-20220919-0006.html (Annex 105); CGTN, *At Least 13 Killed by Shelling in Donetsk City* (19 September 2022), available at: https://news.cgtn.com/news/2022-09-19/At-least-13-killed-by-shelling-in-Donetsk-city-1dsrfV3LPqg/index.html (Annex 106).

[94] Report of the Donetsk Office in the Joint Center for Coordination and Control, 22 September 2022, available at: https://dnr-sckk.ru/25934-2/ (Annex 26); Statement by the Ministry of Defence of the Russian Federation, 8 April 2022, available at: https://eng.mil.ru/en/news_page/country/more.htm?id=12416625@egNews (Annex 25).

[95] TASS, *FSS Solves the Murder of Dugina* (22 August 2022), available at: https://tass.ru/proisshestviya/15531419 (Annex 107).

[96] On 11 July 2022, the head of the Velikiy Burluk, town administration, Kharkov region, Yevgeniy Yunakov died after an explosive device planted under his car went off. *See* TASS, *Official in Kharkov Region Killed in Car Explosion — Authorities* (11 July 2022), available at: https://tass.com/politics/1478349 (Annex 108).

57. Ukraine has also continuously and indiscriminately attacked civil infrastructure within the Russian Federation itself. For example:

(a) In April 2022, the UAF's helicopters entered the Russian airspace covertly at night and destroyed a fuel depot that belonged to Rosneft Oil Company and supplied a gas stations chain within the Belgorod Region.[97]

(b) In May 2022, Ukraine shelled the Solokhi village of the Belgorod Region, killing an 18-year-old teenager and injuring seven further civilians.[98]

(c) In June 2022, Ukraine bombed a bridge and a sugar refinery in the Kursk Region.[99]

(d) The same month, Ukraine shelled multiple villages in the Bryansk Region of the Russian Federation, wounding civilians and inflicting serious damage to civil infrastructure.[100]

On 20 August 2022, a self-made explosive device went off near the entrance to the Mariupol city Zoo at the time of arrival of the Mariupol mayor Konstantin Ivaschenko. *See* TASS, *Mariupol Mayor Unhurt After Assassination Attempt - Source in Mayor's Office* (20 August 2022), available at: https://tass.com/world/1496271 (Annex 109); UrduPoint, *Assasination Attempt on Mariupol Mayor Results in No Injuries, Casualties* (21 August 2022), available at: https://www.urdupoint.com/en/world/assasination-attempt-on-mariupol-mayor-result-1549986.html (Annex 110).

On 24 August 2022, the Head of the Mikhaylovka town administration, Zaporozhye region, Ivan Sushko died after an explosive device planted under his car exploded. *See* The Moscow Times, *Russia-Installed Official in Ukraine Killed in Car Bombing* (24 August 2022), available at: https://www.themoscowtimes.com/2022/08/24/russia-installed-official-in-ukraine-killed-in-car-bombing-a78643 (Annex 111).

On 23 August 2022, Ukrainian saboteurs attempted to murder the Deputy Head of the Kherson region Military and Civil administration Igor Telegin with an explosive device planted near his house. *See* Teller Report, *In the Kherson Region Reported an Attempt on the Deputy Head of the Department Telegin* (23 August 2022), available at: https://www.tellerreport.com/news/2022-08-23-in-the-kherson-region-reported-an-attempt-on-the-deputy-head-of-the-department-telegin.rJWdS3Xzkj.html (Annex 112).

[97] Forbes, *In Night Raid, Choppers Blow Up Fuel Depot On Russian Soil Near Ukraine* (1 April 2022), available at: https://www.forbes.com/sites/sebastienroblin/2022/04/01/in-night-raid-choppers-blow-up-fuel-depot-on-russian-soil-near-ukraine/?sh=31b3d2d84ca1 (Annex 113).

[98] Al-Jazeera, *Ukraine Accused of Deadly Cross-Border Attack on Russian Village* (12 May 2022), available at: https://www.aljazeera.com/news/2022/5/12/ukraine-accused-of-deadly-cross-border-attack-on-russian-village (Annex 114).

[99] The Moscow Times, *Cross-Border Shelling Damages Russian Bridge, Refinery* (6 June 2022), available at: https://www.themoscowtimes.com/2022/06/06/cross-border-shelling-damages-russian-bridge-refinery-a77899 (Annex 115).

[100] TASS, *Ukrainian Army Shells Settlement in Russia's Bryansk Region, No Casualties Reported* (5 July 2022), available at: https://tass.com/emergencies/1475685 (Annex 116).

(e) In July 2022, Ukraine bombed the city of Belgorod, killing numerous civilians and damaging dozens of residential houses.[101]

58. Finally, in its Memorial Ukraine puts forward several unsubstantiated allegations against the Armed Forces of the Russian Federation. While these accusations have been denied by the Russian Federation, they are irrelevant to the present proceedings and the Preliminary Objections are not an appropriate place for going into their substance. The relevant material can be found on the website of the Ministry of Foreign Affairs of the Russian Federation.[102]

[101] BBC News, *Belgorod: Fear and Denial in Russian City Hit by Shells* (4 July 2022), available at: https://www.bbc.com/news/world-europe-62042455 (Annex 117).

[102] Statement by the Russian Federation on the false allegations against the Russian Federation made by Ukraine to cover-up its own violations of international law and military crimes against civilian population of Donbass as well as Kharkov, Kherson and Zaporozhye regions, 27 September 2022, available at: https://mid.ru/en/foreign_policy/news/themes/id/1831500/.

III. FIRST PRELIMINARY OBJECTION: THERE IS NO DISPUTE UNDER THE GENOCIDE CONVENTION

59. Existence of a legal dispute is, in accordance with Article 38(1) of the Statute of the International Court of Justice (the "Statute"), a precondition for the Court to exercise its jurisdiction and consider the claims that an applicant may submit to it. As the Court stated in the *Nuclear Tests* cases, "the existence of a dispute is the primary condition for the Court to exercise its judicial function."[103]

60. The burden of proof to demonstrate the existence of a dispute falls on Ukraine:

> "While it is a legal matter for the Court to determine whether it has jurisdiction, it remains for the Applicant to demonstrate the facts underlying its case that a dispute exists (Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 75, para. 16)."[104]

61. The Memorial deals with the issue of the existence of a dispute between the Russian Federation and Ukraine under the Genocide Convention in a superficial and cursory manner. It limits itself to referring to the definition of a dispute set forth in the *Mavrommatis* case and mentions a handful of statements made by Russian and Ukrainian officials of varying levels and competence, in different contexts, in some of which there were references to genocide in a wider political context. This is not enough to prove the existence of a dispute on responsibility of the Russian Federation for alleged violations of a number of specific obligations under the Genocide Convention, especially in their convoluted and unfounded interpretation suggested by Ukraine.

62. Ukraine overlooks the Court's well-known case law setting forth the criteria that must be applied for the purpose of determining the existence of a dispute. The Court recently summarised these criteria as follows:

> ***First***, "[i]n 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). The two sides must 'hold clearly opposite views

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[103] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, pp. 270-271, ¶55; *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 476, ¶58.

[104] *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, pp. 851-852, ¶44.

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, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)."[105] [Emphasis added]

Second, "[a] dispute exists when it is demonstrated, on the basis of the evidence, that the respondent was aware, or could not have been unaware, that its views were 'positively opposed' by the applicant (*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. 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. 85, para. 30). Indeed, it is stated in Article 38, paragraph 1, of the Court's Statute that the Court's function is 'to decide in accordance with international law such disputes as are submitted to it', this relates to disputes existing at the time of their submission."[106] [Emphasis added]

Third, "[i]n principle, the date for determining the existence of a dispute is the date on which the application is submitted to the Court (*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; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*)."[107] [Emphasis added]

Fourth, "[f]or that purpose, the Court takes into account in particular any statements or documents exchanged between the parties (*Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012 (II)*, pp. 443-445, paras. 50-55), as well as any exchanges made in multilateral settings (*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. 94, para. 51, p. 95, para. 53). In so doing, it pays special attention to 'the author of the statement or document, their intended or actual addressee, and their content' (ibid., p. 100, para. 63)."[108] [Emphasis added]

63. Since Article IX of the Genocide Convention is the only basis for the jurisdiction of the Court invoked by Ukraine, it must be shown that the Russian Federation and Ukraine not only "hold clearly opposite views concerning the question of the performance or non-performance of certain international obligations", but also that they hold such opposite

[105] *Ibid.*, ¶37.

[106] *Ibid.*, p. 850, ¶41.

[107] *Ibid.*, p. 851, ¶42.

[108] *Ibid.*, pp. 849-850, ¶39.

views with respect to precise obligations arising under the Convention. In other words, Ukraine must demonstrate that the claims it has put before the Court on the basis of the Convention had been positively opposed by the Russian Federation before these proceedings were instituted.

64. As the Court stated in *Legality of Use of Force* cases,

> "the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; and whereas in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX."[109] [Emphasis added]

65. In addition, in accordance with the Court's jurisprudence, previous exchanges between the Parties must have been specific enough and made in such a manner that the Parties were aware, or could not have been unaware, that they hold positively opposed views with respect to the specific obligations under the Convention, which are the subject-matter of Ukraine's claim before the Court.

66. With regard to the awareness requirement, Judge Cançado Trindade gave the following breakdown:

> "the Court effectively requires an applicant State to set out its legal claim, to direct it specifically to the prospective-respondent State(s), and to make the alleged harmful conduct clear. All of this forms part of the 'awareness' requirement that the Court's majority has laid down."[110]

67. In particular, in the *Marshall Islands* case, the Court came to the conclusion that even a statement of a foreign minister before the UN General Assembly devoted to the subject-matter of the alleged dispute may not be specific enough to pass this test unless the claims are formulated with sufficient clarity:

> "The Marshall Islands relies on the statement made at the High-Level Meeting of the General Assembly on Nuclear Disarmament, on 26 September 2013 by its Minister for Foreign Affairs, 'urg[ing] all nuclear weapons states

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[109] *Legality of Use of Force (Serbia and Montenegro v. France)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I), p. 372, ¶25; *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 838, ¶33.

[110] *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, Dissenting opinion of Judge Cançado Trindade, p. 917, ¶20.

> to intensify efforts to address their responsibilities in moving towards an effective and secure disarmament.' However, this statement is formulated in hortatory terms and cannot be understood as an allegation that the United Kingdom (or any other nuclear power) was in breach of any of its legal obligations. It does not mention the obligation to negotiate, nor does it say that the nuclear-weapon States are failing to meet their obligations in this regard… Moreover, a statement can give rise to a dispute only if it refers to the subject-matter of a claim 'with sufficient clarity to enable the State against which [that] claim is made to identify that there is, or may be, a dispute with regard to that subject-matter.'"[111] [Emphasis added].

68. Moreover, in *Questions relating to the Obligation to Prosecute or Extradite* the Court held that although there had been an abundant exchange of views between the parties on various issues relating to torture, a dispute could not arise until the applicant State alleged a breach of a specific obligation, and that the existence for a State of an obligation under customary international law is clearly distinct from any question of compliance of that State with its obligations under a treaty:

> "While it is the case that the Belgian international arrest warrant transmitted to Senegal with a request for extradition on 22 September 2005 (see paragraph 21 above) referred to violations of international humanitarian law, torture, genocide, crimes against humanity, war crimes, murder and other crimes, neither document stated or implied that Senegal had an obligation under international law to exercise its jurisdiction over those crimes if it did not extradite Mr. Habré. In terms of the Court's jurisdiction, what matters is whether, on the date when the Application was filed, a dispute existed between the Parties regarding the obligation for Senegal, under customary international law, to take measures in respect of the above-mentioned crimes attributed to Mr. Habré. In the light of the diplomatic exchanges between the Parties reviewed above … the Court considers that such a dispute did not exist on that date.
>
> …
>
> However, the issue whether there exists an obligation for a State to prosecute crimes under customary international law that were allegedly committed by a foreign national abroad is clearly distinct from any question of compliance with that State's obligations under the Convention against Torture and raises quite different legal problems."[112] [Emphasis added]

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[111] *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, p. 853, ¶49.

[112] *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012, pp. 444-445, ¶54.

69. In the present case, the date for determining whether the Court has jurisdiction to entertain Ukraine's claims is 26 February 2022, that is, the day when Ukraine filed the Application.

70. Ukraine has put forward a large number of claims allegedly under the Genocide Convention, and those claims differ significantly in the Application and the Memorial. The claims in the Application, which the Court relied upon when issuing its Order on provisional measures dated 16 March 2022 (the "Provisional Measures Order"),[113] read:

> "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."[114]

71. In contrast, Ukraine's claims in the Memorial read:

> "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.
>
> …
>
> 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.

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[113] Provisional Measures Order, ¶2.

[114] Application, ¶30.

> b. Order the Russian Federation to immediately withdraw its military units from the territory of Ukraine, including the Donbas region…"[115]

72. There is thus a remarkable substantial change in Ukraine's claims: Ukraine has transformed its initial request to confirm that the Russian Federation's actions had no basis in the Genocide Convention into requests to establish the responsibility of the Russian Federation for allegedly violating Articles I and IV of the Convention. Regardless of the fact that this modification of claims after obtaining an order for provisional measures by the Court is inappropriate, and consequences of such changes for their admissibility as will be shown in Chapter V,[116] the fact remains that Ukraine must demonstrate that a dispute existed with respect to each of the claims as formulated in the Memorial at the time of the filing of the Application.

73. Ukraine formulates an alleged dispute with the Russian Federation in the following terms:

> "*First*, the dispute relates to the Russian Federation's claim that Ukraine is responsible for committing genocide in violation of Article I of the Convention, and that Ukrainian officials are 'persons committing genocide' who 'shall be punished' for the purposes of Article IV."[117] [Emphasis added]
>
> "*Second*, the dispute relates to the Russian Federation's recognition of the DPR and LPR and its use of force in and against Ukraine as measures to fulfil Russia's obligation to prevent and punish genocide under Articles I and IV of the Genocide Convention, and as an exercise of a right to invoke the responsibility of Ukraine for alleged violations of the Convention."[118] [Emphasis added]
>
> "*Third*, the dispute relates to Ukraine's claim that by taking these actions, the Russian Federation has abused, misused, and violated the Genocide Convention."[119] [Emphasis added]

74. Before analysing the statements referred to by Ukraine as evidence of the existence of an alleged dispute under the Genocide Convention, two general remarks are warranted.

75. ***First***, Ukraine puts much emphasis on the Provisional Measures Order, suggesting that the Court has already confirmed the existence of a dispute in this Case. The Provisional Measures Order, however, "in no way" prejudged the question of the jurisdiction of the

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[115] Memorial, ¶¶178-179.

[116] *See below*, ¶254.

[117] Memorial, ¶154.

[118] *Ibid.*, ¶156.

[119] *Ibid.*, ¶158.

Court.[120] It is only after the Court has had all relevant elements of fact and law before it, having fully heard the Parties at this stage of the proceedings, that it can form a final view on the question whether a dispute actually exists between the Parties.

76. ***Second***, there is not a single Note Verbale by Ukraine addressed to the Russian Federation where Ukraine set forth its claims, either as formulated in the Application or in the Memorial. This is significant in light of the fact that Ukraine did use diplomatic channels to make its position on various other issues known to the Russian Federation. In other words, Ukraine consciously chose not to communicate any of its concerns regarding the Genocide Convention – if such concerns even existed in the first place.

A. NO DISPUTE EXISTS CONCERNING VIOLATION OF ARTICLES I AND IV OF THE CONVENTION BY THE RUSSIAN FEDERATION

77. Ukraine has failed to submit any evidence showing that Ukraine, by the date of the filing of the Application, clearly alleged that, by using force or recognising the DPR and LPR, the Russian Federation acted in violation of Articles I and IV of the Convention. In fact, Ukraine advanced these claims for the first time in its Memorial, relying on an allegedly existing implicit obligation to "act within the limits of international law", which, in its view, arises from the Convention. Before that, the Russian Federation was not aware, and could not have been aware, of such claims. Consequently, the Russian Federation did not have an opportunity to properly consider, react or positively oppose them.

78. The most that Ukraine alleged almost simultaneously with filing the Memorial was that the special military operation and the recognition of the DPR and LPR by the Russian Federation did not have a basis in the Genocide Convention (and not that these actions somehow violated Articles I and IV of the Convention). This statement was posted by Ukraine's Ministry of Foreign Affairs on its website on 26 February 2022 (the "26 February 2022 Statement")."[121]

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[120] Provisional Measures Order, p. 18, ¶85.

[121] Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression, 26 February 2022, available at: https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi (Annex 27).

79. This is the only Ukrainian statement which the Court referred to in the Provisional Measures Order as evidence of the denial by Ukraine of "Russia's allegations of genocide" and Ukraine disputing "any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression".[122] This statement does not, however, prove the crystallisation of a dispute on alleged violations of Articles I and IV of the Convention as presented in the Memorial.

80. ***First***, the 26 February 2022 Statement is imprecise, vague and therefore cannot serve as evidence of a dispute that had crystallised between the Parties regarding an alleged violation of Articles I and IV of the Convention. This Statement is completely devoid of any references to the Russian Federation's alleged responsibility under the Convention for specific breaches of these provisions, be it through the use of force or the recognition of the DPR and LPR. To the contrary, the 26 February 2022 Statement merely alleges that the Russian Federation's actions have "no real basis" or are an "insult to the Genocide Convention".[123] If anything, this can be interpreted as an admission that the Convention did not serve as the legal basis for the Russian Federation's actions – as is the case.

81. ***Second***, the timing of the 26 February 2022 Statement makes it irrelevant for the purposes of determining whether a dispute exists. It was published on the website of Ukraine's Ministry of Foreign Affairs on the same day Ukraine filed the Application, which was Saturday (not a working day), at 18:39 Kiev time and 19:39 Moscow time,[124] that is, very shortly before the Application was lodged with the Court. It is well-established in case law and legal doctrine that a dispute between the Parties must exist by the date that the Application is filed; it naturally follows that it cannot materialise during this day, especially at that time in the evening on a non-working day.[125]

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[122] Provisional Measures Order, p. 10, ¶42.

[123] Statement of the Ministry of Foreign Affairs of Ukraine on Russia's False and Offensive Allegations of Genocide as a Pretext for Its Unlawful Military Aggression, 26 February 2022, available at: https://www.kmu.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-nepravdivih-ta-obrazlivih-zvinuvachen-rosiyi-v-genocidi-yak-privodu-dlya-yiyi-protipravnoyi-vijskovoyi-agresiyi (Annex 27).

[124] *Ibid*.

[125] H.W. Thirlway, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE. VOLUME 1 (OUP, 2013), p. 568; G. Distefano, *Time Factor and Territorial Disputes* in M. Kohen, M. Hebie (eds), RESEARCH HANDBOOK ON TERRITORIAL DISPUTES IN INTERNATIONAL LAW (Elgar Publishing, 2018), pp. 402-403.

82. ***Third***, the 26 February 2022 Statement was merely put on the website of Ukraine's Ministry of Foreign Affairs along with numerous other statements. As the Court held in the *Marshall Islands* case, even when a Party made a statement publicly at an international conference, the absence of the other Party was material to determining that it was not aware of the claim.[126] Furthermore, as noted even by a Judge who did not support the Court's requirement of awareness in the *Marshall Islands* case, it cannot be reasonably expected that a Party would be aware of a public statement by another Party on the same day it was made.[127] In this Case, it is evident that the Russian Federation was not aware – and could not have been aware – that Ukraine posited this statement.

83. Importantly, Ukraine has not produced any evidence that, before instituting these proceedings, it clarified the way in which, in its view, the Russian Federation could have specifically violated its obligations under Articles I and IV of the Convention. As will be further shown in Chapter IV below, Ukraine's case rests on an alleged obligation, implicit in the Convention, to "act within the limits of international law", which would incorporate other rules of international law into this treaty. Ukraine's claim in this regard is not only unfounded in law, but it also was never made known to the Russian Federation until the Memorial was filed.

84. In light of the above, it must be concluded that a dispute between Ukraine and the Russian Federation concerning an alleged violation by the latter of Articles I and IV of the Genocide Convention did not exist at the time the Application was filed.

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[126] *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, pp. 853-854; ¶50 ("The statement made by the Marshall Islands at the Nayarit conference on 13 February 2014 (see paragraph 28 above) goes further than the 2013 statement, in that it contains a sentence asserting that 'States possessing nuclear arsenals are failing to fulfil their legal obligations' under Article VI of the NPT and customary international law. However, the United Kingdom was not present at the Nayarit conference.").

[127] *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, Dissenting opinion of Judge Robinson, p. 1087, ¶62.

B. NO DISPUTE EXISTS CONCERNING "ABUSE", "MISUSE" OR "MISAPPLICATION" OF THE CONVENTION BY THE RUSSIAN FEDERATION

85. As will be set out in detail in Chapter IV below, it is difficult to understand what, in Ukraine's opinion, constitutes the "abuse and misuse" of the Convention or what the precise legal meaning of these concepts is.

86. In any event, Ukraine failed to show any statement or communication made by the critical date of 26 February 2022, where it ever alleged that the Russian Federation had misused or abused the Convention or explained what legal meaning Ukraine ascribes to these terms. One may suggest that Ukraine considers that the 26 February 2022 Statement suffices for the purposes of proving the existence of a dispute under the Convention with respect to the abuse and misuse of the Convention as well. However, for the reasons explained above, it does not meet the established criteria and cannot be taken into account in this matter.

87. To present the Russian Federation's actions as an "abuse" or "misuse" of the Convention, Ukraine proposes three implied obligations that can allegedly be derived from the Convention:

> "*First*, the Convention does not permit one Contracting Party to invoke the responsibility of another Contracting Party under Article I of the Genocide Convention on the basis of a falsely alleged genocide.
>
> *Second*, should a Contracting Party invoke the responsibility of another Contracting Party for a breach of the Convention, or should a Contracting Party take action to prevent and punish genocide, such action must be taken in good faith and without abuse.
>
> *Third*, even if a State were to fail to meet its obligations under Article I of the Convention, a Contracting Party may not unilaterally act to bring this failure to an end and to prevent and punish genocide in a manner that exceeds the limits of international law."[128]

88. These principles are of a general nature and it is difficult to deduce to what extent and how they are relevant to the performance or non-performance of obligations under the Convention. However, in any event, these principles have been brought to the attention of the Russian Federation for the first time only in Ukraine's Memorial – that is, long after the critical date, so the Russian Federation *a priori* did not have any chance to

[128] Memorial, ¶78.

formulate its position with respect to these principles or positively oppose them by the critical date.

C. NO DISPUTE EXISTS CONCERNING UKRAINE'S RESPONSIBILITY FOR VIOLATION OF THE CONVENTION

89. In its Memorial Ukraine argues that

> "the Russian Federation claims that its recognition of the DPR and LPR and its invasion of Ukraine were to prevent and punish genocide, and that it was exercising a right to invoke the responsibility of Ukraine for its alleged violations of the Convention."[129]

90. Ukraine further alleges that

> "Russia's allegation of genocide appears to be based on a false narrative that Ukraine and its officials set out to 'destroy' Russian-speaking residents in the Donbas region of eastern Ukraine, in breach of Article I of the Convention."[130]
>
> and that
>
> "On the facts before the Court, there is no evidence that Ukraine is responsible for committing any acts of genocide in the Donbas region of Ukraine."[131]

91. Finally, Ukraine submits 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."[132]

92. Therefore, Ukraine limits the scope of its claims in this respect solely to the question of its own State responsibility for the commission of genocide in Donbass.

93. In its jurisprudence, the Court clarified the status of submissions as follows:

> "the Memorial is of considerable importance, not just because it expounds the Applicant's arguments, but also because it specifies the submissions";[133]

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[129] *Ibid.*, ¶14.

[130] *Ibid.*, ¶103.

[131] *Ibid.*, ¶15.

[132] *Ibid.*, ¶178(b).

[133] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Preliminary Objections, Judgment, I.C.J. Reports 2008, p. 443-444, ¶90.

> "Where however claims of a legal nature are…made the subject of submissions, the Court has in principle merely to decide upon those submissions";[134] and
>
> "one must bear in mind the principle that it is the duty of the Court not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not included in those submissions."[135]

94. Despite Ukraine's allegations, it has not demonstrated the existence of a dispute in respect of its responsibility for violations of the Genocide Convention by the date of the filing of the Application – 26 February 2022.

95. However, the Russian Federation has not invoked Ukraine's responsibility under the Convention. As will be demonstrated below, Ukraine has produced no evidence showing that the Russian Federation has taken the necessary steps to invoke Ukraine's responsibility for the breach of the obligations under the Convention.

96. ***First***, as the International Law Commission (the "ILC") explained it:

> "…invocation should be understood as taking measures of a relatively formal character, for example, the raising or presentation of a claim against another State or the commencement of proceedings before an international court or tribunal. A State does not invoke the responsibility of another State merely because it criticizes that State for a breach and calls for observance of the obligation, or even reserves its rights or protests. For the purpose of these articles, protest as such is not an invocation of responsibility; it has a variety of forms and purposes and is not limited to cases involving State responsibility. There is in general no requirement that a State which wishes to protest against a breach of international law by another State or remind it of its international responsibilities in respect of a treaty or other obligation by which they are both bound should establish any specific title or interest to do so. Such informal diplomatic contacts do not amount to the invocation of responsibility unless and until they involve specific claims by the State concerned, such as for compensation for a breach affecting it, or specific action such as the filing of an application before a competent international tribunal, or even the taking of countermeasures."[136] [Emphasis added]

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[134] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America),* Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, p. 431, ¶88.

[135] *Request for Interpretation of the Judgment of November 20th 1950 in the Asylum case (Colombia/Peru),* ICJ Reports (1950), p. 402.

[136] Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, in *Yearbook of the International Law Commission 2001*, vol. II, Part Two, p. 117, ¶(2).

97. Furthermore, according to the ILC:

> "Article 43 requires an injured State which wishes to invoke the responsibility of another State to give notice of its claim to that State."[137] [Emphasis added]

98. ***Second***, Ukraine itself has never declared the existence of a dispute with the Russian Federation under the Convention in diplomatic correspondence, or during the negotiations with the Russian Federation, or at the meetings of bodies of international organisations before the critical date, or in any other manner capable of reaching the Russian Federation. Moreover, Ukraine had not, contrary to what it now claims, "strongly disputed the Russian Federation's allegations of genocide in violation of the Genocide Convention, dating back to the launch of the Investigative Committee's first 'investigations' in 2014".[138]

99. In this regard, Ukraine relies on several statements made by Ukrainian low-ranking officials. Those officials work in State bodies that do not have the authority to represent the view of a State at the international level. In any case, these statements were made in such context (like an interview to a media outlet) that the Russian Federation could not have been expected to be aware of these statements. Examples include news articles containing statements by Ukraine's Prosecutor General's Office, an article authored by "the information agency of the Ukrainian Ministry of Defence", or interviews of advisers to Ukraine's Interior Ministers Anton Gerashchenko and Zoryan Shkiryak.[139]

100. Ukraine proceeds to quote its Foreign Minister Dmitry Kuleba at the General Assembly's meeting of 23 February 2022. However, when Mr Kuleba railed against "Russia's absurd accusations", he only claimed that "Ukraine has never threatened or attacked anyone", "has never planned and does not plan to launch any military offensive in the Donbas" or "to initiate any provocations or acts of sabotage".[140] Not once did Mr Kuleba refer to the Genocide Convention and any supposed violation thereof. On the contrary: when speaking broadly about the Russian Federation's recognition of the DPR and LPR,

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[137] *Ibid*., p. 119, ¶(3).

[138] Memorial, ¶47.

[139] *Ibid.*, ¶¶48-49.

[140] Ministry of Foreign Affairs of Ukraine, Statement by H.E. Mr Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, at the UN General Assembly Debate on the Situation in the Temporarily Occupied Territories of Ukraine, 23 February 2022.

Mr Kuleba referred to "core principles of international law" (rather than any specific treaty obligations), as well as "fundamental principles of international peace and security", "the pillars of the United Nations" and Articles 2 and 51 of the UN Charter.[141] In this sense, Ukraine's Foreign Minister framed Ukraine's views in consonance with the position of the Russian Federation, namely that the discussed issues are regulated by the UN Charter and certain rules of customary international law, and not the Convention.

101. All of Ukraine's references to its officials' statements regarding the recognition of the DPR and LPR[142] contain no mentions of the Genocide Convention, much less of Ukraine's (or the Russian Federation's) responsibility under the Convention. Instead, they refer to the violation of "the principles of the international law", "the UN Charter", "the sovereignty and territorial integrity of Ukraine".[143] The 26 February 2022 Statement is also of no assistance to the case for the reasons given above.[144]

102. References to the statements of the officials of the Russian Federation do not support Ukraine's claims, either.

103. Political leaders of different States have on numerous occasions used the term *genocide* in their public statements. However, at no point were such statements by themselves viewed as an invocation of responsibility under the Convention or as evidence of the existence of a dispute with regard to such responsibility. This has also been the approach of the Court and the Parties in other proceedings, such as the *Legality of Use of Force* cases, where the Court examined allegations of responsibility for use of force under the Convention.[145] Even though the respondent States in those cases claimed to have conducted their armed intervention to prevent genocide, neither the parties nor the Court

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[141] U.N. General Assembly Official Records, 76th Session: 58th Plenary Meeting, U.N. Doc. A/76/PV.58, 23 February 2022, pp. 2-3, available at: https://digitallibrary.un.org/record/3969163/files/A_76_PV.58-EN.pdf?ln=en.

[142] Memorial, ¶51.

[143] Statement of the Ministry of Foreign Affairs of Ukraine on the Russian Federation's decision to recognise the "independence" of the so-called "DPR" and "LPR", 22 February 2022, available at: https://www.kmu.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-russian-federations-decision-recognise-independence-so-called-dpr-and-lpr (Annex 29); Ukraine qualifies Russia's latest actions as a violation of the sovereignty and territorial integrity of our state - Volodymyr Zelenskyy, 22 February 2022, available at: https://www.president.gov.ua/en/news/ukrayina-kvalifikuye-ostanni-diyi-rosiyi-yak-porushennya-suv-73037 (Annex 30).

[144] *See above*, ¶¶78-82.

[145] *See below*, ¶207 et seqq.

viewed this – as Ukraine might put it – "justification" as evidence of existence of a dispute under the Convention.[146]

104. It should be noted that international judicial institutions recognise that the term *genocide* may be used in a broader context as compared to the definition of the term under the Convention.[147] Accordingly, the use of the word *genocide* by no means automatically implies expression of a position regarding *the performance or non-performance of international obligations under the Convention*.

105. The existence of different concepts of genocide has been analysed in doctrine, for example:

> "Genocide is, first and foremost, a legal concept. Like many other terms – murder, rape, theft – it is also used in other contexts and by other disciplines, where its meaning may vary. Many historians and sociologists employ the term genocide to describe a range of atrocities involving killing large numbers of people. But even in law it is imprecise to speak of a single, universally recognized meaning of genocide."[148]

106. As for the specific statements and remarks referred to in Ukraine's Memorial,[149] they, *a priori,* cannot be used to prove the existence of a dispute on responsibility of Ukraine under the Convention. This is because they did not even refer to or invoked Ukraine's responsibility under the Convention, and, in any event, as was shown above,[150] Ukraine has failed to demonstrate that it had positively opposed these statements by the day of filing of the Application, or that it treated them as an invocation of responsibility at the time they were made.

107. Furthermore, Ukraine failed to show that the above-mentioned statements referred specifically to Ukraine's State responsibility for commission of genocide, and not any

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[146] For example, in the *Marshall Islands* case, where the Court also held that a direct reference to a treaty in question was not sufficient to determine existence of a dispute. *See 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, pp. 853-854, ¶¶49-50.

[147] *Vasiliauskas v. Lithuania*, European Court of Human Rights Grand Chamber Judgment, 20 October 2015, Application no. 35343/05, p. 62, ¶181; *Diaz et al. v. Colombia*, Case 11.227, Report No. 5/97, On Admissibility, Inter-Am.C.H.R.,OEA/Ser.L/V/II.95 Doc. 7 rev. at 99 (12 March 1997), ¶¶25, 58.

[148] W. Schabas, *The Law and Genocide*, in D. Bloxham, A. Dirk Moses, THE OXFORD HANDBOOK OF GENOCIDE STUDIES (OUP, 2010), p. 23.

[149] *See* Memorial, ¶¶ 37-38, 40-41,43-46.

[150] *See above*, Chapter III, Sections A – C.

other matters such as, for example, individual criminal responsibility for genocide or State responsibility for failing to prevent and punish genocide, which were excluded by Ukraine from the scope of its claims in the present case.

108. Furthermore, Ukraine attempts to use statements that do not represent the position of State on the international level[151] (because the authority to speak on behalf of the Russian Federation is not included in the relevant mandate of the speakers), are taken out of context or made in an informal setting.[152]

109. As for the Investigative Committee of the Russian Federation (the "Investigative Committee"), its investigations or statements of its officials do not prove the existence of a dispute on responsibility of Ukraine under the Convention either.

110. The Investigative Committee is conducting a national investigation into the crime of genocide. The purpose of the investigation is individual criminal responsibility of persons and not international responsibility of States. The Regulation on the Investigative Committee does not contain provisions authorising the Investigative Committee to represent the position of the Russian Federation at the international level. According to the Law on Investigative Committee,[153] it is vested with specific authority in respect of criminal investigations. The principles of its operation include independence from federal authorities, which cannot interfere into the Investigative Committee's work. It should be reiterated that Ukraine excluded matters of individual criminal responsibility for genocide from its submissions, having reformulated its relevant claim to only encompass State responsibility for commission of genocide.[154]

111. The Investigative Committee initiated criminal investigations in respect of crimes allegedly committed within the territory of the DPR and LPR, including genocide. The investigation of genocide is complex: it should be thorough and should include intensive

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[151] *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, p. 87, ¶37. *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, p. 27, ¶46.

[152] Memorial, ¶¶35-39.

[153] Federal Law No. 403-FZ "On the Investigative Committee of the Russian Federation", 28 December 2010 (as amended on 1 April 2022), Articles 1(4)(1), 5 (Annex 14).

[154] Memorial, ¶178, submission (b).

fact-finding, collection of evidence and interviewing of numerous witnesses before the case is ready to be presented before a court. Such investigation requires cooperation of a State on whose territory a crime has allegedly occurred. In the case of Rwanda, for example, it took the International Criminal Tribunal for Rwanda – the Tribunal which enjoyed ample cooperation of the States concerned – more than 20 years to complete its prosecution in relation to crimes committed just within one year. Likewise, in the International Criminal Tribunal for the former Yugoslavia investigations took years before individual perpetrators of crimes were sentenced.

112. A national criminal investigation of the crime of genocide does not automatically trigger a dispute on the responsibility of a State party under the Convention. Indeed, such a conclusion would impede the States' efforts to combat the crime of genocide through their national authorities.

113. As a last resort to prove the existence of a dispute, Ukraine claims that "a strong national defense" can somehow prove the existence of a dispute under the Convention. This statement is clearly without merit because the use of force cannot prove the existence of a dispute under specific provisions of the Genocide Convention. Conduct can be interpreted as "positive opposition", "only when all other reasonable interpretations of the respondent's conduct and surrounding facts can be excluded".[155]

114. In this Case, where the Russian Federation has been compelled to use force based on Article 51 of the UN Charter and related rules of customary international law, and made these reasons publicly known, Ukraine's conduct can at best be interpreted as evidence of a response to what Ukraine identifies as "an attack on the sovereignty and territorial integrity of Ukraine"[156] that are categories beyond the scope of the Genocide Convention.

[155] *Republic of Ecuador v. United States of America*, PCA Case No. 2012-05, Award, 29 September 2012, ¶223.

[156] Statement of the Ministry of Foreign Affairs of Ukraine on the new wave of aggression of the Russian Federation against Ukraine, 24 February 2022, available at: mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-new-wave-aggression-russian-federation-against-ukraine (Annex 31).

D. ALTERNATIVELY, EVEN IF A DISPUTE EXISTS BETWEEN THE PARTIES, IT CONCERNS ISSUES THAT ARE MANIFESTLY OUTSIDE THE SCOPE OF THE CONVENTION

115. The Court has its own duty to characterise a dispute that a State attempts to bring to its consideration.[157] This means that the Court should not take the applicant's allegations and statements at face value.[158] It should conduct an objective assessment of the alleged dispute and identify its actual subject-matter. The purpose of this rule is to ascertain that the Court exercises its jurisdiction only in respect of matters over which the parties have expressly granted the Court jurisdiction.

116. As the Court noted in *Right of Passage*:

> "The facts or situations to which regard must be had in this connection are those with regard to which the dispute has arisen or, in other words, as was said by the Permanent Court in the case concerning the *Electricity Company of Sofia and Bulgaria*, only "those which must be considered as being the source of the dispute', those which are its 'real cause'.
>
> …
>
> It was from all of this that the dispute referred to the Court arose; it is with regard to all of this that the dispute exists. This whole, whatever may have been the earlier origin of one of its parts, came into existence only after 5 February 1930."[159] [Emphasis added]

117. The Court further elaborated on this approach in *Nuclear Tests (New Zealand v. France)*. It reaffirmed its duty to identify the true object of the claim and to exclude any contentions that are outside thereof. In that case, the Court analysed New Zealand's requests and identified that its true object was the cessation of French nuclear tests:

> "Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions.
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> …

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[157] *See*, for example, *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: I.C.J. Reports 1960, p. 35; *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, Judgment, I.C.J. Reports 1994, p. 14, ¶¶18-19; *Fisheries Jurisdiction (Spain v. Canada), Jurisdiction of the Court*, Judgment, I. C.J. Reports 1998, p. 447-448, ¶30; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, I.C.J. Reports 2015, p. 602, ¶24.

[158] S. Yee, *Article 40*, in A. Zimmermann, K. Oellers-Frahm *et al. (eds.)*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), pp. 1041-1042.

[159] *Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: I.C.J. Reports 1960, p. 35.

> The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party.
>
> …
>
> The Court is asked to adjudge and declare that French atmospheric nuclear tests are illegal, but at the same time it is requested to adjudge and declare that the rights of New Zealand "will be violated by any further such tests." The Application thus contains a submission requesting a definition of the rights and obligations of the Parties. However, it is clear that the *fons et origo* of the dispute was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests. This is indeed confirmed by the various statements made by the New Zealand Government, and in particular by the statement made before the Court in the oral proceedings, on 10 July 1974, when, after referring to New Zealand's submission, the Attorney-General stated that 'My Government seeks a halt to a hazardous and unlawful activity.'"[160] [Emphasis added]

118. Subsequently, in *Fisheries Jurisdiction*, the Court once again confirmed this approach and reiterated that in characterising the dispute, it should focus not only on the Applicant's submissions, but rather on any evidence available to it:

> "It is for the Court itself, while giving particular attention to the formulation of the dispute chosen by the Applicant, to determine on an objective basis the dispute dividing the parties, by examining the position of both parties.
>
> …
>
> The Court's jurisprudence shows that the Court will not confine itself to the formulation by the Applicant when determining the subject of the dispute.
>
> …
>
> The Court will itself determine the real dispute that has been submitted to it…".[161]

[160] *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, pp. 466-467, ¶¶30-31.

[161] *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 448-449, ¶¶30-31.

119. Recently, in *Immunities and Criminal Proceedings*, the Court once again underlined its adherence to the duty of objectively identifying the dispute before it:

> "However, it is for the Court itself to determine on an objective basis the subject-matter of the dispute between the parties, by isolating the real issue in the case and identifying the object of the claim."[162]

120. In the *Chagos* arbitration, the arbitral tribunal declined jurisdiction specifically because the issue at the heart of the dispute did not concern interpretation and/or application of the United Nations Law of the Sea Convention ("UNCLOS") but required the arbitral tribunal to deal with matters of sovereignty:

> "Where the 'real issue in the case' and the 'object of the claim' (*Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 457 at p. 466, para. 30) do not relate to the interpretation or application of the Convention, however, an incidental connection between the dispute and some matter regulated by the Convention is insufficient to bring the dispute, as a whole, within the ambit of Article 288(1).
>
> …
>
> Accordingly, the Tribunal finds itself without jurisdiction to address Mauritius' First Submission."[163] [Emphasis added]

121. Accordingly, in this Case, the Court likewise should characterise the object of the claim, that is, find what the real issue in the case is, and on which facts and circumstances Ukraine bases its position.

122. In reality, Ukraine arrived at the Court's doors with a poorly masked dispute regarding:

(a) whether the recognition of the DPR and LPR was lawful; and

(b) whether the special military operation conducted by the Russian Federation was lawful.

123. It is trite that the Court does not *ipso facto* have jurisdiction to adjudicate these matters. In order to create a jurisdictional nexus and allow itself to present its position on these issues, Ukraine attempts to invent an improbable link between its claims and the Convention.

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[162] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 308, ¶48.

[163] *Chagos Marine Protected Area Arbitration (Mauritius v. United Kingdom)*, PCA Case No. 2011-03, Award, 18 March 2015, p. 90, ¶¶220-221.

124. Even the timing of filing of Ukraine's Application is very indicative of this. Ukraine lodged the Application only and immediately after the Russian Federation recognised the DPR and LPR and commenced the special military operation. Even though Ukraine in its Memorial makes references to events and statements dated from 2014 to 2022, it had not sought to institute the relevant proceedings for all these years, and hardly made any statements on the subject-matter of the Genocide Convention throughout this period. Contrastingly, at present Ukraine applies all efforts to accelerate the present proceedings.

125. Unsurprisingly, Ukraine's submissions in the Memorial focus primarily on the "use of force" and "recognition of the DPR and LPR".[164] This is indicative of what issues actually gave rise to the present Case and that are at its core.

126. Ukraine's true objectives in these proceedings are clearly visible throughout the entire text of its Memorial:

> "Two days after Russia commenced its brutal invasion of Ukraine, on 26 February 2022, Ukraine filed its application instituting these proceedings."[165]
>
> "…in recognizing the DPR and LPR as purportedly independent states within Ukraine's sovereign territory, Russia violated Ukraine's territorial integrity…decision by the Russian Federation related to the status of certain areas of the Donetsk and Luhansk regions of Ukraine as a violation of the territorial integrity and sovereignty of Ukraine and inconsistent with the principles of the Charter."[166]
>
> "While the Russian Federation invoked Article 51 of the U.N. Charter to justify its use of force as a measure to prevent and punish genocide, doing so was not just baseless, but legally incoherent. President Putin claimed no basis to act in individual self-defense, but rather referenced Article 51 after stating that '[t]he people's republics of Donbas have asked Russia for help.' Yet Article 51 refers to 'collective self-defence if an armed attack occurs against *a Member of the United Nations*,' which the DPR and LPR indisputably are not."[167]

127. In its Memorial Ukraine refers to several official statements that it finds most relevant to its claim.[168] Unsurprisingly, these statements concern not interpretation or application of

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[164] Memorial, ¶167.

[165] *Ibid.*, ¶9.

[166] *Ibid.*, ¶127.

[167] *Ibid.*, ¶129.

[168] *Ibid.*, fn 65.

the Genocide Convention, but rather issues of recognition of the DPR and LPR and the use of force (sovereignty and territorial integrity):

(a) The official statement of Ukraine's President Vladimir Zelensky on 22 February 2022 emphasises that "Ukraine unequivocally qualifies the recent actions of the Russian Federation as a violation of the sovereignty and territorial integrity…"[169]

(b) The following day, President Zelensky expanded his position in a Joint Statement with Presidents of Lithuania and Poland, where they criticised recognition of the DPR and LPR and confirmed their "strong commitment to the sovereignty, independence, and territorial integrity of Ukraine within its internationally recognized borders, extending to its territorial waters. The Russian Federation's decision to recognise the so-called "LPR" and "DPR" will have no legal implications."[170]

(c) The speech given by Ukraine's Foreign Minister Dmitry Kuleba on 23 February 2022 at the UN General Assembly, centred around legality of recognition of the DPR and LPR:

> "…this is the first time we debate the situation in the new reality created by the illegal recognition of two territories of Ukraine by Russia. And the backdrop of our discussion today is much more dangerous as Russia attacked the very fundamental principles of international peace and security, the pillars of the United Nations and, as I mentioned, the very existence of the Ukrainian state, the founding member of the United Nations.
>
> …
>
> Two days ago, on February 21st, the Russian President recognized "independence" of the temporarily occupied parts of the Donetsk and Luhansk regions of Ukraine and ordered the deployment of the Russian Armed Forces in these areas. This is an affront attack on the United Nations

[169] Ukraine qualifies Russia's latest actions as a violation of the sovereignty and territorial integrity of our state - Volodymyr Zelensky, 22 February 2022, available at: https://www.president.gov.ua/en/news/ukrayina-kvalifikuye-ostanni-diyi-rosiyi-yak-porushennya-suv-73037 (Annex 30).

[170] Joint statement by the President of Ukraine, the President of the Republic of Lithuania, the President of the Republic of Poland on the Russian Federation's decision to recognise the so-called "DPR" and "LPR", 23 February 2022, available at: https://www.president.gov.ua/en/news/spilna-zayava-prezidenta-ukrayini-prezidenta-litovskoyi-resp-73077 (Annex 32).

and core principles of international law, an ultimate blow to years of peace process and Russia's unilateral withdrawal from the Minsk agreements."[171]

128. It is important to note that at no point prior to the institution of the present proceedings did Ukraine's official statements contain references to the Genocide Convention. On the contrary, these statements were focused on the real issue in this Case – which was transparently perceived by Ukraine – and which does not bear any relevance to the Convention:

(a) on 22 February 2022 Ukraine's Ministry of Foreign Affairs stated that

"Ukraine condemns the Russian Federation's decision to recognise the 'independence' of the quasi-entities it had created in the temporarily occupied territories of Ukraine, the so-called 'Luhansk People's Republic' and 'Donetsk People's Republic'. With this action the Russian side has blatantly defied the fundamental norms and principles of international law, the UN Charter, violated the sovereignty and territorial integrity of Ukraine within its internationally recognised borders."[172]

(b) on 24 February 2022, commenting on severing diplomatic relations with the Russian Federation after it had commenced the special military operation, Ukraine's Ministry of Foreign Affairs declared that

"the Russian offensive operation is an attack on the sovereignty and territorial integrity of Ukraine, a gross violation of the UN Charter, and the established norms and principles of international law",[173]

and later called the special military operation "an act of war, an attack on the sovereignty and territorial integrity of Ukraine, a brutal violation of the UN Charter and basic norms and principles of international law."[174]

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[171] Ministry of Foreign Affairs of Ukraine, Statement by H.E. Mr Dmytro Kuleba, Minister of Foreign Affairs of Ukraine, at the UN General Assembly Debate on the Situation in the Temporarily Occupied Territories of Ukraine, 23 February 2022.

[172] Statement of the Ministry of Foreign Affairs of Ukraine on the Russian Federation's decision to recognise the "independence" of the so-called "DPR" and "LPR", 22 February 2022, available at: https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-russian-federations-decision-recognise-independence-so-called-dpr-and-lpr (Annex 29).

[173] Statement by the Ministry of Foreign Affairs of Ukraine Regarding the Severance of Diplomatic Relations with the Russian Federation, 24 February 2022, available at: https://mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-regarding-severance-diplomatic-relations-russian-federation (Annex 33).

[174] Statement of the Ministry of Foreign Affairs of Ukraine on the new wave of aggression of the Russian Federation against Ukraine, 24 February 2022, available at: mfa.gov.ua/en/news/statement-ministry-foreign-affairs-ukraine-new-wave-aggression-russian-federation-against-ukraine (Annex 31).

(c) on 25 February 2022, Ukraine's Ministry of Foreign Affairs issued another statement on the Russian Federation's actions, condemning its use of force:

> "Russia is grossly violating the rules of war and other norms of international law in Ukraine…The Russian Federation must end its armed aggression against Ukraine and begin a dialogue regarding a peaceful settlement."[175]

129. The true nature of this Case reveals itself even through Ukrainian officials' comments on the filing of the Application. On 27 February 2022, Ukraine's Ministry of Foreign Affairs openly stated that its principal goal is to establish that "Russia's aggression against Ukraine…must be stopped."[176]

130. Notably, even in its Memorial Ukraine fails to cite a single source (which is unsurprising, considering that they do not exist) that would prove its assertion that the Russian Federation, purportedly, recognised the DPR and LPR or conducted the special military operation on the legal basis of the Convention. Yet this does not deter Ukraine from urging the Court to declare that these actions were actually in violation of the Convention.

131. On the contrary, the Russian Federation, while strongly objecting to the position of Ukraine as quoted above, has consistently unravelled any attempt to conceal the true nature of this Case. It specifically addressed the core of Ukraine' claims already at the outset of these proceedings in the very first letter to the Court, which stated that:

> "The special military operation conducted by Russia in the territory of Ukraine is based on the United Nations Charter, <u>its Article 51 and customary international law</u>."[177]
>
> and
>
> "The recognition of the Donetsk and Lugansk Peoples' Republics <u>is a sovereign political act of the Russian Federation</u>. It is related to the right of self-determination of peoples under the United Nations Charter and customary international law…"[178] [<u>Emphasis</u> added]

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[175] Statement by the Ministry of Foreign Affairs of Ukraine regarding the Russian Federation's ongoing military aggression against Ukraine, 25 February 2022, available at: https://mfa.gov.ua/en/news/zayava-mzs-ukrayini-shchodo-trivayuchoyi-zbrojnoyi-agresiyi-rf-proti-ukrayini (Annex 34).

[176] Ukraine filed a case against the Russian Federation at the International Court of Justice in Hague, 27 February 2022, available at: https://www.kmu.gov.ua/en/news/mzs-ukrayina-podala-pozov-proti-rosijskoyi-federaciyi-do-mizhnarodnogo-sudu-oon-v-gaazi (Annex 35).

[177] Letter dated 7 March 2022, ¶15.

[178] *Ibid*., ¶17.

132. The DPR and LPR did not request the Russian Federation's assistance on the basis of the Genocide Convention; and the Russian Federation's response was not based on the Convention, either.

133. References to the Convention that could have been made by officials, were not advanced as legal grounds for the special military operation. While considering such views, the Court cannot depart from its own conclusion that it "cannot ascribe legal views to the parties which they have not themselves formulated".[179] Any State has the right to justify its actions according to its own position and not to have any grounds imposed on it by a Party in legal proceedings.

134. The Russian Federation has not presented the Genocide Convention as the legal basis for its actions, and the Court cannot ascribe such a view to the Russian Federation. Thus, after the Russian Federation made its position abundantly clear regarding the legal grounds of its actions, there can be no doubt regarding this issue.

135. In this respect, the Court's position in the *Military and Paramilitary Activities* case is instructive:

> "The Court also notes that these justifications, advanced solely in a political context which it is naturally not for the Court to appraise, were not advanced as legal arguments. The respondent State has always confined itself to the classic argument of self-defence, and has not attempted to introduce a legal argument derived from a supposed rule of 'ideological intervention', which would have been a striking innovation."[180]

136. To summarise Section D, the real issues at heart of Ukraine's claims are

(a) whether the Russian Federation's recognition of the DPR and LPR complies with customary international law, and

(b) whether the Russian Federation's use of force as an act of collective self-defence meets the criteria of Article 51 of the UN Charter.

137. Those issues are manifestly not regulated by the Convention.

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[179] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, I.C.J. Reports 1986, p. 134, ¶266.

[180] *Ibid*.

IV. SECOND PRELIMINARY OBJECTION: THE COURT LACKS JURISDICTION *RATIONE MATERIAE*

138. Chapter III above showed that an alleged dispute between the Russian Federation and Ukraine is either non-existent or does not concern the prevention and punishment of genocide under the Genocide Convention, but the legality of the special military operation and of the recognition of the DPR and LPR, and that Ukraine's invocation of the Convention is nothing but artificial. Should the Court nonetheless consider that a dispute exists between the Parties concerning either interpretation, application, or fulfilment of the Convention (*quod non*), Ukraine's claims must be dismissed because the Court manifestly lacks jurisdiction *ratione materiae* under Article IX of the Convention.

139. The Memorial unequivocally shows that in reality Ukraine does *not* seek a determination by the Court that the Russian Federation has violated its obligations under Articles I and IV of the Convention. Moreover, as will be shown in this Chapter below, the obligations of prevention and punishment of genocide under the Convention hinge upon the perpetration of genocide, or a serious risk thereof. However, Ukraine denies the occurrence of conditions triggering such obligations. Thus, it effectively denies that any obligation to prevent or punish genocide that could have been breached by the Russian Federation or any other State party to the Convention has come into being. As the Russian Federation made it abundantly clear, its actions are based on Article 51 of the UN Charter and customary international law.[181]

140. Rather, what Ukraine asks the Court to establish, under the guise of claims ostensibly related to the Convention, is that the special military operation and the recognition of the DPR and LPR are unlawful under the UN Charter and customary international law, and that the Russian Federation is internationally responsible for those alleged breaches.[182] The Russian Federation has not, however, consented to the Court's jurisdiction to entertain such disputes.

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[181] *See above*, ¶¶44; 46-50.

[182] *See* also Provisional Measures Order, Declaration of Judge Xue, pp. 1-2, ¶¶2-4.

141. In the absence of a basis of jurisdiction, Ukraine misuses Article IX of the Convention as a vehicle to bring its true claims before the Court. To do so, it engages in a peculiar strategy, which consists of:

(a) ***First***, *reading into* Articles I and IV of the Genocide Convention certain *implicit obligations*;

(b) ***Second***, through those implicit obligations, *incorporating into the Convention an indefinite number of rules of international law*, including those relating to the use of force, *jus in bello*, territorial integrity, self-determination and the recognition of States; and

(c) ***Third***, as a result, *expanding the Court's jurisdiction under Article IX* over matters that manifestly fall outside the subject-matter of the Convention.

142. This translates into two arguments found in the Memorial, and on which most of Ukraine's submissions, including its request for reparation, rest:[183]

(a) ***First***, Ukraine argues that Articles I and IV of the Convention contain an implicit obligation to "act within the limits of international law".

(b) ***Second***, Ukraine suggests that the Convention contains an additional implicit obligation not to "misapply", "misuse" or "abuse" the Convention for the purpose of violating other rules of international law.

143. These alleged implicit obligations are not mentioned in the Application, in which Ukraine merely requests the Court to adjudge and declare that the special military operation and the recognition of the DPR and LPR have "no basis on the Genocide Convention".[184] Ukraine has therefore radically switched gears: the question no longer appears to be whether the actions of the Russian Federation may be grounded on the Convention (that is whether the Convention authorises them), but whether those actions violate the treaty. Yet no matter how Ukraine formulates its position, the strategy is clear: it seeks to obtain a finding by the Court that the Russian Federation has violated the UN Charter and several

[183] Memorial, ¶178, submissions (c) and (d); ¶179, submissions (a) to (g).

[184] Application, ¶30.

rules of customary international law under the guise of an alleged violation of Articles I and IV of the Convention.

144. Ventures to circumvent the fundamental principle of consent are not new. In this Case, Ukraine's attempt to do so can be easily dismissed by reading the plain text of the Convention, properly interpreting it and applying the Court's well-established jurisprudence, which Ukraine cavalierly ignores. **Section A** explains the inconsistencies in Ukraine's artificial reliance on Articles I and IV of the Convention. **Section B** recalls the test that must be applied to determine the scope of the Court's jurisdiction *ratione materiae* under the compromissory clause of a treaty. **Section C** then addresses the Court's jurisprudence concerning the scope of its jurisdiction under Article IX of the Convention. **Section D** shows that, contrary to Ukraine's suggestion, the Convention does not impose on States an obligation to "act within the limits of international law" incorporating an indefinite number of other rules of international law into the Convention and enormously expanding the Court's jurisdiction *ratione materiae* under Article IX. Finally, **Section E** demonstrates that, similarly, the Court's jurisdiction cannot be unduly broadened to cover issues not regulated by the Convention through an alleged implicit obligation not to "misapply", "misuse" or "abuse" the Convention.

A. INCONSISTENCIES IN UKRAINE'S ARTIFICIAL RELIANCE ON ARTICLES I AND IV OF THE CONVENTION

145. In its Memorial, Ukraine essentially presents three claims. Ukraine requests the Court, first, to make a general declaration 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".[185] The second and third claims, the ones actually directed against the Russian Federation, request the Court to adjudge and declare that, through the special military operation and the recognition of the DPR and LPR, the Russian Federation "violates Articles I and IV of the Genocide Convention".[186] As will be explained in Sections D and E below, what Ukraine is in fact asking the Court to do is to determine the international responsibility of the Russian Federation for alleged violations of the UN Charter and several rules of customary international law, and not of

[185] Memorial, ¶178, submission (b).

[186] *Ibid*., submissions (c) and (d).

the Convention itself. However, before addressing Ukraine's real claims, and the Court's lack of jurisdiction *ratione materiae* to entertain them, some preliminary observations regarding Ukraine's artificial reliance on Articles I and IV of the Convention are in place.

146. ***First***, the Memorial makes it crystal clear that Ukraine is not concerned by an alleged violation of the obligation to prevent and punish genocide under Articles I and IV of the Convention. 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."

147. Article IV, for its part, provides that:

> "Persons 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."

148. In the *Bosnia Genocide* case the Court clarified that the obligation to prevent genocide (and accordingly the obligation to punish genocide) only arises in two scenarios: (*i*) if genocide has been committed; or (*ii*) if there is a serious risk that genocide may be committed. As the Court stated:

> "…a State can be held responsible for breaching the obligation to prevent genocide only if genocide was actually committed. It is at the time when commission of the prohibited act (genocide or any of the other acts listed in Article III of the Convention) begins that the breach of an obligation of prevention occurs…
>
> This obviously does not mean that the obligation to prevent genocide only comes into being when perpetration of genocide commences; that would be absurd, since the whole point of the obligation is to prevent, or attempt to prevent, the occurrence of the act. In fact, a State's obligation to prevent, and the corresponding duty to act, arise at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed. From that moment onwards, if the State has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent *(dolus specialis)*, it is under a duty to make such use of these means as the circumstances permit. However, if neither genocide nor any of the other acts listed in Article III of the Convention are ultimately carried out, then a State that omitted to act when it could have done so cannot be held responsible *a posteriori*, since the event did not happen which, under the rule set out above,

must occur for there to be a violation of the obligation to prevent".[187] [Emphasis added]

149. Ukraine's case is based on two propositions that manifestly contradict each other. It maintains, on the one hand, that no genocide within the meaning of Articles II and III of the Convention has occurred on its territory, and that no serious risk of it being committed exists.[188] Ukraine then recognises that "[w]hen there is no reasonable basis to conclude that a genocide or serious risk of genocide is occurring, there is neither an obligation to take action to prevent and punish such an alleged genocide."[189] Thus, according to Ukraine, the obligations to prevent and punish genocide under Articles I and IV of the Convention have not "come into being" for the Russian Federation. Therefore, following the Court's jurisprudence, the Russian Federation could not be found responsible for breaching them.[190]

150. On the other hand, Ukraine asserts that the Convention, and in particular Articles I and IV, contain an implicit obligation "to act within the limits of international law" when preventing and punishing genocide or that Russia has somehow "misinterpreted the right it possesses under Article I of the Genocide Convention, and misapplied it to the detriment of Ukraine".[191] Thus, Ukraine effectively argues that the alleged implicit obligations or an alleged "misinterpreted right" apply regardless of – and independently

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[187] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, ¶431.

[188] *See*, for example, Application, ¶¶2-3, 9, 21, 24, 30(a); Memorial, ¶¶15, 18, 47-51, 93, 178(b). *See* also *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Verbatim Record of Oral Proceedings Held on 7 March 2022, CR 2022/5 (corrected), p. 39, ¶8 (Cheek).

[189] Memorial, ¶88.

[190] Ukraine itself admits this when it says that "[w]hen there is no reasonable basis to conclude that genocide or serious risk of genocide is occurring, there is neither an obligation to take action to prevent and punish such an alleged genocide, nor a right to take action to bring to an end another State's non-existent violation of Article I" (Memorial, ¶79; *see* also ¶81). During the hearings on provisional measures, counsel for Ukraine in fact conceded that the Russian Federation has not acted under any provision of the Genocide Convention: "The text of Article I of the Genocide Convention speaks of the duty to protect and punish. Other provisions of the Genocide Convention give further content to the scope of that duty. Article IV, as previously mentioned, focuses on the punishment of those who commit genocide. Article V points to legislation to provide effective penalties for those found guilty of genocide. Article VI speaks to the prosecution of those accused of committing genocide, and Article VII speaks of extradition. Article VIII states that a Contracting Party "may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations . . . for the prevention and suppression of acts of genocide", But Russia is not focused on any of these things." (*Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation*), Verbatim Record of Oral Proceedings Held on 7 March 2022, CR 2022/5 (corrected), p. 47, ¶33 (Cheek).

[191] Memorial, ¶¶73, 75, 79, 158.

from – whether the obligations under Articles I and IV of the Convention have been triggered as per the *Bosnia Genocide* case. This approach is unsustainable, as will be shown in detail in Sections D and E below.

151. It is therefore clear that Ukraine has no interest in determining whether the Russian Federation has violated its obligations to prevent and punish genocide under Articles I and IV of the Convention. Ukraine often refers to the "high purposes" of the Convention; "a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention",[192] and to its object and purpose, which, according to Ukraine, "as reflected in its Preamble, is to foster "international co-operation" in order to "liberate mankind" from the "odious scourge" of genocide that has "inflicted great losses on humanity". However, since Ukraine does not allege occurrence of genocide, but, on the contrary, denies it, and instead argues that no obligation to prevent and punish genocide – which is at the heart of the Convention – has arisen, it is difficult to see how the Preamble may be relevant to Ukraine's claims at all.

152. ***Second***, as noted above, Ukraine also sought in its Memorial a declaration by the Court 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."[193] The precise legal basis for this request is unclear. What Ukraine seemingly suggests is that States have an obligation to produce or disclose, in an unspecified manner, evidence showing that genocide has been or may be committed before taking measures for its prevention or punishment.[194] Not doing so, Ukraine alleges, would "contravene…the limits of Articles I and IV".[195] In its request for provisional measures, Ukraine further argued that it has a "right not to be subject to a false claim of genocide".[196] At the same time, Ukraine appears to argue that when a State does produce such evidence of genocide, it may act to the detriment of another State, for instance, by using force:

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[192] *Ibid.*, ¶92.

[193] *Ibid.*, ¶178(b).

[194] *Ibid.*, ¶¶102, 108.

[195] *Ibid.*, ¶119.

[196] Request for indication of provisional measures, ¶12.

> "Articles I and IV at a minimum require a State to conduct proper diligence …before a State takes action to the detriment of another State for the purported purpose of preventing and punishing genocide."[197]

153. That the notion of due diligence has been applied by the Court in assessing whether a State has discharged its obligation to prevent genocide is beyond question.[198] However, Ukraine's suggestion that every reference to genocide made at a political level triggers a breach of Articles I and IV of the Convention and engages international responsibility of the State concerned, unless the latter produces or discloses evidence in support of that allegation, is widely off the mark. Nothing in the text or *travaux* of Articles I or IV indicates that such self-standing obligation to produce evidence exists under the Convention. Ukraine's position is based on a confusion between evidentiary matters in the Court's proceedings and the actual obligations enshrined in the Convention.

154. Yet Ukraine's most outstanding proposition in this regard is that, if a State has produced sufficient evidence to show that genocide has occurred or may occur, that State may "take action to the detriment of another State" for the purpose of preventing or punishing genocide. The inconsistency in Ukraine's position on this matter can be summarised as follows: (*i*) the Convention cannot provide a basis for the use of force against a State; (*ii*) *but* a State may resort to the use of force if it possesses sufficient evidence of genocide. This argument, which essentially amounts to saying that a right of humanitarian intervention exists under the Convention (something that Ukraine shies away from openly stating, but also never clearly denies), is closely related to Ukraine's claim that the Russian Federation has "abused" the Convention, and will be further addressed in Section E below. At this stage, the Russian Federation simply restates that the use of force is regulated by the UN Charter and customary international law, and not by the Convention.

155. In short, even on a surface level, Ukraine's reliance on Articles I and IV of the Convention in the present case is replete with unsubstantiated and contradictory assertions. It could not be otherwise because, as already explained, Ukraine's invocation of the Convention and its Article IX is completely artificial, and Ukraine is evidently at pains to make its

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[197] Memorial, ¶102.

[198] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, ¶430.

real claims fit under the operative provisions of the Convention. The Court, however, lacks jurisdiction *ratione materiae* to entertain those claims.

B. THE COURT'S WELL-ESTABLISHED JURISPRUDENCE ON THE LIMITS OF ITS JURISDICTION *RATIONE MATERIAE*

156. Article IX of the Genocide Convention provides that:

> "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 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."

157. For the Court to have jurisdiction *ratione materiae* under Article IX, Ukraine must demonstrate that its claims fall within the provisions of the Convention that it invokes, namely Articles I and IV. As the Court noted in *Legality of Use of Force* (*Yugoslavia v. Belgium*):

> "…in order to determine, even *prima facie*, whether a dispute within the meaning of Article IX of the Genocide Convention exists, the Court cannot limit itself to noting that one of the Parties maintains that the Convention applies, while the other denies it; … in the present case the Court must ascertain whether the breaches of the Convention alleged by Yugoslavia are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX."[199] [Emphasis added]

158. More recently, in *Certain Iranian Assets*, the Court indicated that:

> "…applications that are submitted to it often present a particular dispute that arises in the context of a broader disagreement between parties… In this case, the Court must ascertain whether the acts of which Iran complains fall within the provisions of the Treaty of Amity and whether, as a consequence, the dispute is one which the Court has jurisdiction ratione materiae to entertain, pursuant to Article XXI, paragraph 2, thereof."[200] [Emphasis added]

159. This basic rule was later reaffirmed in the *1955 Treaty of Amity* case, where the Court recalled its "well-established jurisprudence" concerning the limits of its jurisdiction *ratione materiae* under compromissory clauses, noting that this "may require the

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[199] *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 137, ¶38.

[200] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 23, ¶36.

interpretation of the provisions that define the scope of the treaty".[201] In the *Application of the ICSFT and CERD* case, the Court emphasised in a similar context that "its jurisdiction is based on the consent of the parties and is confined to the extent accepted by them."[202]

160. To determine whether Ukraine's claims in the present case fall within the provisions of the Convention, the Court also has to define their precise object. As the Court indicated in the *Nuclear Tests* cases:

> "[I]t is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions."[203]

161. Following this approach, the Court has consistently maintained that it falls upon it to determine "the subject-matter of the dispute of which it is seised".[204]

162. Ukraine is well aware of this *jurisprudence constante* and the criteria that must be applied to determine the jurisdiction *ratione materiae* of the Court in cases brought under the compromissory clause of a treaty, yet the Memorial does not mention it at all. Indeed,

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[201] *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, ¶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, p. 584, ¶57.

[202] *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, p. 577, ¶33, and p. 584, ¶57. *See* also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia*), Preliminary Objections, I.C.J. Reports 1996, p. 615, ¶30; *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 307, ¶¶42, 46-47.

[203] *Nuclear Tests (Australia v. France),* Judgment, I.C.J. Reports 1974, p. 262, ¶29; *Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974*, p. 466, ¶30. *See* also *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, ¶52.

[204] *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, ¶52. *See* also *Fisheries Jurisdiction (Spain v. Canada),* Jurisdiction of the Court, Judgment, I.C.J. Reports 1998, pp. 447-449, ¶¶29-32; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile),* Preliminary Objection, Judgment, I.C.J. Reports 2015, p. 602, ¶26; *Immunities and Criminal Proceedings (Equatorial Guinea v. France),* Preliminary Objections, Judgment, I.C.J. Reports 2018, pp. 308-309, ¶48; *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, p. 575, ¶24.

Chapter 5 of the Memorial is limited to quoting (*i*) Article IX and referring to the Court's "important role under the Genocide Convention"; (*ii*) the view of one author that Article IX is aimed at granting the Court "jurisdiction as wide as possible in the life of the Convention"; (*iii*) the Provisional Measures Order; and (*iv*) the formal requirements for the determination of the existence of a dispute.[205] This is clearly insufficient to demonstrate that the Court has jurisdiction to entertain Ukraine's exorbitant claims. At the same time, Ukraine's omissions do not come as a surprise given the fact that those claims are quite simply incapable of passing the test that the Court has consistently applied.

163. It is important to highlight the need to carry out, at this stage, a proper interpretation of the provisions invoked by Ukraine (Articles I and IV of the Convention) to determine the obligations contained therein and the scope of the Court's jurisdiction *ratione materiae*. It is evident that, if one follows Ukraine's position, Article IX of the Convention could then be used to resolve the case on the basis of the interpretation and application of any rules of international law *other* than the Convention, including Articles 2(4) and 51 of the UN Charter and several rules of customary international law relating to the use of force, *jus in bello*, territorial integrity, the right of peoples to self-determination and the recognition of States. The Russian Federation strongly opposes this unacceptable distortion of Article IX of the Convention, which in its view would lead to an excess of jurisdiction.

C. THE COURT HAS ALREADY DETERMINED IN EARLIER CASES THE LIMITS OF ITS JURISDICTION UNDER ARTICLE IX OF THE GENOCIDE CONVENTION

164. While Ukraine seeks to rely on the Court's case law in support of its position, it does so in an extremely selective manner. When read as a whole and in context, however, it is clear that the Court's jurisprudence relating to the Genocide Convention has already carefully delineated the scope of Article IX of Convention and the extent of the Court's jurisdiction *ratione materiae* under this provision.

[205] Memorial, ¶¶147-160.

165. In the *Bosnia Genocide* case, the Court established that:

> "The jurisdiction of the Court in this case is based solely on Article IX of the Convention. All the other grounds of jurisdiction invoked by the Applicant were rejected in the 1996 Judgment on jurisdiction … It follows that the Court may rule only on the disputes between the Parties to which that provision refers … It has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes.*
>
> As it has in other cases, the Court recalls the fundamental distinction between the existence and binding force of obligations arising under international law and the existence of a court or tribunal with jurisdiction to resolve disputes about compliance with those obligations. The fact that there is not such a court or tribunal does not mean that the obligations do not exist. They retain their validity and legal force. States are required to fulfil their obligations under international law, including international humanitarian law, and they remain responsible for acts contrary to international law which are attributable to them …"[206] [Emphasis added]

166. The Court's finding that it "has no power to rule on alleged breaches of other obligations under international law" was uncontroversial, as it drew no opposition from the individual judges in their (numerous) opinions attached to the judgment. The uniform standing was duly noted in legal doctrine, and in particular by Judge Greenwood, as commentator, who specifically observed that:

> "…if jurisdiction can be based only upon a [compromissory] clause of this kind, the consequence may be that the Court has jurisdiction only in respect of one aspect of what may be a far broader dispute between the states concerned. For example, in its 2007 judgment in the case brought by Bosnia and Herzegovina against Serbia and Montenegro…, the Court was able to rule only on the issues relating to the Genocide Convention (Article IX of which provided the sole basis of jurisdiction), and could not consider other aspects of the broader dispute between the two countries such as the application of the international law on the use of force or of the Geneva Conventions on international humanitarian law."[207] [Emphasis added]

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[206] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, I.C.J. Reports 2007, p. 104, ¶¶147-148.

[207] C. Greenwood, Some Challenges of International Litigation, in *Cambridge Journal of International and Comparative Law*, Vol. 1(1) (2012), p. 16. *See* also R. Kolb, *The Scope* Ratione Materiae *of the Compulsory Jurisdiction of the Court*, in P. Gaeta (ed.), THE UN GENOCIDE CONVENTION: A COMMENTARY (OUP, 2009), p. 464, noting that the 2007 Judgment is "a reminder that Article IX of the Genocide Convention refers in the first place to the contents of that Convention, and that any other source of international law must be brought within its four corners by way of a meticulous analysis. The Court consequently only stressed the intrinsically limited jurisdiction under the compromissory clause, unless enlarged by forum prorogatum or by the complement of optional clauses."

167. In similar but more general terms, Kolb noted that:

> "There is the duty of the Court not to overstep the jurisdiction granted to it by the jurisdictional title, limited here to a particular treaty. Otherwise, it would commit an *excès de pouvoir*. The Court also has to take into account the fact that its jurisdiction is not mandatory but consensual, and that therefore its activity depends on the goodwill of its 'clients'. In this context, the Court must take studious account of the limitation of jurisdiction under Article 36(1) of the ICJ Statute and of the principle prohibiting *ultra vires* action. It might be laudable to settle a dispute rationally and completely, but the Court is not free to force upon the parties such a solution if they did not give an assent to it."[208]

168. Consistent with this approach, the Court later found in the *Croatia Genocide* case that:

> "The fact that the jurisdiction of the Court in the present proceedings can be founded only upon Article IX has important implications for the scope of that jurisdiction. That Article provides for jurisdiction only with regard to disputes relating to the interpretation, application or fulfilment of the Genocide Convention, including disputes relating to the responsibility of a State for genocide or for any of the other acts enumerated in Article III of the Convention…
>
> In the present case, any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself…"[209]

169. The Court's jurisprudence thus leaves no room for doubt: under Article IX, the Court *only* has jurisdiction to rule on violations of obligations "arising under the Convention itself". It does not have the power to rule on alleged violations of obligations under international law falling outside the scope of the Convention, and *a fortiori* to determine that a State has incurred international responsibility for breaching those other obligations, or to order the State concerned to make reparation. The Court's rulings in these cases flatly contradict Ukraine's entire position. Indeed, what Ukraine requests in its Memorial, as will be shown in Sections D and E below, is for the Court to exercise an immense power that the Court itself has already determined it does not possess under Article IX of the Convention.

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[208] R. Kolb, *The Scope* Ratione Materiae *of the Compulsory Jurisdiction of the Court*, in P. Gaeta (ed.), THE UN GENOCIDE CONVENTION: A COMMENTARY (OUP, 2009), p. 455.

[209] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment, I.C.J. Reports 2015, pp. 45, 47, ¶¶85, 88. *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, p. 32, ¶65.

D. THE CONVENTION DOES NOT INCORPORATE OTHER RULES OF INTERNATIONAL LAW THROUGH AN "IMPLICIT OBLIGATION" TO "ACT WITHIN THE LIMITS OF INTERNATIONAL LAW"

170. In its Memorial, Ukraine in essence advances that the Genocide Convention, and in particular Articles I and IV, contain an implicit obligation "to act within the limits of international law" when preventing and punishing genocide. In so doing, Ukraine essentially argues that Articles I and IV incorporate into the Convention an indefinite number of rules of international law that fall outside its scope of application with the objective of unduly expanding the Court's jurisdiction *ratione materiae* under Article IX. This proposition has no basis in international law and is manifestly contrary to the Court's entire jurisprudence on the matter. As noted in Section C above, the Court has already determined that it does not have the "power to rule on alleged breaches of other obligations under international law".[210]

171. The purported implicit obligation relied upon by Ukraine is formulated in a convoluted manner, using varying terminology:

> "A Contracting Party may not unilaterally act to…prevent and punish genocide in a manner that exceeds the limits of international law";[211]
>
> "[A] State seeking to invoke the international responsibility of [another] State may only act within the limits of international law";[212]
>
> "…action under Articles I and IV of the Genocide Convention must be consistent with the limits of international law and, in particular, the fundamental norms reflected in the object and purpose of the Convention";[213]
>
> "Articles I and IV of the Convention impose on Russia a duty…not to exceed the limits of international law in any measures it takes to prevent and punish genocide or to invoke the responsibility of another Contracting Party for genocide."[214]

172. Such an obligation is nowhere to be found in the text of the Convention[215] but Ukraine's objective is clear: by advancing that States have to "act within the limits of international

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[210] *See above*, Chapter IV, Section C.

[211] Memorial, ¶78.

[212] *Ibid*., ¶94.

[213] *Ibid*., ¶96.

[214] *Ibid*., ¶158.

[215] *See* also Provisional Measures Order, Declaration of Judge Bennouna, ¶5.

law" when applying the Convention, it purports to expand the subject-matter of the latter by incorporating into its scope of application an unlimited number of international obligations arising under the UN Charter and customary international law. In fact, Ukraine's argument is formulated in such a way that the Court would have jurisdiction to determine the violation of *any* rule of international law simply because an applicant alleges that it was breached by a State in the course of what is seen by the applicant as a fulfilment or execution of an obligation under the Convention, be it under Articles I, IV, V, VI or VII. It is easy to see that such an approach may lead to an exponential increase in claims under any treaty with a compromissory clause in force between parties who have a dispute under other rules of international law, unrelated to the treaty in any way except by a purported general obligation to "act within the limits of international law" that Ukraine suggests reading into the treaty.

173. The violations of Articles I and IV of the Genocide Convention alleged by Ukraine are, in short, grounded on a purported violation by the Russian Federation of other rules of international law, and in particular the UN Charter and rules of customary international law relating to the use of force, *jus in bello*, territorial integrity, self-determination and the recognition of States.[216] As explained above, Ukraine does not even seek a finding by the Court that the Russian Federation has breached its obligations to prevent and punish genocide under those provisions – it claims that these obligations did not even come into being in the first place.[217] Thus, the implicit obligation conjured up by Ukraine is independent from the obligations that actually exist under the Convention and whether a violation thereof has been committed.

174. This extraordinary proposition is supported by thin reasoning and no practice. Ukraine erroneously attempts to rely on the Court's *dictum* in the *Bosnia Genocide* case, where it

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[216] The present case differs in this respect from the *Application of the ICSFT and CERD* case, where the Court noted that: "Ukraine is not requesting that it rule on issues concerning the Russian Federation's purported 'aggression' or its alleged 'unlawful occupation' of Ukrainian territory. Nor is the Applicant seeking a pronouncement from the Court on the status of Crimea or on any violations of rules of international law other than those contained in the ICSFT and CERD. These matters therefore do not constitute the subject-matter of the dispute before the Court." (*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, p. 577, ¶29). In the present proceedings, Ukraine is specifically requesting the Court to rule on the legality of the special military operation and of the recognition of the DPR and LPR.

[217] *See above*, ¶149.

clarified the nature of the obligation to prevent and punish genocide under Article I of the Convention. The Court noted, in particular, that this obligation is "one of conduct and not one of result", and that a State does not "incur responsibility simply because the desired result is not achieved".[218] The Court then indicated that "[v]arious parameters operate when assessing whether a State has duly discharged the obligation concerned", one of which is:

> "…the capacity to influence effectively the action of persons likely to commit, or already committing, genocide. This capacity itself depends, among other things, on the geographical distance of the State concerned from the scene of the events, and on the strength of the political links, as well as links of all other kinds, between the authorities of that State and the main actors in the events. The State's capacity to influence must also be assessed by legal criteria, since it is clear that every State may only act within the limits permitted by international law; seen thus, a State's capacity to influence may vary depending on its particular legal position vis-à-vis the situations and persons facing the danger, or the reality, of genocide."[219]

175. The Court's statement that when States discharge their obligations under Article I (and any other provision) of the Convention they "may only act within the limits permitted by international law", which Ukraine quotes out of context, was used by the Court to explain that States may not be found responsible for not preventing genocide by means that exceed the limits of international law and therefore have different capacities for fulfilment of their obligations under Article I of the Convention. This is actually the opposite of what Ukraine tries to prove: whereas the Court sought to avoid an interpretation of the Convention that would put it at odds with other rules of international law (*i.e.* requiring of States something that is prohibited by these other rules), Ukraine's suggested interpretation would mean that acting under other rules of international law triggers responsibility under the Convention (*i.e.*, that "exceeding the limits of international law" would be a violation of the Convention).

176. In any event, the Court's general statement that all States must act within the limits of international law is applicable to all State conduct, and was clearly hortatory in nature. This follows from the language of the Court, which used the introductory words "it is clear", not "as provided for by article I of the Convention". The Court did not thereby

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[218] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 221, ¶430.

[219] *Ibid*.

intend to create a confusion between obligations arising under the Convention and obligations arising under other rules of international law, nor to expand its jurisdiction under Article IX beyond what the Contracting Parties have consented to.[220]

177. Most importantly, as noted in Section C above, the Court plainly stated in its 2007 Judgment that it does not have jurisdiction under Article IX of the Convention to rule on alleged violations of international law other than the Convention itself:

> "[The Court] has no power to rule on alleged breaches of other obligations under international law, not amounting to genocide, particularly those protecting human rights in armed conflict. That is so even if the alleged breaches are of obligations under peremptory norms, or of obligations which protect essential humanitarian values, and which may be owed *erga omnes*."[221] [Emphasis added]

178. If the Court had considered that an alleged implicit obligation to "act within the limits of international law" incorporating other rules of international law as described by Ukraine existed under the Convention and fell under Article IX, the Court would have come to a different conclusion. It did not, and there is no reason for the Court to depart from its jurisprudence.

179. Nevertheless, despite the Court's clear position undermining its entire narrative, Ukraine makes a quantum leap from the 2007 Judgment and attempts to transform a States' obligations under international law, which derive from the specific rules where they are contained, into *positive obligations arising under the Convention*. Ukraine founds this sweeping incorporation into the Convention of virtually all rules of international law on: (*i*) the Provisional Measures Order; and (*ii*) a collection of its own obscure and vague references to the Convention.

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[220] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia),* Judgment, I.C.J. Reports 2015, p. 153, ¶523 ("The Court recalls, furthermore, that its jurisdiction in this case is based on Article IX of the Genocide Convention, and that it can therefore only rule within the limits imposed by that instrument. Its findings are therefore without prejudice to any question regarding the Parties' possible responsibility in respect of any violation of international obligations other than those arising under the Convention itself. In so far as such violations may have taken place, the Parties remain liable for their consequences. The Court encourages the Parties to continue their co-operation with a view to offering appropriate reparation to the victims of such violations, thus consolidating peace and stability in the region.").

[221] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro),* Judgment, I.C.J. Reports 2007, p. 104, ¶147.

180. As regards the Provisional Measures Order, which "in no way prejudges the question of the jurisdiction of the Court",[222] Ukraine relies on the statement at paragraph 58 that "[t]he acts undertaken by the Contracting Parties 'to prevent and punish' genocide must be in conformity with the spirit and aims of the United Nations, as set out in Article 1 of the United Nations Charter."[223] Ukraine further refers to the Court's observation that "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide."[224]

181. The fact that a State should respect its obligations under international law when giving effect to a treaty is an obvious proposition. But those obligations arise under their relevant sources (treaties, customary international law or general principles of law); not under the treaty being executed. Furthermore, the Russian Federation does not find it doubtful whether the Convention provides legal basis for a unilateral use of force for the purpose of preventing and punishing genocide – as noted above, its position is that the Convention does not provide such legal basis.

182. A State may resort to the use of force under international law in accordance with the UN Charter, *i.e.* with authorisation from the UN Security Council and cases of individual or collective self-defence. Interestingly, as noted above, Ukraine shies away from openly stating this basic rule in its Memorial – evidently because its entire case rests on the false belief that the Russian Federation acted on the legal basis of the Convention.[225] But this is not the case. As explained in Chapters II and III, the Russian Federation carried out the special military operation on the basis of Article 51 of the UN Charter, and recognised the DPR and LPR on the basis of the relevant rules of customary international law. The Russian Federation made it clear, *inter alia*, before this Court in the Letter dated 7 March 2022.[226]

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[222] Provisional Measures Order, ¶85.

[223] *Ibid.*, ¶58; Memorial, ¶95.

[224] Provisional Measures Order, ¶59; Memorial, ¶100.

[225] *See* also Section E below.

[226] Letter dated 7 March 2022, ¶15.

183. In this regard, it must be noted that the fact that a treaty does not *authorise* certain conduct cannot be understood as meaning that the treaty *prohibits* that conduct. Treaties have a limited subject-matter and scope of application – they are not aimed at regulating the relations between States generally. If something is not *authorised* by a treaty, this simply means that the conduct in question may or may not be prohibited by other rules of international law, and that the treaty does not create an exception to those rules unless expressly stipulated. It is important, for purposes of evaluating the Court's jurisdiction under the Convention, to bear in mind that conduct not authorised under the Convention may be regulated by other bodies of law, such as the law on self-defence, which lies beyond the scope of the Convention, and that such conduct is thus outside the Court's jurisdiction under Article IX of the Convention.

184. Ukraine seeks to further justify the incorporation of other rules of international law into the Convention by referring to the preamble of the Convention and the preamble and Article 1 of the UN Charter,[227] as well as Articles VIII and IX of the Convention.[228]

185. The preamble of the Genocide Convention reads:

> "The Contracting Parties,
>
> Having considered the declaration made by the General Assembly of the United Nations in its resolution 96 (I) dated 11 December 1946 that genocide is a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilized world,
>
> Recognizing that at all periods of history genocide has inflicted great losses on humanity, and
>
> Being convinced that, in order to liberate mankind from such an odious scourge, international co-operation is required,
>
> Hereby agree as hereinafter provided…"

186. As the Court further noted in 1951:

> "The objects of such a convention must also be considered. The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the

[227] Memorial, ¶95.

[228] *Ibid*., ¶97. Ukraine's interpretation seems to heavily rely on one separate opinion to the Provisional Measures Order. *See* Provisional Measures Order, Separate Opinion of Judge Robinson, ¶¶27-28.

> contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide, by virtue of the common will of the parties, the foundation and measure of all its provisions."[229]

187. The Russian Federation fully supports the aims and purposes of the Convention, but a superficial reference to them does not suffice for Ukraine to establish the existence of an implicit positive obligation to "act within the limits of international law" attracting all rules of international into the scope of application of the Convention and almost infinitely broadening the Court's jurisdiction *ratione materiae*. It is clear from this preamble that the object and purpose of the Convention is limited to criminalising genocide under international law and liberating mankind from this crime, which is undoubtedly contrary to the spirit and aims of the UN Charter, through international cooperation.

188. The rules agreed upon by States to give effect to this object and purpose are reflected in other provisions of the Convention, which include the obligation to prevent and punish genocide (Article I), to punish genocide (Article IV), to enact legislation to give effect to the Convention (Article V), to try persons charged with genocide (Article VI), and to cooperate through extradition (Article VII).[230] Not a single word in the operative part or in the preamble of the Convention suggests that the Contracting Parties intended to regulate issues relating to the use of force, territorial integrity, self-determination or the recognition of States, and to grant the Court jurisdiction over such matters.

189. Ukraine's reliance on the "spirit and aims of the United Nations", which are briefly referred to in the preamble of the Genocide Convention, does not lead to any different result. Virtually all treaties concluded within the UN contain similar references to the UN Charter and the principles enshrined therein,[231] and it would be unreasonable to

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[229] *Reservations to the Convention on Genocide*, Advisory Opinion: I.C.J. Reports 1951, p. 23.

[230] *See* also R. Gardiner, TREATY INTERPRETATION, 2nd ed. (OUP, 2015), p. 206 ("The recitals in the preamble are not the appropriate place for stating obligations, which are usually in operative articles of the treaty…").

[231] *See*, for example, the preambles of the 1951 Convention relating to the Status of Refugees; 1961 Vienna Convention on Diplomatic Relations; 1963 Vienna Convention on Consular Relations; 1965 Convention on the

maintain that, simply by virtue of such broad references, States have consented to the Court's jurisdiction to entertain disputes relating to the interpretation and application of the UN Charter that go beyond the subject-matter of those treaties.[232]

190. Articles VIII and IX of the Convention are equally of no assistance to Ukraine. Article VIII stipulates that "[a]ny Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide." This provision does not impose a specific obligation upon States – it is limited to pointing out some of the ways in which a State may seek to carry out the obligation to prevent and punish and Articles I and IV. As the Court has noted, "Article VIII…may be seen as completing the system by supporting both prevention and suppression, in this case at the political level rather than as a matter of legal responsibility",[233] and it does not "confer on [the Court] any functions or competence additional to those provided for in its Statute".[234] More recently, in *The Gambia v. Myanmar*, the Court recalled this position, adding that:

> "…the ordinary meaning of the expression 'competent organs of the United Nations', viewed in isolation, could appear to encompass the Court, the principal judicial organ of the United Nations. However, reading Article VIII as a whole leads to a different interpretation. In particular, Article VIII provides that the competent organs of the United Nations may 'take such

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Elimination of All Forms of Racial Discrimination; 1966 International Covenant on Civil and Political Rights; 1966 International Covenant on Economic, Social and Cultural Rights; 1973 Convention on the Suppression and Punishment of the Crime of Apartheid; 1979 Convention on the Elimination of All Forms of Discrimination against Women; 1984 Convention against Torture; 1989 Convention on the Rights of the Child; 1982 UN Convention on the Law of the Sea; 1992 UN Framework Convention on Climate Change; 1997 Chemical Weapons Convention; 2006 Convention on the Rights of Peoples with Disabilities.

[232] As Wolfrum also noted, the preamble of the UN Charter "does not set forth any basic obligations of the member States. It is rather the function of the Preamble, by highlighting some of the motives of the founders of the Organization, to serve as an interpretative guideline for the provisions of the Charter. In practice, the impact of the Preamble upon decisions of United Nations organs has been quite minimal." *See* R. Wolfrum, *Preamble*, in B. Simma *et al.* (eds.), THE CHARTER OF THE UNITED NATIONS: A COMMENTARY, Vol. I, (3rd ed., OUP, 2012), p. 105. *See* also *South West Africa, Second Phase*, Judgment, I.C.J. Reports 1966, p. 34, ¶50 ("Humanitarian considerations may constitute the inspirational basis for rules of law, just as, for instance, the preambular parts of the United Nations Charter constitute the moral and political basis for the specific legal provisions thereafter set out. Such considerations do not, however, in themselves amount to rules of law. All States are interested – have an interest – in such matters. But the existence of an 'interest' does not of itself entail that this interest is specifically juridical in character.").

[233] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, I.C.J. Reports 2007, p. 109, ¶159.

[234] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993, p. 23, ¶47.

> action … as they consider appropriate', which suggests that these organs exercise discretion in determining the action that should be taken with a view to 'the prevention and suppression of acts of genocide or any of the other acts enumerated in article III'. The function of the competent organs envisaged in this provision is thus different from that of the Court, 'whose function is to decide in accordance with international law such disputes as are submitted to it' pursuant to Article 38, paragraph 1, of its Statute and to give advisory opinions on any legal question pursuant to Article 65, paragraph 1, of its Statute. In this sense, Article VIII may be seen as addressing the prevention and suppression of genocide 'at the political level rather than as a matter of legal responsibility' …
>
> It thus follows from the ordinary meaning of the terms of Article VIII considered in their context that that provision does not govern the seisin of the Court …".[235]

191. Following the Court's judgment, it is clear that Article VIII cannot be used to read into Articles I and IV of the Convention an implicit obligation to "act within the limits of international law" as described by Ukraine. Indeed, since Article VIII of the Convention does not govern the seisin of the Court and is merely indicative of political action that may or may not be taken by States and UN organs in cases of genocide, it follows, *a fortiori*, that this provision can have no bearing on the determination of the Court's jurisdiction *ratione materiae* under Article IX.[236] The provision can certainly not be interpreted as sufficient evidence of States' consent to the Court's jurisdiction over any violation of international law beyond the Convention.

192. Article IX, for its part, is a dispute settlement clause that allows seisin the Court for disputes concerning the interpretation, application, and fulfilment of the Convention. As the Court has previously indicated, compromissory clauses are "adjectival not substantive

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[235] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, 22 July 2022, ¶¶88-90.

[236] As noted by a former judge of the Court, "[g]iven the fact that Article VIII of the Genocide Convention does not add to the powers of UN organs nor affects their exercise, the provision retains only an expository character." *See* G. Gaja, *The Role of the United Nations in Preventing and Supressing Genocide* in P. Gaeta (ed.), THE UN GENOCIDE CONVENTION: A COMMENTARY (OUP, 2009), p. 400. Indeed, when the Convention was negotiated, the Sixth Committee had decided to delete Article VII because it was considered superfluous. The final retention of the provision was explained by the British representative (Fitzmaurice) as follows: "…although his delegation considered it unnecessary to include in the convention provisions conferring on the organs of the United Nations powers which they already possessed under the terms of the Charter, he had voted in favour of the Australian amendment in order that it might be clear, beyond any doubt, that the joint amendment of Belgium and the United Kingdom…did not imply that recourse might be had only to the International Court of Justice, to the exclusion of the other competent organs of the United Nations." (*See* UN Doc. A/C.6/SR.105). The draft report of the *Ad Hoc* Committee on Genocide also noted that a "principle of compulsory notification" of alleged acts of genocide to the competent UN organs was rejected by the negotiating parties (UN Doc. E/AC.25/W.1/Add.4, ¶2).

in their nature and effect", in the sense that they "do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal".[237] Indeed, the Court's well-established jurisprudence regarding the limits of its jurisdiction *ratione materiae*, as laid down in Section B above, is premised on this understanding. Article IX of the Convention, therefore, cannot be relied upon as Ukraine does, in order to read additional implicit obligations into the Convention and unduly broaden its subject-matter.

193. In short, Ukraine has not demonstrated that there is, by any stretch of imagination, a basis in the Convention, interpreted in accordance with Articles 31 and 32 of the Vienna Convention on the Law of Treaties, to credibly justify the imposition by the Convention of a separate implicit obligation to "act within the limits of international law" in the sense it describes.

194. The Russian Federation recalls that this is not the first time that the Court has faced the argument that a treaty incorporates other rules of international law with a view to expanding the Court's jurisdiction *ratione materiae* and obtaining a determination that those other rules had been violated. In many cases, applicant States have claimed, like Ukraine, a violation of a treaty which conferred the Court jurisdiction predicated or grounded on the alleged violation of other rules of international law. The Court has consistently concluded that it had no jurisdiction *ratione materiae* and rejected such claims. This case is unique because Ukraine attempts to do so without reliance on any specific text of the Convention.

195. In *Oil Platforms*, for example, Iran argued that Article I of the 1955 Treaty of Amity incorporated into the Treaty rules of international law concerning the use of force. The Court rejected this argument noting that:

> "…the object and purpose of the Treaty of 1955 was not to regulate peaceful and friendly relations between the two States in a general sense. Consequently, Article 1 cannot be interpreted as incorporating into the Treaty all of the provisions of international law concerning such relations. Rather, by incorporating into the body of the Treaty the form of words used in Article 1, the two States intended to stress that peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations and that such a development would in turn reinforce

[237] *South West Africa, Second Phase*, Judgment, I.C.J. Reports 1996, p. 39, ¶¶64-65.

> that peace and that friendship. It follows that Article 1 must be regarded as fixing an objective, in the light of which the other Treaty provisions are to be interpreted and applied."[238]

196. The Genocide Convention is also not aimed at regulating the relations between the Contracting Parties "in a general sense", in particular not at regulating matters relating to the use of force, territorial integrity, self-determination or the recognition of States. Moreover, the Convention operates by terms related to the prevention and punishment of crimes, such as "prevent", "punish", "fulfil"; it does not contain limited but specific provisions – such as those present in the Treaty of Amity – regarding "firm and enduring peace and sincere friendship" between the Parties or possible taking of "measures necessary to protect the essential security interests" of the Parties. The Convention's main objective, as noted above, is to liberate mankind from genocide and ensure that this crime is effectively prevented and punished. This important but limited object and purpose cannot be relied upon with a view to incorporating into the Convention an indefinite number of rules of international law as Ukraine suggests.

197. In *Immunities and Criminal Proceedings,* Equatorial Guinea claimed a violation by France of rules of customary international law relating to sovereign immunities relying on the Palermo Convention, Article 4(1) of which provides that States Parties "shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States". The Court rejected Equatorial Guinea's arguments as follows:

> "Article 4 (1) stipulates that 'States Parties shall carry out their obligations under [the Palermo] Convention in a manner consistent with the principles' to which it refers. The Court considers that the word 'shall' imposes an obligation on States parties. Article 4 (1) is not preambular in character, nor does it merely formulate a general aim, as the Court held that Article I of the Treaty of Amity did in *Oil Platforms*. However, Article 4 is not independent of the other provisions of the Convention. Its purpose is to ensure that the States parties to the Convention perform their obligations in accordance with the principles of sovereign equality, territorial integrity and non-intervention in the domestic affairs of other States.
>
> As the Court has previously observed, the rules of State immunity derive from the principle of sovereign equality of States … <u>However, Article 4 does not</u>

[238] *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996, p. 814, ¶28.

> refer to the customary international rules, including State immunity, that derive from sovereign equality but to the principle of sovereign equality itself. Article 4 refers only to general principles of international law. In its ordinary meaning, Article 4 (1) does not impose, through its reference to sovereign equality, an obligation on States parties to act in a manner consistent with the many rules of international law which protect sovereignty in general, as well as all the qualifications to those rules…
>
> In light of the above, the Court concludes that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials. Therefore, the aspect of the dispute between the Parties relating to the asserted immunity of the Vice-President of Equatorial Guinea and the immunity claimed for the building at 42 Avenue Foch in Paris from measures of constraint as State property does not concern the interpretation or application of the Palermo Convention. Consequently, the Court lacks jurisdiction in relation to this aspect of the dispute. The Court notes that its determination that Article 4 does not incorporate the customary international rules relating to immunities of States and State officials is without prejudice to the continued application of those rules."[239] [Emphasis added]

198. The Court thus agreed with France's position, according to which:

> "…by contending that Article 4 of the Palermo Convention 'contains an 'independent obligation' to comply with customary international law in general', Equatorial Guinea unduly confuses the obligations under the Convention with the manner in which they must be performed, thereby attempting to ascribe to the Convention an object it does not have and artificially broadening the scope of the consent given by virtue of Article 35, paragraph 2, thereof."[240]

199. The similarities between the claims by Equatorial Guinea and Ukraine are self-evident. In the present case, Ukraine argues that States have, under the Convention, an implicit obligation to act "within the limits of international law" or in a manner "consistent with the limits of international law" when executing their obligations under Articles I and IV. In *Immunities and Criminal Proceedings*, Equatorial Guinea also argued that France had an obligation to carry out its obligations under the Palermo Convention "in a manner consistent with" the principles of sovereign equality and non-intervention. Furthermore, in the present case, Ukraine aims at incorporating several rules of international law into the Convention, including those relating to the use of force, territorial integrity, self-determination and recognition of States. Equatorial Guinea, for its part, sought to

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[239] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, pp. 321, 323, ¶¶92-93, 102.

[240] *Ibid*., p. 313, ¶62.

incorporate into the Palermo Convention rules relating to the immunity of State officials and State property. In both cases, the disputes revolved around treaties that aim at preventing and punishing crimes, as well as ensuring cooperation between States for that purpose.

200. It is important to highlight that, in *Immunities and Criminal Proceedings, there was an actual textual basis* in the Palermo Convention for the incorporation of the principles of sovereign equality and non-intervention – Article 4(1). Nonetheless, the Court rejected the argument that the rules relating to sovereign immunities were also incorporated into that treaty, even if those rules are closely connected to the principles in question, because there was no *express reference* to them, nor any indication in the *travaux* of that Convention that could indicate otherwise. In the present case, there is no provision similar to Article 4(1) of the Palermo Convention in the Convention, nor any reference in the text or *travaux* of the latter that could indicate that the Contracting Parties intended to incorporate rules relating to the use of force, territorial integrity, self-determination or the recognition of States, and to confer the Court jurisdiction over alleged violations of these rules.[241] Following the precedent set by the Court, it cannot be upheld that the Convention incorporates other rules of international law in the manner sought by Ukraine.

201. In *Certain Iranian Assets*, the Court similarly rejected several claims by Iran on the basis that the 1955 Treaty of Amity did not incorporate rules of customary international law relating sovereign immunities. As regards Article IV(2) of the Treaty of Amity, for instance, the Court indicated that:

> "Iran's proposed interpretation of the phrase referring to the 'require[ments of] international law' in the provision quoted above is not consistent with the object and purpose of the Treaty of Amity. As stated in the Treaty's preamble, the Parties intended to 'encourag[e] mutually beneficial trade and investments and closer economic intercourse generally between their peoples, and [to] regulat[e] consular relations'. In addition, the title of the Treaty does not suggest that sovereign immunities fall within the object and purpose of the

[241] In fact, the *travaux* show that the negotiating States were careful not to create a confusion between these issues and the subject-matter of the Convention. The draft convention prepared by the UN Secretariat, for example, noted that "the law of war, the law of nationality, the protection of minorities, the general rights and obligations of States the protection of human rights – these are so many chapters of international law which should not be completely, or even partially, coincide with the question of genocide." (UN Doc. E/447, p. 17). Later, the Chairman of the *Ad Hoc* Committee on Genocide noted that "the Committee had not contemplated the case of war, since the codification of the laws of war was not within its competence." (UN Doc E/AC.25/SR.12, p. 6).

instrument concerned. Such immunities cannot therefore be considered as included in Article IV, paragraph 2…

….Taken together, these provisions clearly indicate that the purpose of Article IV is to guarantee certain rights and minimum protections for the benefit of natural persons and legal entities engaged in activities of a commercial nature. It cannot therefore be interpreted as incorporating, by reference, the customary rules on sovereign immunities."[242]

202. As regards Article IX(4) of the Treaty, the Court further decided that:

"…the Court cannot adopt the interpretation put forward by Iran. It is one thing for Article XI, paragraph 4, to leave intact, by not barring them, the immunities enjoyed under customary law by State entities when they engage in activities *jure imperii*. It is quite another for it to have the effect, as Iran claims it does, of transforming compliance with such immunities into a treaty obligation, a view not supported by the text or context of the provision.

…The argument that this provision incorporates sovereign immunities into the Treaty thus cannot be upheld."[243]

203. With respect to Article III(2) of the Treaty, the Court concluded that:

"There is nothing in the language of Article III, paragraph 2, in its ordinary meaning, in its context and in light of the object and purpose of the Treaty of Amity, to suggest or indicate that the obligation to grant Iranian 'companies' freedom of access to United States courts entails an obligation to uphold the immunities that customary international law is said to accord — if that were so — to some of these entities. The two questions are clearly distinct."[244]

204. The Court similarly concluded, with respect to Article IV(1), that it:

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[242] *Certain Iranian Assets (Islamic Republic of Iran v. United States of America),* Preliminary Objections, Judgment, I.C.J. Reports 2019, p. 28, ¶¶57-58. The provision reads: "Property of nationals and companies of either High Contracting Party, including interests in property, shall receive the most constant protection and security within the territories of the other High Contracting Party, in no case less than that required by international law. Such property shall not be taken except for a public purpose, nor shall it be taken without the prompt payment of just compensation. Such compensation shall be in an effectively realizable form and shall represent the full equivalent of the property taken; and adequate provision shall have been made at or prior to the time of taking for the determination and payment thereof."

[243] *Ibid*., p. 30, ¶65. The provision reads: "No enterprise of either High Contracting Party, including corporations, associations, and government agencies and instrumentalities, which is publicly owned or controlled shall, if it engages in commercial, industrial, shipping or other business activities within the territories of the other High Contracting Party, claim or enjoy, either for itself or for its property, immunity therein from taxation, suit, execution of judgment or other liability to which privately owned and controlled enterprises are subject therein."

[244] *Ibid*., p. 32, ¶70. The provision reads: "Nationals and companies of either High Contracting Party shall have freedom of access to the courts of justice and administrative agencies within the territories of the other High Contracting Party, in all degrees of jurisdiction, both in defense and pursuit of their rights, to the end that prompt and impartial justice be done. Such access shall be allowed, in any event, upon terms no less favorable than those applicable to nationals and companies of such other High Contracting Party or of any third country. It is understood that companies not engaged in activities within the country shall enjoy the right of such access without any requirement of registration or domestication."

> "…does not consider that the requirements of Article IV, paragraph 1, include an obligation to respect the sovereign immunities of the State and those of its entities which can claim such immunities under customary international law. It cannot therefore uphold on this point Iran's argument that the question of sovereign immunities falls within the scope *ratione materiae* of this provision, and consequently within the jurisdiction of the Court under the compromissory clause of the Treaty of Amity."[245]

205. Based on the above, the Court's final conclusion was that:

> "…none of the provisions the violation of which Iran alleges, and which, according to the Applicant, are capable of bringing within the jurisdiction of the Court the question of the United States' respect for the immunities to which certain Iranian State entities are said to be entitled, is of such a nature as to justify such a finding.
>
> Consequently, the Court finds that Iran's claims based on the alleged violation of the sovereign immunities guaranteed by customary international law do not relate to the interpretation or application of the Treaty of Amity and, as a result, do not fall within the scope of the compromissory clause in Article XXI, paragraph 2. Thus, in so far as Iran's claims concern the alleged violation of rules of international law on sovereign immunities, the Court does not have jurisdiction to consider them."[246]

206. Iran's argument that the abovementioned provisions of the 1955 Treaty of Amity incorporated rules on sovereign immunities was based on a reading of the Treaty that was at least *plausible, taking into account textual elements* that to some extent supported Iran's interpretation – but the Court still dismissed it. In this Case, Ukraine's position must be rejected with even more reason because it finds no such support in the text of the Convention *at all*, nor does the object and purpose of the Convention, which is unrelated to questions such as the use of force or recognition of States, allow to read into it a broad obligation to "act within the limits of international law" incorporating all sorts of rules of international law. There is, in the words of the Court, no "link" between the Convention and such other rules that would lead to an incorporation; nor is there a *renvoi* to be seen anywhere in the Convention.[247]

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[245] *Ibid*., p. 33, ¶74. *See* also p. 34, ¶¶78-79. The provision reads: "Each High Contracting Party shall at all times accord fair and equitable treatment to nationals and companies of the other High Contracting Party, and to their property and enterprises; shall refrain from applying unreasonable or discriminatory measures that would impair their legally acquired rights and interests; and shall assure that their lawful contractual rights are afforded effective means of enforcement, in conformity with the applicable laws."

[246] *Ibid*., pp. 34-35, ¶80.

[247] *Ibid*., p. 32, ¶70.

207. In the *Legality of Use of Force* cases, Yugoslavia sought to rely on the Convention to bring before the Court claims related to the armed attack by NATO Member States against it, alleging, together with a violation of the Convention, breaches of rules of international law relating to the use of force, non-intervention, and the *jus in bello*, among others. The Court rejected Yugoslavia's claims at the provisional measures stage noting that:

> "…the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention…"[248]

208. Although the Court approached the question before it from the point of view of Article II of the Genocide Convention and whether the acts of NATO Member States showed a genocidal intent, it is nonetheless clear that the case had a bearing on the relationship between the Convention and matters related to the use of force.[249] It must be recalled that the bombing of Yugoslavia by NATO Members States was undertaken under the so-called "principle of humanitarian intervention", on the basis of allegations of ethnic cleansing and other serious human rights violations, including genocide. To name only a few examples:

(a) The then President of the US Bill Clinton, when explaining the initiation of the airstrikes in Yugoslavia in 1999, stated that "[t]his was genocide in the heart of Europe, not in 1945, but in 1995… We must apply that lesson in Kosovo, before what happened in Bosnia, happens there, too."[250] Subsequently, Clinton added that: "NATO stopped war crimes. NATO stopped deliberate, systematic efforts at ethnic cleansing and genocide."[251]

(b) The spokesperson for the US Department of State James Rubin commented that "[W]e have very clear indicators that genocide is unfolding in Kosovo."[252]

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[248] *See Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, p. 138, ¶40.

[249] *See* also Provisional Measures Order, Declaration of Judge Bennouna, ¶¶7-11.

[250] CNN, *Transcript: Clinton addresses nation on Yugoslavia's strike* (24 March 1999), available at: https://edition.cnn.com/ALLPOLITICS/stories/1999/03/25/clinton.transcript/ (Annex 118).

[251] The New York Times, *CRISIS IN THE BALKANS: THE PRESIDENT; Clinton Underestimated Serbs, He Acknowledged*, (26 June 1996), available at: https://www.nytimes.com/1999/06/26/world/crisis-in-the-balkans-the-president-clinton-underestimated-serbs-he-acknowledges.html (Annex 119).

[252] US Department of State Daily Press Briefing No. 40, Briefer: James P. Rubin (30 March 1999), available at: https://1997-2001.state.gov/briefings/9903/990330db.html (Annex 36).

(c) The US Ambassador-at-Large for War Crimes Issues David Scheffer stated that "On Monday, March 29th, spokesman Rubin from this podium described what we concluded were ethnic cleansing, war crimes, crimes against humanity and indicators of genocide occurring in Kosovo… [W]e believe that it creates the basis for stating that there are indicators of genocide unfolding in Kosovo."[253]

(d) Similarly, the Prime Minister of the United Kingdom Tony Blair referred to genocide in justifying his country's participation in the operation against Yugoslavia: "We fought this conflict because we believe in justice, because we believed it was wrong to have ethnic cleansing and racial genocide here in Europe towards the end of the 20th century, and we didn't fight it to have another ethnic minority [the Kosovan Serb minority] repressed".[254]

(e) UK Foreign Secretary Robin Cook shared the above assessment in his discussion with his US counterpart, Madeleine Albright: "In 1945 when we looked at the Europe that we inherited, it was a Europe scarred by genocide, by mass deportation of peoples, by ethnic confrontation and ethnic aggression. The tragedy is that we witness all of those again in Kosovo today."[255]

(f) In a similar vein, German Chancellor Gerhard Schroeder stated that "the genocide in Yugoslavia cannot be met with pacifism" and that Germany must stand by the ethnic Albanian "victims of expulsion, rape and murder".[256]

(g) Turkish President Süleyman Demirel also referred to the situation in Kosovo as "genocide"[257] and likewise ordered the participation of his country in the bombings.

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[253] On-the Record Briefing on Atrocities in Kosovo released by the Office of the Spokesman, US Department of State, Washington, DC (9 April 1999), available at: https://1997-2001.state.gov/policy_remarks/1999/990409_scheffer_kosovo.html (Annex 37).

[254] The Washington Post, *Kosovo's Cruel Realities* (4 August 1999), available at: https://www.washingtonpost.com/archive/opinions/1999/08/04/kosovos-cruel-realities/28f9e16b-1d00-44d4-a85c-d2c22952209c/ (Annex 120).

[255] Secretary of State Madeleine K. Albright and UK Foreign Secretary Robin Cook Press Conference, Washington, D.C. (22 April 1999), available at: https://1997-2001.state.gov/statements/1999/990422a.html (Annex 38).

[256] The New York Times, *An Echo of Kosovo in Bonn* (13 April 1999), available at: https://archive.nytimes.com/www.nytimes.com/library/world/europe/041399kosovo-germany.html (Annex 121).

[257] S. Gangloff, Turkish policy towards the conflict in Kosovo: the preeminence of national political interests in *Balkanologie,* Vol. VIII (1) (2004), p. 111 (Annex 135).

209. While the views of members of parliamentary bodies cannot be considered an expression of the official position of the State concerned, still, seeing how Ukraine apparently ascribes relevance to such statements, it may also be recalled that discussions in NATO States' legislatures were in the same vein. For example, the US Senate repeatedly held hearings on the "genocidal conflict in Kosovo".[258]

210. Even during the Court's proceedings, some of NATO Member States used *prevention of genocide* as an excuse for their armed intervention, such as Germany:

> "It is a matter of common knowledge, as demonstrated in the Preliminary Objections… that the military operations against the FRY were undertaken in an attempt to rescue the Kosovo Albanians from being subjected to atrocities, including genocidal acts, and from being driven out of their ancestral lands".[259] [Emphasis added]

211. Yet, even though Yugoslavia's Memorial addressed matters of legality of use of force in some detail,[260] the possibility of such statements forming some kind of *jurisdictional link* under the Convention was never brought up by the applicant. The Court, being well aware of these statements (as opinions of the Judges clearly show),[261] also never considered this possibility, *proprio motu* or otherwise, and eventually decided that it did not have jurisdiction for different reasons.

212. While making their case, the respondent States also made it clear that the Convention and the rules of international law relating to the use of force are distinct and should not be confused:

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[258] The Crisis in Kosovo: Hearings before the Subcommittee on European Affairs of the Committee on Foreign Relations, United States Senate (6 May and 24 June 1998), available at: https://www.govinfo.gov/content/pkg/CHRG-105shrg49265/html/CHRG-105shrg49265.htm (Annex 39).

[259] *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Verbatim Record of Oral Proceedings held on 20 April 2004, p. 23, ¶44.

[260] *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Yugoslavia's Memorial, pp. 301-308.

[261] *See*, for instance, *Legality of Use of Force (Yugoslavia v. Belgium)*, Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999, Dissenting Opinion of Vice-President Weeramantry, p. 184: ("The Respondent on the other hand claims that its actions are taken with purely humanitarian intent to prevent gross violations of human rights extending to genocide which have been perpetrated in Kosovo by the Applicant and still continue to be perpetrated. In this context it invokes the 'clean hands' principle, a principle of equity and judicial procedure, well recognized in all legal systems, by which he who seeks the assistance of a court must come to the court with clean hands.")

(a) Canada, relying on the *Oil Platforms* case, stated that Yugoslavia's case

> "assumes the existence of pleaded violations that pertain to the State against which the proceedings have been brought…in reality, the dispute between Canada and the Applicant has nothing to do with breaches of the *Genocide Convention* by Canada. The Convention has been invoked as an artificial basis for bringing proceedings to which the compulsory jurisdiction of the Court does not extend."[262]

(b) France observed that

> "[t]he Court is…without jurisdiction to rule on the issues concerning alleged violations of the United Nations Charter and of certain principles and rules of international humanitarian law applicable in armed conflict, as those issues do not fall within the provisions of Article IX of the 1948 Genocide Convention."[263]

(c) Similarly, according to Germany,

> "[b]y enunciating in a long list all the breaches of rules of international law which all ten NATO member States impleaded before the Court have allegedly committed, [Yugoslavia] openly admits that even according to its own judgment the bulk of the dispute lies outside the confines of the Genocide Convention."[264]

(d) In the same vein, the UK said that

> "[j]urisdiction under Article IX would not extend to disputes regarding alleged violation of other rules of international law, such as the provisions of the United Nations Charter relating to the use of force and the Geneva Conventions and Additional Protocols of 1997 relating to the conduct of armed conflict."[265]

(e) In line with this, Belgium also observed that the Court would

> "have jurisdiction pursuant to [Article IX] in the case of allegations concerning acts that come within the scope of the Convention *ratione materiae* and in respect of such acts only. Article IX of the *Genocide Convention* does not constitute a basis on which the jurisdiction of the Court may be founded more generally."[266]

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[262] *Legality of Use of Force (Serbia and Montenegro v. Canada)*, Canada's Preliminary Objections, ¶171.

[263] *Legality of Use of Force (Serbia and Montenegro v. France)*, France's Preliminary Objections, ¶14.

[264] *Legality of Use of Force (Serbia and Montenegro v. Germany)*, Germany's Preliminary Objections, ¶3.28.

[265] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)*, United Kingdom's Preliminary Objections, ¶5.02.

[266] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Belgium's Preliminary Objections, ¶319.

213. Consistent with this approach, the Court has already carefully clarified the limits of its jurisdiction *ratione materiae* under Article IX of the Genocide Convention, as explained in Section C above. In the *Croatia Genocide* case, the Court notably found that:

> "… since Article IX provides for jurisdiction only with regard to 'the interpretation, application or fulfilment of the Convention, including . . . the responsibility of a State for genocide or for any of the other acts enumerated in Article III', the jurisdiction of the Court does not extend to allegations of violation of the customary international law on genocide …
>
> In the present case, any jurisdiction which the Court possesses is derived from Article IX of the Genocide Convention and is therefore confined to obligations arising under the Convention itself. Where a treaty states an obligation which also exists under customary international law, the treaty obligation and the customary law obligation remain separate and distinct … Accordingly, unless a treaty discloses a different intention, the fact that the treaty embodies a rule of customary international law will not mean that the compromissory clause of the treaty enables disputes regarding the customary law obligation to be brought before the Court. In the case of Article IX of the Genocide Convention no such intention is discernible. On the contrary, the text is quite clear that the jurisdiction for which it provides is confined to disputes regarding the interpretation, application or fulfilment of the Convention, including disputes relating to the responsibility of a State for genocide or other acts prohibited by the Convention. Article IX does not afford a basis on which the Court can exercise jurisdiction over a dispute concerning an alleged violation of the customary international law obligations regarding genocide."[267] [Emphasis added]

214. As the Court noted, for it to have jurisdiction to entertain claims over alleged violations of international law falling outside the scope of the Convention, there must be a *discernible intention* in the Convention itself. Accordingly, the Court decided that no such intention existed for purposes of incorporating rules of customary international law on the prohibition of genocide into the Convention. If such an intention does not exist in the Convention even with respect to rules of customary international law having the same subject-matter as the Convention, a similar intention *a fortiori* cannot be inferred for rules of conventional and customary international law that regulate unrelated issues. In short, there is nothing in the Convention that establishes the incorporation of rules of international law relating to the use of force, *jus in bello*, territorial integrity,

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[267] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, pp. 46-48, ¶¶87-88. *See* also *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, pp. 104-105, ¶¶147-149.

self-determination and the recognition of States any more than the customary rules on the prohibition of genocide.

215. To conclude, the Convention does not incorporate an indefinite scope of other rules of international law, including those relating to the use of force, territorial integrity, self-determination and the recognition of States, through an alleged implicit obligation to "act within the limits of international law" as described by Ukraine. There is no basis in the text, object and purpose, or even *travaux* of the Convention, nor in the Court's jurisprudence, to support the existence of such a broad and all-encompassing obligation. The subject-matter of the Convention is limited and it does not regulate the relations between States generally, and the Court's jurisdiction *ratione materiae* under Article IX must be thus circumscribed. Accordingly, the Russian Federation requests the Court to reject for lack of jurisdiction Ukraine's claims, since they are predicated or grounded on an alleged violation by the Russian Federation of other rules of international law beyond the scope of the Genocide Convention.

E. THE CONVENTION DOES NOT INCORPORATE OTHER RULES OF INTERNATIONAL LAW THROUGH AN "IMPLICIT OBLIGATION" NOT TO "MISAPPLY", "MISUSE" OR "ABUSE" THE CONVENTION

216. As noted above, Ukraine's attempt to unduly expand the Court's jurisdiction *ratione materiae* under Article IX of the Genocide Convention is not limited to arguing that the Convention contains an implicit obligation to "act within the limits of international law". In addition, Ukraine advances that the Convention also contains an implicit obligation not to "misapply", "misuse" or "abuse" the Convention with a view to violating other rules of international law. For the reasons set out in Sections C and D above, Ukraine's claims based on this argument must equally be dismissed: the Court lacks jurisdiction over alleged violations of rules of international law other than the Convention, which do not form part of the subject-matter of the latter.

217. Some additional observations regarding Ukraine's position are nonetheless warranted. ***First***, the implicit obligation invoked by Ukraine is formulated in a manner that is far from clear. Thus, according to Ukraine:

> "…should a Contracting Party invoke the responsibility of another Contracting Party for a breach of the Convention, or should a Contracting

> Party take action to prevent and punish genocide, such action must be taken in good faith and without abuse";[268]
>
> "Inherent in this network of obligations and rights is a duty not to act to the detriment of other States on the basis of preventing and punishing a falsely alleged genocide";[269]
>
> "States must perform their obligations to prevent and punish genocide, and exercise their right to invoke the responsibility of States in breach of their obligations, in good faith and without abuse";[270]
>
> "…no Contracting Party may claim a right to take action against another State it unreasonably and pretextually accuses of committing genocide in violation of the Convention".[271]

218. *Prima facie*, Ukraine may appear to be advancing a claim of abuse of rights. Ukraine made no effort in its Memorial to demonstrate the existence of the prohibition of abuse of rights as a rule of international law, and what the precise conditions for its application are. It limits itself to making broad references to the principles of *pacta sunt servanda* and good faith; the declaration of a Judge; the view of a few selected authors; and the *dictum* in two cases where abuse of rights was briefly mentioned but not applied as such.[272] Similarly, Ukraine's mantra that "the abuse of a treaty constitutes a violation of that treaty"[273] is unsupported and at odds with the view of most authors that the prohibition of abuse of rights, if it forms part of international law at all, it does so as a general principle of law in the sense of Article 38(1)(c) of the Statute.[274] Therefore, any violation of this doctrine would constitute a violation of a general principle, and not of a particular treaty.

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[268] Memorial, ¶78.

[269] *Ibid*., ¶79.

[270] *Ibid*., ¶¶86-88.

[271] *Ibid*., ¶88.

[272] *Ibid*., ¶¶86-93.

[273] *Ibid*., ¶¶91-92. The reference by Ukraine to the *US – Shrimp* case before the WTO Appellate Body is in this regard misleading. The provision that had been allegedly abused in that case was Article XX of the GATT, which provides for an exception to the performance of States' obligations under the treaty. In that context, it was evident that an abuse of the exception under Article XX would inevitably lead to a violation of the GATT, since the application of Article XX presupposes an act that is contrary to the treaty in the first place. In the end, the Appellate Body did not find that the US had abused Article XX, but that it applied it in an arbitrary and discriminatory manner. *See United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, AB Report, 12 October 1998, pp. 60-63, 75-76, ¶¶156-160, 186.

[274] First Report on General Principles of Law (M. Vázquez-Bermúdez), A/CN.4/732, 5 April 2019, p. 16, 46-47, ¶¶64, 154; available at: https://digitallibrary.un.org/record/3805756/files/A_CN.4_732-EN.pdf?ln=en; A. Kiss, *Abuse of Rights* in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW (OUP, 2008), ¶¶8-9, 34-35; J. Paulsson, THE UNRULY NOTION OF ABUSE OF RIGHTS (CUP, 2020), pp. 76-77.

219. The Court, together with the PCIJ, has never granted a claim of abuse of rights in over a hundred years of jurisprudence.[275] Rather, it has taken a cautious approach, indicating that an abuse of rights cannot be presumed,[276] and also that good faith "is not in itself a source of obligation where none would otherwise exist."[277] As Lauterpacht noted:

> "There is no legal right, however well established, which could not, in some circumstances, be refused recognition on the ground that it has been abused. The doctrine of abuse of rights is therefore an instrument which, apart from other reasons calling for caution in the administration of international justice, must be wielded with studied restraint."[278]

220. It should be noted that the only remedy envisaged to rectify an abuse of right is the non-recognition of that right, which is not the same as equating an abuse of rights to the violation of an obligation.

221. Similarly, Judge Crawford, writing as commentator, was of the view that:

> "…while the doctrine is a useful agent in the progressive development of the law as a general principle, it is not part of positive international law. Indeed, it is doubtful if it could be safely recognized as an ambulatory doctrine, since it would encourage doctrines as to the relativity of rights and would result, outside the judicial forum, in instability".[279]

222. In any event, what is clear is that, for a claim of abuse of rights to succeed, a State must as a minimum establish the existence of the *right* that was purportedly abused. As the Court indicated in *Immunities and Criminal Proceedings*:

> "As to the abuse of rights invoked by France, it will be for each Party to establish both the facts and the law on which it seeks to rely at the merits phase of the case. The Court considers that abuse of rights cannot be invoked

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[275] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 335, ¶147.

[276] *See Certain German Interests in Polish Upper Silesia*, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, p. 30 ("such misuse cannot be presumed, and it rests with the party who states that there has been such misuse to prove his statement"); *Free Zones of Upper Savoy and the District of Gex*, Order of 6 December 1930, P.C.I.J., Series A, No. 24, p. 12 ("as a reservation must be made as regards the case of abuses of a right, an abuse which however cannot be presumed by the Court"); *Free Zones of Upper Savoy and the District of Gex*, Judgment, 1932, P.C.I.J., Series A/B, No. 46, p. 167 ("A reservation must be made as regards the case of abuses of a right . . . But an abuse cannot be presumed by the Court."). *See* also *Tacna-Arica Question (Chile/Peru)*, Arbitral Award, 4 March 1925, UNRIAA, vol. II, p. 930.

[277] *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 105, ¶94.

[278] H. Lauterpacht, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT (Grotius Publications, 1982), p. 164.

[279] J. Crawford, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW (8th ed., OUP, 2019), pp. 545-546.

> as a ground of inadmissibility when the establishment of the right in question is properly a matter for the merits …"[280]

223. Ukraine's Memorial is in this regard entirely confusing and misleading: it does not identify *any* right under the Convention that the Russian Federation has allegedly abused; rather, Ukraine appears to suggest that what has been "misapplied", "misused" or "abused" is either the Convention as a whole (in an unspecified manner), or Articles I and IV (which contain obligations, but not rights).

224. One actual right that Ukraine refers to is the "right to invoke the responsibility of another State" for violations of the Convention. As demonstrated in Chapter III above, the Russian Federation, however, has not taken any measure of a formal character to invoke Ukraine's responsibility, and Ukraine has not produced any evidence showing otherwise.

225. In addition, and rather paradoxically, Ukraine also appears to suggest that the other right that has allegedly been abused by the Russian Federation is the right to use force or to recognise States for purposes of preventing and punishing genocide:

> "… the Russian Federation has asserted that it may recognize new sovereigns on Ukrainian territory and use force on Ukrainian territory – actions which are contrary to international law. To the extent Article I confers both obligations and corresponding rights on the Contracting Parties, any such rights must be exercised in a manner that is not pretextual, that is well-founded, and that is consistent with the Convention's 'purely humanitarian and civilizing purpose.' In asserting a right to take these *ultra vires* actions under the claimed authority of the Genocide Convention, Russia has done none of these things. Instead, it has abused and misused Articles I and IV of the Genocide Convention for its own aims."[281]

226. It is hard to conceive how Ukraine's claim of abuse of rights could succeed when the right allegedly abused is at the same time denied by Ukraine. Indeed, Ukraine made it clear in the Application that it does not consider that a State may resort to the use of force or recognise States on the basis of the Convention.[282] Neither does Ukraine assert the

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[280] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 337, ¶151. *See* also Memorial, ¶91 (quoting cases that refer to rights arising under treaties, as opposed to obligations). *See* further R. Jennings and A. Watts, OPPENHEIM'S INTERNATIONAL LAW, (9th ed., OUP, 2009), p. 407 (noting that an abuse of rights may occur when "a State avails itself of its right in an arbitrary manner in such a way as to inflict upon another State an injury which cannot be justified by a legitimate consideration of its own advantage"). *See* also E. Gaillard, Abuse of Process in International Arbitration, in *ICSID Review* (2017), p. 16.

[281] Memorial, ¶90; *see* also ¶102.

[282] Application, ¶27.

existence of such right in its Memorial. As explained above, the Russian Federation similarly did not claim the existence of a right to use force or recognise States on the basis of the Convention, since the use of force and State recognition are grounded in other sources of international law, on which Russia has explicitly based its actions.[283] The Court also seems to agree with the Parties on this matter:

> "it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide".[284]

227. If the Applicant, the Respondent and the Court reject the existence of this "right", then there is simply no room for the application of the abuse of rights doctrine. The latter does not apply to illusory rights that one party ascribes to the other while in fact both parties deny it, but to rights that actually exist under international law.

228. In light of this, it can be concluded that Ukraine has not put forward a real claim of abuse of rights under the Convention. Rather, Ukraine's arguments appear to be a mere combination or synthesis of the claim that no genocide has taken place in Ukraine, the DPR and LPR, on the one hand, and the claim that the Russian Federation has allegedly violated an implicit obligation under the Convention to "act within the limits of international law", on the other. Indeed, this is evidenced in paragraph 158 of the Memorial, where Ukraine's final formulation of its "abuse of rights" claim is presented as follows:

> "Articles I and IV of the Convention impose on Russia a duty *not* to act to Ukraine's detriment on the basis of a falsely alleged genocide, and not to exceed the limits of international law in any measures it takes to prevent and punish genocide or to invoke the responsibility of another Contracting Party for genocide."[285]

229. For the reasons already explained in the Preliminary Objections, the Ukrainian claims mentioned above must be rejected because of the absence of a dispute and the Court's lack of jurisdiction *ratione materiae* under Article IX of the Convention, respectively.

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[283] *See above*, ¶¶37; 44; 46-50.

[284] Provisional Measures Order, ¶59. *See* also Provisional Measures Order, Declaration of Judge Bennouna, ¶2.

[285] Memorial, ¶158.

V. UKRAINE'S CLAIMS ARE INADMISSIBLE

230. Were the Court to find that it has jurisdiction, in whole or in part, to entertain Ukraine's claims (*quod non*), the Court must nonetheless decline to do so because such claims are inadmissible. This is for the following reasons:

(a) Ukraine has inappropriately changed the substance of its claims in the Memorial as compared to the claims raised in the Application (**Section A**).

(b) Any judgment rendered by the Court based on the Convention cannot affect the rights of the Russian Federation to use force and recognise the DPR and LPR under Article 51 of the UN Charter and customary international law. As a result, the judgment requested by Ukraine would lack practical effect (**Section B**).

(c) Ukraine's request for declaration "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" is a *reverse compliance* request that is contrary to the jurisprudence of the Court and detrimental to its judicial function (**Section C**); and

(d) Ukraine's Application constitutes an abuse of process (**Section D**).

A. THIRD PRELIMINARY OBJECTION: UKRAINE'S NEW CLAIMS ADVANCED IN THE MEMORIAL ARE INADMISSIBLE

231. The Statute and the Rules of Court provide that the applicant State must set forth the nature of the claim and its subject-matter:

(a) Article 40 of the Statute provides that "the subject of the dispute and the parties shall be indicated" in the application.

(b) Article 38(2) of the Rules of Court stipulates that the application instituting proceedings "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".

232. The Court summed up these requirements as follows:

> "No applicant may come to the Court without being able to indicate, in its Application, the State against which the claim is brought and the subject of

the dispute, as well as the precise nature of that claim and the facts and grounds on which it is based."[286]

233. These requirements take on particular importance when the applicant State tries to deviate from the claims that it made in the application instituting proceedings and introduce new claims or significantly alter the original claims at the stage of filing the memorial or even later. The Court considers such new or significantly altered claims inadmissible for two interrelated reasons:

(a) An alteration of the claims disrupts orderly administration of justice. As the Court stated in *Certain Phosphate Lands in Nauru*:

> "Article 40, paragraph 1, of the Statute of the Court provides that the 'subject of the dispute' must be indicated in the Application; and Article 38, paragraph 2, of the Rules of Court requires 'the precise nature of the claim' to be specified in the Application. These provisions are so essential from the point of view of legal security and the good administration of justice that they were already, in substance, part of the text of the Statute of the Permanent Court of International Justice…and of the text of the first Rules of that Court… respectively."[287] [Emphasis added]

(b) An alteration of the claims can also affect the Court's jurisdiction. As the PCIJ stated in *Société Commerciale De Belgique*,

> "…It is to be observed that the liberty accorded to the parties to amend their submissions up to the end of the oral proceedings must be construed reasonably and without infringing the terms of Article 40 of the Statute and Article 32, paragraph 2, of the Rules which provide that the Application must indicate the subject of the dispute… it is clear that the Court cannot, in principle, allow a dispute brought before it by application to be transformed by amendments in the submissions into another dispute which is different in character. A practice of this kind would be calculated to prejudice the interests of third States to which, under Article 40, paragraph 2, of the Statute, all applications must be communicated in order that they may be in a position to avail themselves of the right of intervention provided for in Articles 62 and 63 of the Statute."[288] [Emphasis added]

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[286] *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 206, ¶64.

[287] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, pp. 266-267, ¶¶69.

[288] *Société Commerciale De Belgique (Belg. v. Greece)*, 1939 P.C.I.J. (ser. A/B) No. 78 (June 15), p. 173.

234. The Court further elaborated on this requirement in the *Military and Paramilitary Activities* case:

> "Since the Court must always be satisfied that it has jurisdiction before proceeding to examine the merits of a case, it is certainly desirable that 'the legal grounds upon which the jurisdiction of the Court is said to be based' should be indicated at an early stage in the proceedings, and Article 38 of the Rules of Court therefore provides for these to be specified "as far as possible" in the application."[289] [Emphasis added]

235. If the Court allowed the applicant State to modify the basis underlying its claims after the institution of the proceedings, this would negatively affect the orderly judicial proceedings in the Court. Not only would it be increasingly challenging for the respondent State to formulate its defences and objections, but it would also force the Court to reassess its jurisdiction at every juncture of the proceedings. For this reason, it is important that the applicant State sets out the precise nature and the basis of its claims in the application instituting proceedings, which can be built upon but not remade in subsequent submissions. In the words of the Court's predecessor:

> "… it is the Application which sets out the subject of the dispute, and the Case, though it may elucidate the terms of the Application, must not go beyond the limits of the claim as set out therein…"[290][Emphasis added]

236. *Certain Phosphate Lands in Nauru* is a helpful illustration of the Court's approach to new or altered claims. In that case, the Court considered whether Nauru's claim – absent from its Application instituting proceedings and first introduced in its Memorial – was admissible. Nauru argued that this claim was admissible because it did not "…constitute a new basis of claim and that, even if it were formally so, the Court could nevertheless entertain it; that the claim is closely related to the matrix of fact and law [of its original claim]".[291]

237. The Court disagreed, holding that the claim was "both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim." The Court reasoned as follows:

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[289] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 426-427, ¶80.

[290] *Prince von Pless Administration* (Preliminary Objection), P.C. I. J., Series A/B, No. 52, p. 14.

[291] *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 265, ¶63.

> "…to be held to have been, as a matter of substance, included in the original claim, it is not sufficient that there should be links between them of a general nature. An additional claim must have been implicit in the application...or must arise 'directly out of the question which is the subject-matter of that Application'.
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> …
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> Moreover, while not seeking in any way to prejudge the question whether there existed, on the date of the filing of the Application, a dispute of a legal nature between the Parties as to the disposal of the overseas assets of the British Phosphate Commissioners, the Court is convinced that, if it had to entertain such a dispute on the merits, the subject of the dispute on which it would ultimately have to pass would be necessarily distinct from the subject of the dispute originally submitted to it in the Application. To settle the dispute on the [new claim] the Court would have to consider a number of questions that appear to it to be extraneous to the original claim…"[292]

238. Accordingly, the Court concluded that:

> "The Nauruan claim…is inadmissible inasmuch as it constitutes, both in form and in substance, a new claim, and the subject of the dispute originally submitted to the Court would be transformed if it entertained that claim."

239. The Court's jurisprudence on new claims was applied by the International Tribunal for the Law of the Sea (the "ITLOS") in the *M/V "Louisa" Case* (*Saint Vincent and the Grenadines v. Kingdom of Spain*). In that case, the ITLOS noted that the applicant did not refer to Article 300 of the UNCLOS in its application, but subsequently sought to rely on that provision for its claims:

> "The Tribunal considers this reliance on article 300 of the Convention generated a new claim in comparison to the claims presented in the Application; it is not included in the original claim. The Tribunal further observes that it is a legal requirement that any new claim to be admitted must arise directly out of the application or be implicit in it (see *Certain Phosphate Lands in Nauru (Nauru v. Australia), Preliminary Objections, Judgment, I.C.J. Reports 1992*, p. 240, at p. 266, para. 67)."[293]

240. The ITLOS proceeded to quote further from the jurisprudence of the Court to the effect that the parties in a case cannot in the course of proceedings transform the dispute brought before the Court into a dispute that would be of a different nature, for reasons of legal certainty and good administration of justice. The ITLOS then found that there were no

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[292] *Ibid.*, ¶68.

[293] *The M/V "Louisa" Case (Saint Vincent and the Grenadines v. Kingdom of Spain)*, ITLOS Case No. 18, Judgment (28 May 2013), ¶¶142-151.

special circumstances to depart from this jurisprudence and held that Article 300 of the Convention could not serve as a basis for the claims submitted by the applicant.[294]

241. In sum, it is not possible for an applicant State to make new claims or amend the original claims during the proceedings to the extent such claims or "amendments" significantly alter the subject-matter of the dispute as the applicant State originally set it forth in the application instituting proceedings.

242. In this Case, as already noted in the previous chapters, Ukraine has introduced multiple new claims in its Memorial. These new claims effectively eschew or significantly alter the claims that Ukraine initially advanced in the Application. This has transformed Ukraine's claims beyond recognition. Not only are Ukraine's claims based on different provisions of the Convention; they also include allegations of the Russian Federation's violations of the Convention that were not present in the original Application.

243. Ukraine's submissions in the Application are manifestly different to those advanced in the Memorial. As indicated above,[295] Ukraine has transformed its initial request to confirm that the Russian Federation's actions had no basis on the Convention into requests to establish the responsibility of the Russian Federation for allegedly violating Articles I and IV of the Convention.[296]

244. A few observations are warranted. ***First***, in its Application Ukraine did not mention Article IV of the Genocide Convention at all. Now in its Memorial, in Submissions (c) and (d), Ukraine asks the Court to find that the Russian Federation violates this provision. Ukraine's claims regarding the violation of Article IV are thus completely new and, for this reason alone, should be declared inadmissible.

245. ***Second***, the Application did not contain any claims concerning Russia's actual *violation* of any of its obligations arising from the Genocide Convention. Neither Article I nor IV was mentioned in the Application's submissions. Ukraine merely requested the Court to declare that Ukraine did not violate the Convention and that, for this reason, the Russian Federation's actions "have no basis in the Genocide Convention". In other words,

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[294] *Ibid.*, ¶¶141-150.

[295] *See above*, ¶¶70-72.

[296] Application, ¶30; Memorial, ¶178.

Ukraine claimed that certain allegations of genocide were inaccurate pursuant to Articles II and III of the Convention, and that Russia could not, therefore, base its actions on the Convention. But in its Memorial, in Submissions (c) and (d), Ukraine asks the Court to find that the Russian Federation violates Articles I and IV.

246. As explained above, there is a great distance from "having no basis" in a treaty to "violating" that treaty.[297] "Having no basis" in a treaty plainly addresses whether a treaty is the authority for a certain conduct, while "violating" a treaty addresses whether obligations or prohibitions in that treaty have been breached by a conduct contrary to them. Authority to act and obligations and/or prohibitions are very different matters, and claims about lack of authority to act are not the same as claims about a violation of obligations and prohibitions, which cannot be presumed simply from an absence of authority to act.

247. Accordingly, the claims concerning the Russian Federation's alleged violations of Articles I and IV of the Convention in Ukraine's Memorial are completely new. An act that has no legal basis under a treaty does not necessarily violate an obligation under that treaty.[298] It will simply not be grounded in that treaty legally – but may well be grounded in another source of international law.[299] In the present case, the Russian Federation's actions regarding the use of force and the recognition of the DPR and LPR were legally based on the provisions of the UN Charter and customary international law rather than the Convention.

248. In stark contrast, in the Memorial Ukraine asks the Court to establish that the Russian Federation's actions constitute a breach of Articles I and IV of the Convention. As explained in Chapter IV above, Ukraine does not even argue that the Russian Federation

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[297] *See above*, ¶183.

[298] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 138, ¶474: "There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another."

[299] *See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 46-47, ¶¶ 87-88; *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, pp. 321, 323, ¶¶ 93, 102; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, pp. 30, 34-35, ¶¶ 65, 80; *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, pp. 104-105, ¶¶ 147-148.

has breached the actual obligations contained in these provisions (*i.e.* that Russia has failed to prevent and punish genocide), but that certain implicit obligations allegedly contained within those provisions have been violated.[300] Ukraine even implies, alongside an indefinite number of rules of international law that Ukraine seeks to unduly incorporate into the Convention for purposes of its unfounded claim of abuse of rights, that the Russian Federation may have a right to use force for purposes of preventing and punishing genocide,[301] which is a manifest contradiction of Ukraine's claims in the Application that Russia's actions had "no basis on the Convention".[302] In these circumstances, it is evident that Ukraine's entire initial case has been transformed into a significantly different one.

249. ***Third***, Ukraine has also changed the nature of its claims in respect of acts of genocide. In the Application, Ukraine requested that the Court to:

> "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."[303]

250. In its Memorial Ukraine modified the wording and now requests that the Court

> "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."[304]

251. This is telling. At first, Ukraine asked the Court to find that there were no acts of genocide committed in the DPR and LPR as defined by Article III of the Convention. Now, 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 relief sought indicates that Ukraine's purpose of 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. Moreover, responsibility for committing genocide under the Convention is criminal in nature, and aimed at physical persons – perpetrators of genocide – while State obligations are built around preventing and punishing genocide;

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[300] *See above*, Chapter IV, Sections D, E.

[301] Memorial, ¶¶76, 78, 99-100.

[302] *Ibid*, ¶119.

[303] Application, ¶30.

[304] Memorial, ¶178.

by focusing exclusively on State responsibility for commission of acts of genocide, Ukraine leaves out its possible responsibility for failing to take the required measures to prevent and/or punish genocide.

252. ***Fourth***, the Court assessed its *prima facie* jurisdiction at the state of indicating provisional measures based on the claims contained in the Application. Now, when Ukraine's case has changed from seeking a declaration of its own non-violation to one concerning the Russian Federation's alleged violation of the Convention and of several rules of conventional and customary international law falling outside the scope of the latter, it begs the question whether the Court's Provisional Measures Order would have been the same. This illustrates the danger that such alterations pose to judicial propriety and fair administration of justice.

253. Ukraine's transformation of its original case as formulated in the Application has substantively affected Ukraine's request for relief. Ukraine changed its request for relief set forth in the Application, where it requested the Court to hold that Russia's actions are based on a "false claim of genocide" and "have no basis in the Genocide Convention". Now Ukraine alleges violations of Articles I and IV of the Convention in relation to matters concerning use of force and State recognition that are out of the scope of the Convention.

254. The above analyses clearly demonstrate that the new, or additional claims, or additional components of the claims made for the first time in Ukraine's Memorial are not implicit in its original claims, nor do they directly arise out of the question which is the subject-matter of the Application. For these reasons, the requests contained in paragraph 178 (b), (c), (d) of Ukraine's Memorial and the associated requests in paragraph 179 are inadmissible.

B. FOURTH PRELIMINARY OBJECTION: THE COURT'S POTENTIAL JUDGMENT UPHOLDING UKRAINE'S CLAIMS WOULD BE DEVOID OF PRACTICAL EFFECT (*EFFET UTILE*)

255. It is trite that the Court was created with the goal to render enforceable judgments that would have practical effect, that is, effectively to resolve disputes between the parties.[305]

256. In the *Northern Cameroons* case, the Court stated that its judgments should have a practical effect and be able to affect the existing rights or obligations of the parties to the case:

> "the Court's 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."[306]

257. The Court elaborated on this principle and explained that its judgments must lead to the parties being able to undertake actions, which would constitute compliance with the Court's judgments:

> "it is not the function of a court merely to provide a basis for political action if no question of actual legal rights is involved. Whenever the Court adjudicates on the merits of a dispute, one or the other party, or both parties, as a factual matter, are in a position to take some retroactive or prospective action or avoidance of action, which would constitute a compliance with the Court's judgment or a defiance thereof."[307]

258. Accordingly, rendering a judgment that would have no practical consequence would not be within the proper judicial function of the Court and would negatively affect its judicial integrity.

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[305] *See* also L. Gross, Limitations upon the Judicial Function, *American Journal of International Law*, Vol. 58, No. 2 (1964), p. 424 ("From the procedural point of view it must be observed that when a question of propriety arises, involving the function of the Court as a court of law, this question has priority over all preliminary objections to the jurisdiction or to the admissibility of the claim.").

[306] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963, p. 34.

[307] *Ibid.*, pp. 37-38.

259. Considerations of judicial integrity have led the Court to decline to exercise its jurisdiction in circumstances where it would not be in a position to "render a judgment capable of effective application."[308]

260. Subsequently, the Court applied the same principle in the *Nuclear Tests* cases, where the Court was faced with a claim that could not, even if satisfied, be performed because France unilaterally had declared that its nuclear tests would effectively cease. Accordingly, the Court declined to continue the proceedings to avoid giving a moot judgment, which could not affect the parties' rights under the applicable norms of international law:

> "The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony."[309] [Emphasis added]

261. In the *Military and Paramilitary Activities* case, the Court discussed the issue of the practical effect of its judgments in circumstances when the conduct of the parties was governed by more than one source of international law:

> "The United States observed that the multilateral treaties in question contain legal standards specifically agreed between the Parties to govern their mutual rights and obligations, and that the conduct of the Parties will continue to be governed by these treaties, irrespective of what the Court may decide on the customary law issue…Accordingly, in the contention of the United States, the Court cannot properly adjudicate the mutual rights and obligations of the two States when reference to their treaty rights and obligations is barred; the Court would be adjudicating those rights and obligations by standards other than those to which the Parties have agreed to conduct themselves in their actual international relations.
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> …
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> The question raised by this argument is whether the provisions of the multilateral treaties in question, particularly the United Nations Charter, diverge from the relevant rules of customary international law to such an extent that a judgment of the Court as to the rights and obligations of the parties under customary law, disregarding the content of the multilateral

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[308] *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 33. *See* also L. Gross, who comments in Limitations upon the Judicial Function, *American Journal of International Law*, Vol. 58, No. 2 (1964), p. 428, "Cameroon, however, wanted no more than a declaratory judgment, which calls for no compliance, with respect to a situation which she knew could not be undone. The Court did not deem it a proper exercise of its judicial function to give her this satisfaction."

[309] *Nuclear Tests (New Zealand v. France)*, Judgment, I.C.J. Reports 1974, p. 477, ¶61.

> treaties binding on the parties, would be a wholly academic exercise, and not *'*susceptible of any compliance or execution whatever*'*.*"*[310]

262. In this regard, the Court clearly confirmed that it could exercise its jurisdiction because of the similarities between the content of the relevant obligations in customary international law and in the UN Charter:

> "the differences which may exist between the specific content of each are not, in the Court's view, such as to cause a judgment confined to the field of customary international law to be ineffective or inappropriate, or a judgment not susceptible of compliance or execution."[311]

263. Judge Schwebel recalled this position in his dissenting opinions in the *Lockerbie* cases:

> "In the case before the Court, it is precisely such 'subsequent events', namely adoption by the Security Council of resolutions 748 (1992) and 883 (1993), that render Libya's Application "without object", that is to say, moot. Accordingly any judgment by the Court could have no lawful effect on the rights and obligations of the Parties in light of the Council's binding decisions and would thus not be within the proper judicial function of the Court."[312]

264. Judge Xue expressed a similar view in her Dissenting Opinion in the *Application of the Interim Accord* case:

> "In so far as NATO's decision remains valid, the Court's decision will have no practical effect on the future conduct of the Parties with respect to the Applicant's membership in that organization. In the *Northern Cameroons* case, the Court stated that its decision "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"…That requirement does not seem to have been met in the present case."[313]

265. Thus, the Court's *jurisprudence constante* is unambiguous that where a judgment cannot affect the rights and obligations of the parties to a case and cannot be effectively

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[310] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, pp. 96-97, ¶¶180-181.

[311] *Ibid.*, pp. 96-97, ¶181.

[312] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 1998, Dissenting Opinion of President Schwebel, p. 161; *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. Dissenting Opinion of President Schwebel, p. 70.

[313] *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v. Greece)*, Judgment of 5 December 2011, I.C.J. Reports 2011, Dissenting Opinion of Judge Xue, p. 718.

performed, exercising jurisdiction and rendering a moot judgment would be contrary to the Court's judicial integrity.

266. In this Case, the Court's potential judgment could only be able to affect the rights and obligations of the Russian Federation under the Convention, *not* under other rules of international law, in particular the UN Charter.

267. At the same time, Ukraine asks that the Court order the Russian Federation to

> "immediately terminate its use of force in and against Ukraine that it commenced on 24 February 2022";
>
> "immediately withdraw its military units from the territory of Ukraine, including the Donbass region";
>
> "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";
>
> "withdraw its recognition of the DPR and LPR"; and
>
> "provide assurances that it will not undertake any further use of force in or against Ukraine."[314]

268. These requests are clearly based on rules of international law that are beyond the Convention. As explained in Chapter III above, the issues which are at the heart of Ukraine's claims, that is, the use of force and recognition of States, are governed by Article 51 of the UN Charter and rules of customary international law and not by the Convention. Accordingly, any potential judgment of the Court in support of Ukraine's claims would lack practical effect, because, instead of the Convention, other bodies of international law, namely, the UN Charter and customary international law, are the basis for the Russian Federation's conduct that Ukraine has challenged before the Court.

269. In *Croatia Genocide*, the Court confirmed that a judgment on the lawfulness of certain actions under one instrument does not prejudge the issue of lawfulness of the same actions under a different instrument.[315]

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[314] Memorial, ¶179.

[315] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment, I.C.J. Reports 2015, p. 138, ¶474 ("There can be no doubt that, as a general rule, a particular act may be perfectly lawful under one body of legal rules and unlawful under another.").

270. Likewise, any judgment under the Convention cannot affect the rights and obligations, which a State has under the UN Charter or customary international law. The former and the latter are independent bodies of international law, and a judgment rendered under one of them does not and cannot prejudge or diminish a State's right under the other. This is especially important to a State's inherent[316] right to self-defence under Article 51 of the UN Charter, which cannot be limited or diminished based on other instruments in international law.

271. Judge Robinson, despite voting in favour of the indication of provisional measures, acknowledged in his Separate Opinion that

> "It is critical to note that the fact that the military operation by Russia appears to be capable of falling within the Convention as being in breach of Article I, has no implication for Russia's claimed right of self-defence. The right of self-defence recognized in Article 51 is inherent in every State and cannot be overridden by any pronouncement the Court may make as to the consistency of Russia's military operation with the Genocide Convention."[317]

272. Judge Robinson's argumentation applies not only to the special military operation based on Article 51 of the UN Charter, but also to the recognition of States, which lies within the discretionary power of States and is governed by separate rules of general international law.

273. Therefore, a judgment of the Court under the Convention upholding Ukraine's claims in this Case would be devoid of practical effect (*effet utile*). For this reason, the Court needs to preserve its judicial integrity, and declare Ukraine's claims inadmissible.

C. FIFTH PRELIMINARY OBJECTION: UKRAINE'S *REVERSE COMPLIANCE* REQUEST TO CERTIFY THAT UKRAINE DID NOT BREACH THE CONVENTION IS INADMISSIBLE

274. As explained in Chapter III above, Ukraine did not show the existence of a dispute with the Russian Federation under the Genocide Convention. In addition and/or in alternative, Ukraine's request for the Court to "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" (a *reverse compliance*

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[316] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment. I.C.J. Reports 1986, pp. 102-103, ¶193.

[317] Provisional Measures Order, Separate Opinion of Judge Robinson, pp. 8-9, ¶32.

request, by which Ukraine seeks to proactively establish through the Court's proceedings that it cannot be held responsible for violation of international law) must be declared inadmissible for the following reasons.

275. Requests of such nature are extremely rare in inter-State dispute settlement. This is because in the normal course of a dispute, it is the State that has a standing to invoke responsibility for an internationally wrongful act that will bring a claim against the wrongdoer State. This is preceded by due preparation and invocation of responsibility in a manner described in Part Three, Chapter 1, of the ILC Articles on State Responsibility. In this Case, as already explained in previous Chapters, the Russian Federation has not yet invoked the international responsibility of Ukraine for violations of the Convention.[318]

276. The *reverse compliance* procedure is currently reserved for the WTO, which is a self-contained regime and its practices are not directly transposable to the Court. But even when *reverse compliance* claims are used in the WTO procedure, such claims are only allowed in relation to disputes concerning compliance with a previously issued recommendation or ruling of the WTO Dispute Settlement Body[319] – *i.e.* after a particular case was reviewed by that Body. However, Ukraine presents its *reverse compliance* claim pre-emptively of any decision on its responsibility under the Convention. Such pre-emptive claims are not permitted even by the WTO dispute settlement procedure and are even less appropriate in the Court's practice.

277. It follows that requests like the one made by Ukraine in this Case are not to be taken at face value – rather, it is the task of the Court to determine whether they are admissible in light of the circumstances of each case. In this Case, Ukraine's request that the Court declare that "there is no credible evidence that Ukraine is responsible for committing genocide" should be declared inadmissible because (*i*) it is incompatible with the judicial function of the Court, which is tasked with settling legal disputes and not acting as a fact-finding body while criminal investigations on the commission of the crime of genocide are ongoing, and (*ii*) the claim may interfere with the right of the Russian Federation to invoke Ukraine's responsibility in the future, should it decide to do so.

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[318] *See above*, ¶¶95-97.

[319] *See* Understanding on Rules and Procedures Governing the Settlement of Disputes, Article 21(5), available at: https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm#21.

278. The unfounded nature of Ukraine's request has already been noted by Judge Bennouna, who in his declaration to the Provisional Measures Order expressed:

> "…I am not convinced that the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or the "1948 Convention") was conceived, and subsequently adopted, in 1948, 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.
>
> …
>
> It is not sufficient for the Court to state 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" (Order, paragraph 60). The Court must also be able to found this alleged plausible right on one of the provisions of the Genocide Convention which the Russian Federation is said to have breached."[320]

279. Judge Bennouna's opinion highlights the patent incompatibility of *reverse compliance* request with the Convention – there is *no* textual basis in the Convention for the Court to entertain it.

280. ***First***, as explained above, the Convention does not govern the question whether one State's allegations in respect of another State's violations of the Convention are valid.[321] The issue that Ukraine attempts to put before the Court, that is, whether Ukraine did or did not breach the Convention, could effectively be considered only in the framework of an application brought *against* Ukraine, not *by* Ukraine. By instituting these proceedings, Ukraine in fact pursues an anticipated and premature defence against any other eventual claims that may be filed against it.

281. As the Court stated in the *Nuclear Tests (Australia v. France)*,

> "While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony."[322]

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[320] Provisional Measures Order, Declaration of Judge Bennouna, p. 1, ¶¶2, 6.

[321] *See above*, ¶¶152-153.

[322] *Nuclear Tests (Australia v. France)*, Judgment, I.C.J. Reports 1974, p. 271, ¶58.

282. Ukraine's attempt to adjudicate its own responsibility and possible defences to it within an application brought by itself against the Russian Federation is an example of such needless litigation.

283. ***Second***, Ukraine's attempt to pre-empt a possible application against it under the Convention and thereby absolve itself of the risk of responsibility in the future contradicts principles of judicial propriety. Resolving an inter-State dispute requires careful and lengthy preparatory work. A premature *reverse compliance* request like the one made by Ukraine can have the unwarranted effect of not only exonerating the applicant from responsibility before other States have had the opportunity to prepare their respective claims and actually invoke the applicant's responsibility under international law, but also of obstructing any national or international investigation. This is particularly true in a dispute related to the Genocide Convention.[323]

284. In case of a successful *reverse compliance* request, a State can obtain a declaration from the Court of its compliance with a treaty without running a risk of any adverse consequences in case its application is dismissed.

285. Furthermore, should a request for a declaration of non-violation succeed, the applicant State may obtain an undue advantage by virtue of Article 60 of the Court's Statute: an eventual judgment would constitute *res judicata* and the injured State may be precluded from subsequently bringing its claims before the Court. Pursuant to Article 60 of the Statute, the judgment of the Court "is final and without appeal". Therefore, the Court's pronouncement of lack of "existence of credible evidence that Ukraine is responsible for committing genocide" at this stage will be an efficient safeguard for Ukraine.

286. Finally, the Russian Federation is of the view that Ukraine's *reverse compliance* request is inconsistent with the judicial function of the Court. By asking the Court to determine that there is no "credible evidence" regarding the commission of genocide by Ukraine, while the competent authorities of the Russian Federation find themselves in ongoing criminal investigations, Ukraine attempts to rely on the Court as if it were an interim fact-finding body. The Court, however, is tasked with resolving legal disputes between States, not with assessing factual matters before a legal dispute has actually materialised.

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[323] *See above*, ¶111.

287. The absence of such *reverse compliance* claims in the Court's jurisprudence is telling. The only case that may appear remotely relevant is the *Rights of Nationals of the United States of America in Morocco (France v. United States of America).* However, its circumstances, as well as the nature of the claim under the Court's review, were completely different.

(a) ***First,*** the *Rights of Nationals* case did not concern the investigation of crimes, especially of such magnitude as genocide. In that case, France asked the Court a question of purely legal nature that did not hinge upon the examination of evidence – to interpret certain treaties for the purposes of establishing applicability of certain domestic regulations to the nationals of the US in Morocco.[324]

(b) ***Second,*** France did not seek any remedies. In contrast, Ukraine has asked the Court to award various remedies, including compensation, following Ukraine's request for a declaration that it did not breach the Convention.

(c) ***Third***, the *Rights of Nationals* case concerned what was essentially a bilateral matter between two States, whereas in this Case the obligations under the Convention are of *erga omnes* nature.[325]

(d) ***Fourth and finally***, even if one could consider France's application in the *Rights of Nationals* case to be even remotely similar to Ukraine's request in this Case, any such resemblance ended when the respondent State, in that case the US, chose not to pursue any objections to the jurisdiction or admissibility and instead brought a counterclaim against France. From that moment, the *Rights of Nationals* case ceased to be a case of a declaratory or non-violation nature and was transformed into a standard contentious case between two States.

288. Therefore, Ukraine's application for a *reverse compliance* declaration is not in accordance with the practice of the Court and can prejudice its judicial propriety and thus must be declared inadmissible.

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[324] *Case Concerning Rights of Nationals of the United States of America in Morocco,* Judgment of August 27th, 1952: I.C.J. Reports 1952, pp. 179-180; *Case Concerning Rights of Nationals of the United States of America in Morocco*, France's application instituting proceedings, p. 12.

[325] *Barcelona Traction, Light and Power Company, Limited*, Judgment, I.C.J. Reports 1970, p. 32, ¶33-34.

D. SIXTH PRELIMINARY OBJECTION: UKRAINE'S APPLICATION IS AN ABUSE OF PROCESS

289. Considering all facts and arguments that the Russian Federation has presented in previous Chapters, Ukraine's Application is also inadmissible in its entirety because it constitutes an abuse of process.

290. According to the principle of abuse of process, "if a State has the right of access to an international court yet uses it in an abusive way, the court shall refrain from exercising its jurisdiction over the State and its claims."[326] This principle draws "from requirements of good order that are applicable to each and every judicial system" that "a tribunal may decline to exercise jurisdiction because it decides that the doctrine of…abuse of process…is applicable."[327]

291. Abuse of process in general terms consists of the

> "use of procedural instruments and entitlements with a fraudulent, malevolent, dilatory, vexatious, or frivolous intent, with the aim to harm another or to secure an undue advantage to oneself, with the intent to deprive the proceedings… of their proper object and purpose or outcome, or with the intent to use the proceedings for aims alien to the ones for which the procedural rights at stake have been granted."[328]

292. Abuse includes the use of judicial procedures for purposes "that are alien to those for which the procedural rights were established", "procrastinatory or frivolous", "propagand[istic]", "malevolent" or in "bad faith", as well as for the purpose of "causing harm or obtaining an illegitimate advantage", "reducing or removing the effectiveness of some other available process".[329] Kolb has elaborated on this idea and argued that

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[326] Y. Fukunaga, Abuse of Process under International Law and Investment Arbitration in *ICSID Review*, Vol. 33, No. 1 (2018), p. 184. *See* also E. Gaillard, Abuse of Process in International Arbitration in *ICSID Review* (2017), Vol 32, No. 1, p. 16.

[327] V. Lowe, Overlapping Jurisdiction in International Tribunals, *Australian Yearbook of International Law*, Vol. 20 (1999), pp. 202–203; cited by G. Gaja, *Relationship of the ICJ with Other International Courts and Tribunals*, in A. Zimmermann, K. Oellers-Frahm *et al.* (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), p. 650.

[328] R. Kolb, *General Principles of Procedural Law* in A. Zimmermann A., K. Oellers-Frahm et al. *(eds.)*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), pp. 998-999.

[329] *Ibid*.

"'abuse of process' connotes a sense of maliciousness, unreasonableness and arbitrariness."[330]

293. If a State files a case with an international court on spurious grounds or in an untimely manner, thereby causing prejudice to the respondent and compromising the proper functioning of the Court, the filing of the case would be considered unreasonable or arbitrary and hence abusive.[331] If an applicant State files a case in an abusive way, the international court should refrain from exercising its jurisdiction because it possesses the relevant case management powers and an inherent jurisdiction to "maintain its judicial function".[332]

294. The Court's jurisprudence confirms that the Court may refuse to consider the case if it finds that an application has been filed abusively.[333]

295. The Court acknowledged in *Northern Cameroons* that its judicial function "is circumscribed by inherent limitations which are none the less imperative because they may be difficult to catalogue and may not frequently present themselves as a conclusive bar to adjudication in a concrete case".[334]

296. Judge Higgins stated in her Separate Opinion in *Legality of Use of Force (Serbia and Montenegro v. United Kingdom)* that it is not "whether the present circumstances are exactly identical to the few examples where the Court itself has removed a case from the

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[330] Y. Fukunaga, Abuse of Process under International Law and Investment Arbitration in *ICSID Review*, Vol. 33, No. 1 (2018), p. 185, citing R. Kolb, LA BONNE FOI EN DROIT INTERNATIONAL PUBLIC: CONTRIBUTION A` L'ETUDE DES PRINCIPES GENERAUX DE DROIT (Presses Universitaires de France, 2001), pp. 468-469.

[331] C. Brown, A COMMON LAW OF INTERNATIONAL ADJUDICATION (OUP, 2007), pp. 248–249.

[332] H. Thirlway, *The Law and Procedure of the International Court of Justice 1960–1989, Supplement 2005: Parts One and Two* in BRITISH YEARBOOK OF INTERNATIONAL LAW, Vol. 76, Issue 1 (OUP, 2006), pp. 12-14. Although judicial authorities in general are very cautious to implement strict remedies against abuse of process, nothing precludes an international court from applying the measures that it considers appropriate (including the most categorical ones) to prevent procedural violations. In this regard, Article 294 UNCLOS directly provides for the court's right to discontinue proceedings if it finds that the claim constitutes an abuse of right. Under Article 3 of the Optional Protocol to the International Covenant on Civil and Political Rights the Human Rights Committee shall consider inadmissible any communication which it considers to be an abuse of the right of submission.

[333] *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018, p. 336, ¶150; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019, pp. 42-43, ¶113; *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019, p. 433, ¶49; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment, 22 July 2022, p. 21, ¶49.

[334] *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963, I.C.J. Reports 1963, p. 30.

List (examples which will, in their turn, have been "new" at the relevant time and not falling into any previously established category)", but "whether the circumstances are such that it is reasonable, necessary and appropriate for the Court to strike the case off the List as an exercise of inherent power to protect the integrity of the judicial process".[335]

297. Thus, it is impossible to enumerate all circumstances in which the Court should decline to exercise jurisdiction; it requires a case-by-case inquiry into the specific circumstances of the applicant's case.

298. In this Case, Ukraine's claims and conduct in these proceedings are so abusive that they render the Application inadmissible. In fact, the present Case is unique in terms of quantity and magnitude of abuses by the Applicant and States seeking to intervene into the proceedings to support the Applicant. Some of these abuses are self-evident (such as propagandistic nature of Ukraine's written pleadings, which contain a large number of irrelevant, highly politicised statements); others will be examined below. Separately and cumulatively, the level of abuse in this Case is far above previous cases where the Court considered matters of abuse of process.

i. <u>Ukraine is abusing the Convention's dispute settlement mechanism</u>

299. Provisions like Article IX of the Convention were intended to be triggered by disputes related to the Convention's subject-matter; they do not, and cannot, possess a blanket character tantamount to a declaration accepting the compulsory jurisdiction of the Court in any and all cases.[336] Thus, they do not and cannot constitute a proper link for the examination of claims relating to, primarily, the application or interpretation of customary international law, or of the UN Charter, as Ukraine purports to utilise them.

300. The Court has recognised that it always needs to verify whether the object of the request of the applicant falls within the Court's judicial function,[337] because the latter is limited by considerations of integrity and propriety. The Court further stated that

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[335] *Legality of Use of Force (Serbia and Montenegro v. United Kingdom),* Preliminary Objections, Judgment, I.C.J. Reports 2004, Separate Opinion of Judge Higgins, p. 1362, ¶12.

[336] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia*), Judgment, I.C.J. Reports 2015, p. 49, ¶93.

[337] *Frontier Dispute (Burkina Faso/Niger),* Judgment, I.C.J. Reports 2013, p. 69, ¶45; *Nuclear Tests (New Zealand v. France),* Judgment, I.C.J. Reports 1974, pp. 466-467, ¶¶30-31.

> "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 the case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character."[338]

301. As it was explained in Chapter IV, Ukraine attempts to create an illusory *jurisdictional link* to make the Court examine matters outside the Convention.[339] This would be contrary to the Convention's object and purpose. Having invented this artificial *jurisdictional link*, Ukraine has brought to the Court a request for relief that is unavailable under the Convention. This approach is at odds with the reasons why the Contracting Parties signed or acceded to the Convention in the first place, or have refrained from making reservations to its compromissory clause – which exists exclusively to settle disputes under the Convention and not outside or beyond it.[340]

302. If international adjudicators start to favour such abusive tactics to seise judicial bodies of disputes unrelated to the subject-matter of the treaty, other States may start to denounce such treaties or at least make new reservations to the compromissory clauses in order to avoid such risks. This would weaken the international framework for adjudicating inter-State disputes. The Court, vested with the task to promote peaceful settlement of disputes,[341] should be wary of such an unwarranted outcome, especially in respect of such an important treaty like the Convention.

303. Ukraine is taking this approach to the extreme; not only does it create a dangerous precedent, it also effectively undermines the Convention. Ukraine's abuse of the compromissory clause will be detrimental to this important multilateral treaty.

304. Accordingly, Ukraine's attempts to drag its claims into the scope of Article IX of the Convention constitute an abuse of process and thus Ukraine's claims are inadmissible.

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[338] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963: I.C. J. Reports 1963, p. 29.

[339] *See above*, Chapter IV, Section A.

[340] *See above*, ¶¶164, 184 et seqq.

[341] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, I.C.J. Reports 2004, p. 200, ¶161.

ii. Ukraine is abusively changing its legal case within the course of these proceedings

305. As explained above,[342] after Ukraine had submitted the Application, it then completely re-invented its case in a manner inconsistent with the Statute and Rules of Court. Ukraine's submissions in the Application and in the Memorial represent two different cases. In February 2022, Ukraine requested the Court to declare that "no acts of genocide have been committed" in the DPR and LPR, and that the Russian Federation's actions "had no basis" in the Convention. In July 2022, these submissions were replaced by those of an entirely different nature: that the Court declare Ukraine to not be *responsible for commission of genocide* (completely removing its potential responsibility for failure to perform the basic obligations of preventing and punishing genocide), and that the Russian Federation's actions constituted a positive *violation* of the Convention.

306. Ukraine does not hesitate to juggle with the wording of its claims and Articles of the Convention that it alleges to be relevant to the case. It grabs different legal provisions of the Convention that are in actuality not related to the case in order to mislead the Court and the Russian Federation as to what relief it actually seeks and what legal basis underlies that relief.

307. By including the second set of submissions in its Memorial, Ukraine acts clearly unreasonably and attempts to suddenly change its claims to circumvent Article 38(2) of the Rules. As per Kolb,[343] this constitutes a serious procedural abuse.

iii. The timing of the Application is abusive

308. In *Certain Phosphate Lands in Nauru* the Court stated:

> "The Court recognizes that, even in the absence of any applicable treaty provision, delay on the part of a claimant State may render an application inadmissible."[344]

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[342] *See above*, Chapter V, Section A.

[343] *See above*, ¶¶70-72, 291.

[344] *Certain Phosphate Lands in Nauru (Nauru v Australia)*, Preliminary Objections, Judgment (26 June 1992) 2004, ICJ Rep 12, pp. 253, ¶32.

309. This is recognised as a general principle of law, according to which an unjustified delay by a party may render its request inadmissible.[345] This reflects a general rule against undue delay in international legal proceedings, which in turn is based on the principles of procedural fairness (aimed at protecting the other party against unfair surprise) and the good administration of justice.[346]

310. Ukraine alleges that a dispute with the Russian Federation has lasted since at least 2014.[347] However, Ukraine does not explain why, if this is indeed the case, it had not filed any application against the Russian Federation under the Convention until 2022. Moreover, for all these years Ukraine had never taken a stance even remotely resembling its current allegations, ostensibly related to the Convention.

311. The only plausible explanation for Ukraine's conduct would be that until this point, it had never considered that it had a "legal dispute" with the Russian Federation in the sense of Articles 36 and 38 of the Statute. It only turned to its convoluted interpretation of the Convention in February 2022, when it sought to create a *jurisdictional link* between its claims concerning the Russian Federation's use of force and recognition of new States and the Convention.

312. While the general principle formulated in *Certain Phosphate Lands in Nauru* is certainly applicable in the present case, some particular circumstances in *Nauru* were different: while both Parties to that case (Australia and Nauru) knew about the dispute between them for 15 years, the Russian Federation was never aware of an alleged dispute with Ukraine under the Convention that could be referred to the Court.[348]

iv. <u>Ukraine arranged an abusive mass intervention into this Case</u>

313. Scholars have noted in respect to incidental proceedings that they are a popular tactic of interfering with the ordinary course of the Court's proceedings:

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[345] J. Quintana, LITIGATION AT THE INTERNATIONAL COURT OF JUSTICE: PRACTICE AND PROCEDURE (Koninklijke Brill NV, 2015), p. 987.

[346] Christian J. Tams, *III Procedure, Article 52* in A. Zimmermann, K. Oellers-Frahm *et al.* (eds.), THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY (3rd ed., OUP, 2019), p. 1454.

[347] Memorial, ¶2.

[348] *See above,* Chapter III, Sections A – C.

> "It is clear that parties have developed a large array of litigation tactics which, considered loosely, can often be labelled as being abusive. This is particularly the case with incidental proceedings, since they have a highly disruptive nature in the judicial process."[349]

314. Interventions have drawn particular attention in that regard, with scholars expressing concerns that this instrument may be abused for ulterior political purposes:

> "The use of procedural incidents may also be seen as abusive when they are primarily designed to give the applicant a public forum for its claim... The Court may thus be used for political aims rather than for pursuing justice
>
> …
>
> Intervention may also be mentioned since third States who are granted the possibility to intervene in ongoing proceedings may, however, seek to intervene in a case for the sole purpose of having a podium to voice their claims and opinions."[350]

315. In this Case, Ukraine does not even try to hide that it has actively engaged in *lawfare* against the Russian Federation, and even created a website with the same name on its governmental servers dedicated to its legal campaign.[351]

316. In its legal crusade against the Russian Federation, Ukraine has decided to use the tool of *mass interventions*, inviting dozens of States to support or just repeat its claims in the Court with the sole goal of putting political pressure on the Court and the Russian Federation. These abusive tactics have commenced long before the submission of Ukraine's Memorial.

317. Already on 20 May 2022, 41 States and the EU published a Joint Statement supporting Ukraine's Application to the Court. Crucially, all those States have expressed their "joint intention to explore all options to support Ukraine in its efforts before the ICJ and to consider a possible intervention in these proceedings".[352] By doing so, the signatories

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[349] M. Lemey, Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process*"* in *The Law & Practice of International Courts and Tribunals*, Vol. 20 (2021), p. 9.

[350] *Ibid.*, p. 20.

[351] *See* Law Confrontation with the Russian Federation at: https://lawfare.gov.ua/.

[352] Joint Statement by Albania, Australia, Austria, Belgium, Bosnia & Herzegovina, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Georgia, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Marshall Islands, Micronesia (Federated States of), Montenegro, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, United Kingdom, United States, European Union, 20 May 2022, available at: https://www.auswaertiges-amt.de/en/newsroom/news/-/2532254.

essentially confirmed that they are willing to use intervention as a tool of supporting one of the Parties – Ukraine – in these proceedings.

318. Less than two weeks after Ukraine had filed its Memorial, on 13 July 2022, a second joint statement came out, in which 44 signatories once again declared their intention to intervene in the present proceedings in order to support Ukraine in its case against the Russian Federation:

> "We reiterate our support for Ukraine's Application instituting proceedings against the Russian Federation before the International Court of Justice under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, which seeks to establish that Russia has no lawful basis to take military action in Ukraine on the basis of unsubstantiated allegations of genocide.
>
> …
>
> It is in the interest of all States Parties to the Genocide Convention, and more broadly of the international community as a whole, that the Convention not be misused or abused. That is why the signatories of the present declaration which are Parties to the Genocide Convention intend to intervene in these proceedings.
>
> …
>
> We once again call upon the international community to explore all options to support Ukraine in its proceedings before the ICJ."[353]

319. Individual statements from some of the declarants further confirm their motives:

    (a) for example, after filing its declaration of intervention under Article 63 of the Statute, Poland stated that its declaration "is part of Poland's consistent policy of

[353] Joint Statement by Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Marshall Islands, Moldova, Monaco, Montenegro, Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, United Kingdom, United States and the European Union, Joint statement on supporting Ukraine in its proceeding at the International Court of Justice, 13 July 2022, available at: https://ec.europa.eu/commission/presscorner/detail/en/statement_22_4509. *See* also Joint statement by the Ministers for European Affairs of the Weimar Triangle - Federal Foreign Office (auswaertiges-amt.de), 16 September 2022, available at: https://www.auswaertiges-amt.de/en/newsroom/news/weimar-triangle/2552384: "France, Germany and Poland also reiterate their support for Ukraine's legal proceedings against the Russian Federation including by intervening in Ukraine's proceedings before the International Court of Justice under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide..."

firmly condemning all unlawful actions by Russia and is an expression of our support and solidarity for Ukraine";[354]

(b) Sweden, on its part, has also disclosed that it would "put forward positions that are in line with those of Ukraine".[355]

320. Unsurprisingly, the contents of those submissions repeat Ukraine's arguments. Unlike any ordinary applicant in the Court's proceedings, which has one shot at presenting its position to the Court, Ukraine will have its case presented possibly over 40 times, by abusing the mechanism of intervention under Article 63 of the Statute. This would not only severely harm the Russian Federation and violate the principle of equality of Parties, but would also overload the Court. Such tactic is regarded as a distinct type of abuse:

> "Many other instances of abuse of procedure could be envisaged, *e.g.*, the 'flooding' of the Court with procedural objections of any type, in order to frustrate the efficacy of the proceedings…"[356]

321. There should be no doubt as to Ukraine's role or purpose in this grand scheme of abuse. Romania, one of the declarants, publicly admitted that Ukraine stands behind this campaign of mass intervention and coordinates other States in what and when they should present to the Court:

> "The Romanian démarche to intervene in this process comes at the express request of the Ukrainian side… In the context of these proceedings, Romania will coordinate with other *like minded* States that have taken a similar decision and will cooperate closely with Ukraine's representatives involved in the proceedings at the ICJ."[357]

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[354] Ministry of Foreign Affairs of the Republic of Poland, Press release, Poland Filed a Declaration of Intervention to the International Court of Justice in Ukraine's Case Against Russia, 16 September 2022, available at: https://www.gov.pl/web/diplomacy/poland-filed-a-declaration-of-intervention-to-the-international-court-of-justice-in-ukraines-case-against-russia.

[355] Ministry for Foreign Affairs of Sweden, Press release, Sweden Participating in Two Court Cases Concerning the War in Ukraine, 9 September 2022, available at: https://www.government.se/press-releases/2022/09/sweden-participating-in-two-court-cases-concerning-the-war-in-ukraine/.

[356] R. Kolb, *General Principles of Procedural Law* in A. Zimmermann, K. Oellers-Frahm et al. *(eds.)*, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY, (3rd ed., OUP, 2019), p. 1002.

[357] Ministry of Foreign Affairs of Romania, Press release, Romania Has Decided to Intervene in Favour of Ukraine at the International Court of Justice in Proceedings Against the Russian Federation,18 May 2022, available at: https://www.mae.ro/en/node/58706#null.

322. Cases where only a few States shared "the same interest" in interconnected (though separate) proceedings, or one State intervened while sharing the same goals as one of the Parties, have already been a matter of concern for Judges of the Court.

323. In *Whaling in the Antarctic*, Judge Owada expressed concern over just one State intervening. He believed that Australia and New Zealand pursuing a joint case against Japan would prejudice the latter's procedural rights:

> "although Japan does not raise a formal objection to the intervention, it seems evident that it is deeply concerned that New Zealand's intervention could have consequences that would affect the equality of the Parties to the dispute and thus the fair administration of justice…
>
> Japan pointed to the fact that 'by pursuing what may be in effect a joint case under the rubric of an Article 63 intervention [Australia and New Zealand] could avoid some of the safeguards of procedural equality under the Statute and Rules of the Court.'
>
> …
>
> It is regrettable that a State party to a case before the Court and a State seeking to intervene in that case pursuant to Article 63 of the Statute should engage in what could be perceived as active collaboration in litigation strategy to use the Court's Statute and the Rules of Court for the purpose of promoting their common interest, as is candidly admitted in their Joint Media Release of 15 December 2010."[358]

324. Judge Xue expressed similar concerns of inequality of the parties in *The Gambia v. Myanmar*, where the applicant instituted proceedings on behalf of an international organisation, specifically referring to the number of Judges on the Bench:

> "When the applicant is in fact acting on behalf of an international organization, albeit in its own name, the respondent may be placed in a disadvantageous position before the Court. <u>This is particularly true if several judges on the bench are nationals of member States of the international organization concerned</u>. With the organization in the shadow, inequality of the Parties may be hidden in the composition of the Court, thereby undermining the principle of equality of the parties, one of the fundamental principles of the Court for dispute settlement."[359] [<u>Emphasis</u> added]

325. As matters stand, numerous declarants (Germany, France, the US) already have their nationals as judges of the Court. Taken together, the States seeking to intervene in the

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[358] *Whaling in the Antarctic (Australia v. Japan)*, Declaration of Intervention of New Zealand, Order of 6 February 2013, I.C.J. Reports 2013, Declaration of Judge Owada, p. 12, ¶¶4-5.

[359] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Judgment, 22 July 2022, Dissenting Opinion of Judge Xue, pp. 2-3, ¶10.

proceedings have four nationals as Judges on the Bench, and if other States that declared their intention to intervene make good on their promise, this number would be even larger.

326. Considering that Ukraine also has a Judge *ad hoc* on the Bench, this campaign of intervention creates a dangerous situation in which a significant number of judges could be from States that are "parties of the same interest". The Russian Federation believes in the impartiality of the judges of the Court, but conflict of interest may arise in this Case.

327. Judge Kreća observed in *Legality of Use of Force (Serbia and Montenegro v. Belgium)* that the Court considered NATO members in that case to be parties of the same interest:

> "As regards Belgium, Canada and Italy, the Court adopted the relevant decision "pursuant to Article 31, paragraph 5, of the Statute, *taking into account the presence on the Bench of judges of British, Dutch and French nationality*" (CR 2004/6, pp. 6-7; emphasis added). The interpretation of this explanation of the Court's decision inevitably leads to the conclusion that the Court considered not only Belgium, Canada and Italy as parties in the same interest, but also France, the Netherlands and the United Kingdom."[360]

328. In this Case, the sheer magnitude of the interventions – their number and the volume of submissions – is absolutely unprecedented and dwarfs any previous cases, while their coordination and ulterior political motives are in plain public sight.

329. Accordingly, Ukraine – with assistance from its political allies – has set up and perpetrated a campaign of mass intervention under Article 63 of the Statute, which puts enormous pressure on the Court, as well as on the Respondent. This is clear evidence of Ukraine's abuse of process through acting in bad faith and obtaining an illegitimate advantage to the detriment of the other Party to the proceedings.

330. In sum, the totality of evidence, both referred to in Section D and elsewhere in the Preliminary Objections, demonstrates that Ukraine's claims and conduct in these proceedings constitute such a serious abuse of process that this Case should qualify as an exceptional instance in which the Court should reject Ukraine's claims on the ground of abuse of process. Accordingly, the Court's high threshold for abuse of process, as formulated in its *jurisprudence constante*, is met in this Case.

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[360] *Legality of Use of Force (Serbia and Montenegro v. Belgium)*, Preliminary Objections, Judgment, I.C.J. Reports 2004, Separate Opinion of Judge *ad hoc* Kreća, pp. 420-421, ¶72.

VI. SUBMISSIONS

331. 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.

332. The Russian Federation reserves the right to make further preliminary objections during further proceedings, if any.

Agent of the Russian Federation

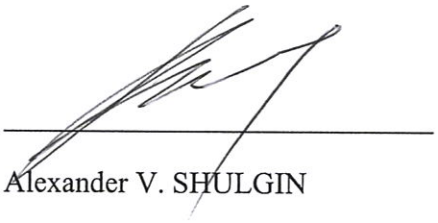
Alexander V. SHULGIN

The Hague, 1 October 2022

CERTIFICATION

I hereby certify that the annexes are true copies of the documents referred to and that the translations provided are accurate.

Agent of the Russian Federation



Alexander V. SHULGIN

The Hague, 1 October 2022

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