

## SEPARATE OPINION OF PRESIDENT DONOGHUE

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

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

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

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

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

### I. THE SUBMISSIONS IN UKRAINE’S MEMORIAL FUNDAMENTALLY CHANGE THE CLAIMS FORMING PART OF THE SECOND ASPECT OF THE DISPUTE

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

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

“Ukraine respectfully requests the Court to:

- (a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.
- (b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.
- (c) Adjudge and declare that the Russian Federation’s recognition of the independence of the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’ on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.
- (d) Adjudge and declare that the ‘special military operation’ declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

.....

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

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

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

.....

- (b) Adjudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine.
- (c) Adjudge and declare that the Russian Federation’s use of force in and against Ukraine beginning on 24 February 2022 violates Articles I and IV of the Genocide Convention.
- (d) Adjudge and declare that the Russian Federation’s recognition of the independence of the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic” on 21 February 2022 violates Articles I and IV of the Genocide Convention.

.....

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

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

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

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

11. In the present Application, however, instead of alleging that the Russian Federation violated obligations under the Convention, the request for relief adopts an unusual formulation. It asks the Court to adjudge and declare that the Russian Federation "cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of [the Russian Federation's] false claims of genocide". It also asks the Court to adjudge and declare that the "special military operation" and the recognition of the independence of the "so-called 'Donetsk People's Republic' and 'Luhansk People's Republic'" are "based on a false claim of genocide" and therefore have "no basis" in the Genocide Convention (Application, para. 30 (b)-(d)).

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

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

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

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

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

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

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

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

18. The significance of these changes, as I see it, lies in the relationship between the substance of a claim on the merits and the form of reparation that would be appropriate if the claim were successful. Taken together, Articles 2 and 34 of the Articles on the Responsibility of States for Internationally Wrongful Acts establish that full reparation is required for the injury caused by a breach of an international obligation that is attributable to a State. If the case were to proceed to the merits on the submissions in the Memorial, a decision by the Court that the Russian Federation had violated obligations imposed on it by the Genocide Convention would provide a clear foundation for reparations, potentially including compensation, which Ukraine expressly seeks in the Memorial (Memorial, paras. 169-170). If a State has violated a treaty obligation and the other conditions for awarding compensation are met (proof of damage and a sufficient causal link), compensation is an available remedy.

19. If the claims that form part of the second aspect of the dispute were limited to those presented in the Application, however, the Court would not be asked to find that the Russian

Federation had violated obligations under the Convention. Absent a finding on the merits that the Respondent had violated obligations under the Convention, the basis for awarding compensation (assuming that Ukraine had prevailed on the merits) would be far less evident. In such a situation, the relief granted to Ukraine might well have been limited to a declaratory judgment addressing the question whether the Respondent had interpreted and applied the Convention in good faith.

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

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

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

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

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

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

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

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

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

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

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

(Signed) Joan E. DONOGHUE.

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