JOINT DISSENTING OPINION OF JUDGES SEBUTINDE AND ROBINSON

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

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

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

INTRODUCTION

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

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

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

3. Failure to interpret the Convention in this way flies in the face of the generally accepted scope of the duty to prevent and punish genocide and may result in serious harm for some State parties. Take, for instance, State A, a small, militarily weak developing country. Its population consists mainly of the descendants of enslaved Africans, but the rest of its population includes a

small minority of citizens who are descendants of Indian indentured labourers. Nearby is State B, a big, militarily strong country, which has ethnic ties to State B's Indian population. This country alleges that State A is killing members of the Indian minority population in a manner that amounts to genocide under the Genocide Convention. State A vehemently denies this accusation, describing it as a shameful concoction. Nonetheless, State B uses this allegation of State A's breach of the Genocide Convention as a pretext for invading State A; in taking this action, State B asserts that it is acting under the Genocide Convention to prevent State A's genocidal acts. The militarily weak State A is in no position to resist this invasion, which results in the death of a significant number of its population and causes damage to property amounting to billions of dollars. Both States A and B are parties to the Genocide Convention.

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

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

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

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

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

8. Determining whether a State has consented to the jurisdiction of the Court will on many occasions not be problematic. However, there are occasions when, as in this case, the exercise is fraught with difficulties. The question, therefore, is whether there is before the Court a dispute between Ukraine and the Russian Federation relating to the interpretation, application or fulfilment of the Genocide Convention. The majority find that there is no such dispute in relation to Ukraine's

submissions *(c)* and *(d)* in paragraph 178 of its Memorial. For our part, we do not agree with this finding.

PART I

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

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

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

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

> "Article 26 combines two elements, which are of equal importance. It provides that 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith.' This latter element, in the Court's view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized." (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, pp. 78-79, para. 142.)

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

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

hesitant in confronting the issue whether the principle of good faith has been incorporated into the Genocide Convention.

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

15. We also wish to emphasize the finding in the Court's dictum in *Gabčíkovo-Nagymaros* that the two elements of Article 26 of the VCLT are of "equal importance". The temptation to dumb down or undervalue the second element must be resisted. The Court's dictum makes clear that the obligation to perform a treaty in good faith is as important in the enjoyment of the rights and the discharge of the obligations of the parties to a treaty as its binding effect on the parties. When Article 38 of the Court's Statute lists international conventions as a source of law to be applied by the Court, it is not only referring to the binding character of a treaty, but also to the duty of the parties to a treaty to apply it in good faith. We find the dismissive attitude of the majority to the principle of good faith strange, considering that, in the Court's provisional measures Order in this case, it observed that the Contracting Parties to the Genocide Convention must implement the obligation to prevent and punish genocide under Article I "in good faith, taking into account other parts of the Convention, in particular Articles VIII and IX, as well as its preamble" (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I)*, p. 224, para. 56). Although findings in provisional measures proceedings do not bind the Court in subsequent proceedings, it is noteworthy that the majority have offered no reason for departing from that jurisprudence.

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

the States parties. The Court must interpret and apply the Genocide Convention consistently with its exalted, purely humanitarian and civilizing purposes.

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

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

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

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

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

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

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

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

1. Paragraph 142

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

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

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

28. Notably, at no point in the Court's consideration of its jurisdiction *ratione materiae* in paragraphs 142 and 143 of its Judgment does the majority attempt to explain why the principle of good faith in general international law is not to be treated as an obligation to be observed by the

parties to the Genocide Convention when they seek to discharge the conventional undertaking to prevent and punish genocide. This failure undermines the majority's reasoning.

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

2. Paragraph 143

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

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

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

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

PART II

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

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

33. Throughout its analysis, the majority have failed to address the substance of Ukraine's case. Simply put, Ukraine's case is that the Russian Federation breached the obligation inherent in Article I to act reasonably and within the limits permitted by international law in any act that it takes to fulfil its undertaking to prevent and punish genocide. The analysis is — and we say so with respect — inconclusive, indeterminate, uncertain and, for the most part, misdirected. The opinion now proceeds to an examination of the majority's analysis in paragraph 146 of the Judgment.

1. Paragraph 146

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

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

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

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

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

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

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

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

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

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

44. In this paragraph, the majority contend that "[t]he Court did not intend, by its 2007 ruling, to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force". But we do not have to speculate as to what the Court intended by its ruling in 2007 because it stated quite unequivocally what it was doing: in outlining

the scope of the duty to prevent under the Genocide Convention, the Court held that States parties to the Convention "may only act within the limits permitted by international law" in any action that they take to prevent and punish genocide. The Court's formulation — "may only act" — is confining, decisive, categoric and jussive in the instruction that it conveys to States parties to the Genocide Convention. The majority's conjecture as to the intention of the Court in *Bosnian Genocide* is therefore wholly unwarranted. In this paragraph, therefore, the Court is addressing what a State party may and may not do in fulfilling its duty to prevent and punish genocide. Significantly, no mention is made by the majority in this Judgment of the Court's explanatory statement in paragraph 429 of the *Bosnian Genocide* case. This statement makes clear that in paragraph 430, the Court was outlining the scope of the duty to prevent genocide under Article I of the Genocide Convention.

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

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

47. In sum, the scope of the duty to prevent and punish genocide under Article I of the Genocide Convention includes the duty to act within the limits permitted by international law. Ukraine's case is that, by its "special military operation", the Russian Federation did not act within the limits permitted by international law. The Court therefore has jurisdiction to entertain Ukraine's claim that the Russian Federation breached the requirement under Article I to act within the limits permitted by international law in any act taken to prevent or punish genocide. The majority should therefore have concluded that the Court has the jurisdiction to entertain Ukraine's claim and should leave for the merits the determination whether by conducting its "special military operation" the Russian Federation had acted within the limits permitted by international law.

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

CONCLUSION

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

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

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

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

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

(Signed) Julia SEBUTINDE.

(Signed) Patrick L. ROBINSON.