



INTERNATIONAL COURT OF JUSTICE

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Summary

Unofficial

Summary 2024/3

2 February 2024

Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening)

Summary of the Judgment of 2 February 2024

HISTORY OF THE PROCEEDINGS (PARAS. 1-28)

The Court begins by recalling that, on 26 February 2022, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation concerning “a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide” (hereinafter the “Genocide Convention” or the “Convention”). In its Application, Ukraine seeks to found the Court’s jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

Ukraine filed its Memorial on 1 July 2022. On 3 October 2022, the Russian Federation raised preliminary objections to the jurisdiction of the Court and the admissibility of the Application.

Between 21 July 2022 and 15 December 2022, 33 States filed declarations of intervention under Article 63, paragraph 2, of the Statute of the Court. The Russian Federation objected to the admissibility of all those declarations. By an Order dated 5 June 2023, the Court decided that the declarations of intervention under Article 63 of the Statute submitted by 32 States were admissible at the preliminary objections stage of the proceedings in so far as they concerned the construction of Article IX and other provisions of the Genocide Convention that are relevant for the determination of the jurisdiction of the Court.

I. GENERAL BACKGROUND (PARAS. 29-37)

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

On 21 February 2022, the Russian Federation formally recognized the DPR and LPR as independent States. In an address delivered on the same day, the President of the Russian Federation stated, *inter alia*, that this decision was taken in light of continuing attacks against the Donbas communities and the “genocide, which almost 4 million people are facing”. On 22 February 2022, the Russian Federation concluded what it refers to as two “Treaties on Friendship, Cooperation and

Mutual Assistance”, one with the DPR and the other with the LPR. On the same date, the DPR and LPR requested military assistance from the Russian Federation pursuant to these “treaties”. At 6 a.m. (Moscow time) on 24 February 2022, the President of the Russian Federation declared that he had decided to conduct a “special military operation” in Ukraine, stating in particular that “[i]ts purpose [wa]s to protect people who ha[d] been subjected to abuse and genocide by the Kiev regime for eight years”. The “special military operation” was launched early in the morning on the same day.

On 26 February 2022, the Ministry of Foreign Affairs of Ukraine issued a statement denouncing “Russia’s false and offensive allegations of genocide as a pretext for its unlawful military aggression against Ukraine”. On the same day, a few hours after the issuance of this statement, Ukraine filed its Application before the Court.

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

II. EXISTENCE AND SUBJECT OF THE DISPUTE (PARAS. 38-57)

A. Existence of the dispute (first preliminary objection) (paras. 38-52)

The Court explains that it must determine whether, on the date of the filing of the Application, a dispute existed between the Parties relating to the subject-matter of the Application submitted to the Court. The Court starts by recalling its established jurisprudence on this requirement, before turning to the application in the present case.

The Court considers that there was, on the date of the filing of the Application, a disagreement on the question whether genocide attributable to Ukraine had been, or was being, committed in the eastern part of its territory. Several organs of the Russian Federation, having the authority to represent the Russian Federation in international relations, issued statements that acts of Ukraine constituted genocide against the Russian-speaking inhabitants of the Donbas. The President of the Russian Federation declared, in his address of 21 February 2022 which coincided with that State’s recognition of the “republics” of Donetsk and Luhansk, that “4 million people” living in the eastern region of Ukraine were victims of “genocide”. The Permanent Representative of the Russian Federation to the United Nations, defending the recognition of the two “republics” in question before the General Assembly on 23 February 2022, claimed that the inhabitants of the Donbas region were victims of a “blatant genocide”. In his address of 24 February 2022, the President of the Russian Federation claimed that the purpose of the “special military operation” was “to protect people who have been subjected to abuse and genocide by the Kiev regime for eight years”.

Ukraine has consistently rejected accusations that genocide was being committed in its territory. The Ukrainian authorities had already, in the years before the launch of the “special military operation”, denounced the activities of the “Investigative Committee” of the Russian Federation, which was charged, *inter alia*, with investigating alleged acts of genocide committed in the Donbas region, as having no serious basis. In this context, as early as 2014, the Prosecutor General’s Office of Ukraine initiated criminal proceedings against certain Russian officials who were members of the Committee. Following the launch of the “special military operation” on 24 February 2022, the Ministry of Foreign Affairs of Ukraine issued a statement denouncing “Russia’s false and offensive

allegations of genocide”. The Russian Federation could therefore not have been unaware that the Applicant categorically rejected the allegations that it had committed genocide.

Furthermore, Ukraine denounced the use by the Russian Federation of allegations of genocide against it as a pretext for justifying an “unlawful aggression” (above-mentioned statement of the Ministry of Foreign Affairs of Ukraine). Even though this statement was issued only shortly before the institution of the proceedings, it is clear that the Russian Federation knew at that time that its views were positively opposed by Ukraine, which was accusing it of acting unlawfully by using the Convention as a pretext to justify its actions against Ukraine. In the specific circumstances of the case, the Court considers that Ukraine could seize it without further delay.

The Court concludes that, on the date of the Application, a dispute existed between the Parties on the question whether acts of genocide attributable to Ukraine had been committed in the Donbas region and on the lawfulness of the Russian Federation’s actions allegedly undertaken on the basis of such an accusation. It therefore considers that the Russian Federation’s first preliminary objection must be rejected.

B. The two aspects of the dispute (paras. 53-57)

In the Court’s view, there are two aspects of the dispute submitted by Ukraine, the essential characteristics of which are distinct and which the Court therefore considers it necessary to examine separately and in turn.

The first aspect of the dispute arises from Ukraine’s request that the Court declare that, contrary to the allegations of the Respondent, the Applicant has not committed genocide. By such a request, Ukraine does not seek to invoke the international responsibility of the Russian Federation for an internationally wrongful act attributable to that State; it seeks a judicial finding that it has itself not committed the wrongful acts that the Russian Federation has, falsely in Ukraine’s view, imputed to it in public statements.

The second aspect of the dispute arises from Ukraine’s requests that the Court find that the Russian Federation has acted unlawfully with respect to the Genocide Convention. The Court notes that this second aspect of the dispute is fundamentally different in nature from the first. Ukraine seeks to invoke the international responsibility of the Russian Federation by imputing internationally wrongful conduct to it. The claims for reparation submitted by Ukraine are part of that second aspect.

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

III. THE FIRST ASPECT OF THE DISPUTE: UKRAINE’S SUBMISSION THAT NO GENOCIDE ATTRIBUTABLE TO IT HAS BEEN COMMITTED IN THE DONBAS REGION (PARAS. 58-118)

The Court starts by noting that, during the oral proceedings, the Russian Federation stated that its second preliminary objection, in which it contends that Ukraine’s claims must be dismissed because the Court lacks jurisdiction *ratione materiae* under Article IX of the Genocide Convention, does not concern the first aspect of the dispute. The Court therefore examines this objection in relation to the second aspect of the dispute in Part IV of the Judgment. The Court adds that it sees no reason to call into question its jurisdiction to entertain the first aspect of the dispute.

The Court then turns to the remaining four preliminary objections raised by the Russian Federation.

A. Introduction of new claims (third preliminary objection) (paras. 60-72)

In its third preliminary objection, the Russian Federation contends that Ukraine's claim in the Memorial is manifestly different from the one advanced in the Application, and that it is therefore inadmissible.

The Court recalls its well-settled jurisprudence on the subject of additional or amended claims formulated in the course of proceedings, explaining in particular that such claims are inadmissible if they would transform the subject of the dispute originally brought before the Court under the terms of the application.

In the present case, both submission (a) in Ukraine's Application and its amended submission (b) in its Memorial concern the same allegations of genocide made by the Respondent. The Court is of the view that Ukraine's amended submission (b) merely clarifies the claim as presented in its Application and therefore does not transform the subject of the dispute originally brought before the Court under the terms of the Application. Accordingly, the Court thereafter considers the first aspect of the dispute to be defined in terms of Ukraine's submission (b) in its Memorial, namely whether "there is . . . credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine".

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

B. Lack of practical effect of the judgment (fourth preliminary objection) (paras. 73-80)

In its fourth preliminary objection, the Russian Federation contends that a potential judgment of the Court on Ukraine's submissions would be devoid of any practical effect.

The Court recalls that, even if it finds that it has jurisdiction, it is not compelled in every case to exercise it because there are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. The Court has stated that its judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. It is not the function of the Court to provide a basis for political action if no question of actual legal rights is involved. Accordingly, the Court cannot adjudicate upon the merits of the claim when it considers that any adjudication would be devoid of purpose.

The Applicant requests the Court to "[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine". The Court notes that its jurisprudence and that of its predecessor make clear that the Court may, in an appropriate case, issue a declaratory judgment. The purpose of a declaratory judgment is to ensure recognition of a situation at law, once and for all and with binding force as between the parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned.

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

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

C. Inadmissibility of a request for a declaration that the Applicant did not breach its obligations (fifth preliminary objection) (paras. 81-109)

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

First, the Russian Federation contends that "reverse compliance requests" are extremely rare in inter-State dispute settlement and are currently reserved for the World Trade Organization ("WTO"), whose practices are not directly transposable to the Court. The Court considers that the practices of the WTO provide no assistance to it for determining the admissibility of Ukraine's request because they are based on particular provisions of the Marrakesh Agreement establishing the World Trade Organization.

Second, the Russian Federation argues that Article IX of the Genocide Convention was not intended for "reverse compliance requests". The Court observes that Article IX clearly allows a State that invokes the responsibility of another State for genocide to submit the dispute to the Court. The question is whether Article IX precludes the possibility for a State to seek a declaration that it is not responsible for committing genocide in violation of its obligations under the Convention. The Court recalls that it has considered the phrase "including those [disputes] relating to the responsibility of a State for genocide" to be an unusual feature of Article IX, pointing out that according to the English text of the Convention, the responsibility contemplated is responsibility "for genocide" (in French, "responsabilité . . . en matière de genocide"), not merely responsibility "for failing to prevent or punish genocide". The Court has also noted the exceptional inclusion of the additional term "fulfilment" in Article IX. Moreover, Article IX specifies that disputes "relating to the interpretation, application or fulfilment" of the Convention include disputes "relating to the responsibility of a State for genocide" and provides that "*any* of the parties to the dispute" may submit such a dispute to the Court (emphasis added). In light of the above, the Court considers that Article IX does not preclude the possibility for a State to seek a declaration that it is not responsible for committing genocide in violation of the Convention.

Third, the Respondent argues that the Court has never accepted "reverse compliance requests" in its jurisprudence. The Court examines its Judgments in *Rights of Nationals of the United States of America in Morocco (France v. United States of America)* and *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v. United Kingdom)*, before stating that these two cases do not provide a basis for concluding that the Court has either accepted or denied in its jurisprudence an applicant's request for a declaration that it did not breach its obligations under a treaty.

Fourth, the Respondent argues that Ukraine's submission (*b*) is incompatible with the judicial function of the Court. The Russian Federation contends that, by ruling on Ukraine's submission (*b*), the Court would be acting as an interim fact-finding body while criminal investigations are ongoing. The Court responds that, to address Ukraine's submission (*b*), it would have to make findings of facts in light of the evidence presented by the Parties, and then apply the provisions of the Genocide Convention to the facts it has established. The Court considers that it is an integral part of its judicial function to establish the facts in light of the evidence presented and apply the provisions of the Genocide Convention to the established facts. Accordingly, the Court finds that the reasons advanced by the Respondent cannot support its argument that Ukraine's submission (*b*) is incompatible with the judicial function of the Court.

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

Having considered the five arguments of the Russian Federation, the Court then explains that, in assessing the admissibility of Ukraine's request contained in submission (*b*) of the Memorial, it takes account of the circumstances in which the request was made. It recalls that, in the present case, Ukraine made a request for a declaration that it did not breach its obligations under the Genocide Convention in the context of an armed conflict between the Parties. The Respondent took the allegedly unlawful measures in and against Ukraine with a stated purpose of preventing and punishing genocide allegedly committed in the Donbas region. In such a special context, the Court recognizes the legal interest that Ukraine has under the Genocide Convention to resolve the dispute regarding its submission (*b*). A judgment of the Court regarding Ukraine's submission (*b*) will clarify the rights and obligations of the Parties under the Genocide Convention, in particular whether Ukraine acted in accordance with its obligations under Article I of the Convention.

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

D. Abuse of process (sixth preliminary objection) (paras. 110-118)

In its sixth preliminary objection, the Russian Federation contends that Ukraine's Application is inadmissible because it constitutes an abuse of process.

The Court recalls that it is only in exceptional circumstances that the Court should reject a claim based on a valid title of jurisdiction on the ground of abuse of process. There has to be clear evidence that the Applicant's conduct amounts to an abuse of process. An abuse of process goes to the procedure before a court or tribunal and concerns the question whether a State has misused that procedure to such an extent that its case should be rejected at the preliminary phase of the proceedings.

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

The Court recalls that it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement. The Court is therefore not persuaded by the Respondent's second argument relating to the timing of Ukraine's Application.

As to the Respondent's third argument that the manner in which Ukraine allegedly rallied States to arrange a mass intervention amounts to an abuse of process, the Court notes that, in support of this argument, the Russian Federation relies exclusively on the conduct and statements of the intervening States. It has not adduced any evidence regarding Ukraine's alleged abuse of process. The Court does not consider that Ukraine, having established a valid title of jurisdiction, should be barred at this preliminary stage without clear evidence that its conduct with respect to the interventions amounts to an abuse of process. For this reason, the Court does not consider the third argument of the Respondent convincing.

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

IV. THE SECOND ASPECT OF THE DISPUTE: UKRAINE'S SUBMISSIONS RELATING TO THE COMPATIBILITY OF THE RUSSIAN FEDERATION'S ACTIONS WITH THE CONVENTION (PARAS. 119-148)

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

The Court considers that it must first examine the question of the admissibility of the submissions in the Memorial. In light of the answer to that question, it will then consider whether the submissions relating to the second aspect of the dispute fall within its jurisdiction *ratione materiae*.

A. Introduction of new claims (third preliminary objection) (paras. 121-130)

According to the Russian Federation, the submissions in paragraph 178, subparagraphs (c) and (d), of Ukraine's Memorial are inadmissible, because they differ from the claims in the Application to the point that they are beyond recognition and change the nature of the dispute submitted to the Court.

The Court observes that the wording of the claims presented by Ukraine in the Application is not identical to that of the claims set out in the Memorial. None of the claims in the Application refers specifically to Articles I and IV of the Convention. Nor is there an explicit assertion that the Russian Federation violated its obligations under the Convention. By contrast, the submissions at the end of the Memorial contain the explicit allegation that the actions of the Russian Federation "violate" the Convention and specify that, in Ukraine's view, the provisions violated are those of Articles I and IV of the Convention. The Court recalls, however, that a difference in wording is not in itself decisive. What must be ascertained is whether the claim as it is newly formulated would

transform the subject of the dispute originally brought before the Court under the terms of the Application.

In this regard, the Court notes that, in paragraph 30, subparagraph (b), of the Application, Ukraine submitted that the Russian Federation could not “lawfully” take any action on the basis of its false claims of genocide. Paragraphs 26 and 29 also alleged that the actions of the Russian Federation were incompatible with the Convention and violated Ukraine’s rights. In asserting that the Russian Federation had acted unlawfully by carrying out actions incompatible with the Convention which violated Ukraine’s rights, the Applicant was already challenging in the Application the conformity of the Russian Federation’s conduct with its obligations under the Convention and raising the question of the Respondent’s responsibility vis-à-vis the Applicant, whose rights had purportedly been violated. Lastly, by presenting claims for reparation under submissions (e) and (f) of its Application Ukraine was necessarily calling into question the lawfulness of the actions undertaken by the Russian Federation.

In the Court’s view, it thus follows from the foregoing that, from the very institution of the proceedings, Ukraine was not merely requesting that the Court declare that it had not committed genocide but was also seeking a finding that the actions of the Russian Federation were incompatible with its obligations under the Convention. It is true that the submissions at the end of the Application were not without a certain ambiguity. It is also true that, while Article I of the Convention was referred to several times in the Application, there was no mention of Article IV. However, in the opinion of the Court, the submissions in the Memorial clarify Ukraine’s claims and make them more specific without transforming the subject of the dispute such as it was submitted to the Court in the Application instituting proceedings. The Court concludes that the submissions set out in paragraph 178, subparagraphs (c) and (d), of the Memorial are admissible, and that, in this regard, the third preliminary objection raised by the Respondent is unfounded and must be rejected.

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

B. Jurisdiction *ratione materiae* of the Court under the Genocide Convention (second preliminary objection) (paras. 131-148)

The Russian Federation contends that the Court lacks jurisdiction *ratione materiae* to entertain the claims in submissions (c) and (d) presented by Ukraine at the end of its Memorial. According to the Respondent, these claims fall outside the scope *ratione materiae* of the Genocide Convention and, consequently, do not fall within the scope of its compromissory clause.

The Court recalls that, according to its well-established jurisprudence, when it is seised on the basis of a treaty’s compromissory clause by a State invoking the international responsibility of another State party for the breach of obligations under the treaty, in order for the Court to have jurisdiction, it is not sufficient for the applicant to claim an alleged violation of the treaty and for the respondent to contest it. It must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty. This may require, to a certain extent, that the Court interpret the provisions which have allegedly been violated and which define the scope of the treaty.

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

obligations under the Convention. More specifically, the obligations allegedly violated are those under Articles I and IV of the Convention.

The Court is of the view that, even assuming that the acts of the Russian Federation complained of by Ukraine are fully established — which is not for the Court to decide at this stage — they would not constitute a violation of obligations under Articles I and IV. Ukraine does not claim that the Russian Federation refrained from taking any measure to prevent a genocide or to punish persons who had committed such a genocide. On the contrary, the Applicant claims that the genocide invoked by the Russian Federation did not occur and the allegation was made in bad faith. The purpose of the first aspect of Ukraine’s legal action is to request a finding by the Court that there is no credible evidence that it has committed any such genocide. In these circumstances, it is difficult to see how the conduct of the Russian Federation complained of by Ukraine could constitute a violation, by the Respondent, of its obligations to prevent genocide and punish the perpetrators.

It is true that Ukraine seeks to demonstrate that the acts of which it accuses the Russian Federation constitute violations of obligations under Articles I and IV of the Convention by relying on two grounds: the first is that the Russian Federation has invoked the Convention in bad faith and implemented its obligations abusively; the second is that the measures it has adopted in invoking the Convention go beyond the limits permitted by international law.

The Court observes that it is indisputable that “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith” (Article 26 of the Vienna Convention on the Law of Treaties, reflecting customary international law). More generally, the Court has recalled on a number of occasions that the principle of good faith is a well-established principle of international law and one of the basic principles governing the creation and performance of legal obligations. However, the Court has also stated that the principle of good faith is not in itself a source of obligation where none would otherwise exist. What matters, for the purpose of establishing the Court’s jurisdiction *ratione materiae* when it is seised of an application alleging the respondent’s violation of an obligation under a treaty, is whether the respondent State could have violated a specific obligation incumbent upon it and whether the alleged violation falls within the scope of the Court’s jurisdiction. In the present case, even if the Russian Federation had, in bad faith, alleged that Ukraine committed genocide and taken certain measures against it under such a pretext — which the Respondent contests — this would not in itself constitute a violation of obligations under Articles I and IV of the Convention. It is no more convincing to argue that the Respondent’s conduct amounts to an “abuse of right” or, as Ukraine sometimes put it, an “abuse of the Convention”. It is certainly not consistent with the principle of good faith to invoke a treaty abusively, by claiming that there is a specific situation falling within its scope when it is clearly not the case, or by deliberately interpreting the treaty incorrectly for the sole purpose of justifying a given action. However, while such an abusive invocation will result in the dismissal of the arguments based thereon, it does not follow that, by itself, it constitutes a breach of the treaty. In the present case, even if it were shown that the Russian Federation had invoked the Convention abusively (which is not established at this stage), it would not follow that it had violated its obligations under the Convention, and in particular that it had disregarded the obligations of prevention and punishment under Articles I and IV.

As regards the Applicant’s argument that the actions undertaken by the Russian Federation on the basis of its false allegation of genocide go beyond the limits of international law, this raises questions that, in the opinion of the Court, do not fall within the scope *ratione materiae* of the Convention. Ukraine and some of the intervening States rely in this respect on the dictum in paragraph 430 of the Judgment on the merits in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*. The Court stated in that Judgment that the obligation to prevent genocide requires States parties to “employ all means reasonably available to them, so as to prevent genocide so far as possible”, while adding that “it is clear that every State may only act within the limits permitted by international law”. However, it does not follow from the foregoing that, if a State seeks to fulfil its obligation of prevention under the Convention through an act that is in breach of international law,

such action by itself constitutes a violation of the Convention. The Court did not intend, by its 2007 ruling, to interpret the Convention as incorporating rules of international law that are extrinsic to it, in particular those governing the use of force. It sought to clarify that a State is not required, under the Convention, to act in disregard of other rules of international law. Nor can a State avail itself of the obligation of prevention under the Convention to act beyond the limits permitted elsewhere by international law. Those limits are not defined by the Convention itself but by other rules of international law. Thus, in the present case, assuming — for the sake of argument — that by recognizing the DPR and LPR and by launching the “special military operation”, the Russian Federation sought to implement its obligations under the Convention, and that the acts in question are contrary to international law, it is not the Convention that the Russian Federation would have violated but the relevant rules of international law applicable to the recognition of States and the use of force. These matters are not governed by the Genocide Convention and the Court does not have jurisdiction to entertain them in the present case.

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

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

CONCLUSIONS (PARAS. 149-150)

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

However, the Court considers that it must reject: the first preliminary objection, based on the lack of jurisdiction of the Court to entertain the totality of Ukraine’s submissions because of the alleged non-existence of a dispute; the third preliminary objection, based on the inadmissibility of the submissions presented in the Memorial on the ground that these submissions are allegedly new and transform the subject of the dispute; the fourth preliminary objection, based on the inadmissibility of Ukraine’s submissions because of the alleged lack of practical effect of a judgment on the merits; the fifth preliminary objection, based on the inadmissibility of a request for a declaration that the Applicant did not breach its obligations under the Convention; and the sixth preliminary objection, based on the inadmissibility of the Application on the ground that it allegedly constitutes an abuse of process.

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

The Court recalls, as it has on several occasions in the past, that there is a fundamental distinction between the question of the acceptance by States of the Court’s jurisdiction and the conformity of their acts with international law. States are always required to fulfil their obligations under the Charter of the United Nations and other rules of international law. Whether or not they have consented to the jurisdiction of the Court, States remain responsible for acts attributable to them that are contrary to international law.

OPERATIVE CLAUSE (PARA. 151)

For these reasons,

THE COURT,

(1) By fifteen votes to one,

Rejects the first preliminary objection raised by the Russian Federation;

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

AGAINST: *Vice-President* Gevorgian;

(2) By twelve votes to four,

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

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

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

(3) By fifteen votes to one,

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

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

AGAINST: *Vice-President* Gevorgian;

(4) By fourteen votes to two,

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

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

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

(5) By fourteen votes to two,

Rejects the fourth preliminary objection raised by the Russian Federation;

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

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

(6) By thirteen votes to three,

Rejects the fifth preliminary objection raised by the Russian Federation;

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

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

(7) By fifteen votes to one,

Rejects the sixth preliminary objection raised by the Russian Federation;

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

AGAINST: *Vice-President* Gevorgian;

(8) By fifteen votes to one,

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

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

AGAINST: *Vice-President* Gevorgian;

(9) By thirteen votes to three,

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

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

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

*

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

Separate opinion of President Donoghue

In her separate opinion, President Donoghue explains her votes in relation to subparagraphs (2) and (4) of the operative part of the Judgment. She observes that, in the submissions in the Memorial, Ukraine reformulated its claims relating to the Russian Federation's "special military operation" and the recognition of the independence of the "Donetsk People's Republic" and the "Luhansk People's Republic". She considers that, in so doing, Ukraine expanded the scope of these claims and transformed the subject of the dispute originally brought before the Court. As a result, the Court should have declined to examine its jurisdiction *ratione materiae* on the basis of the submissions set out in the Memorial and should instead have done so on the basis of the claims as presented in the Application.

President Donoghue considers that the claims as presented in the Application call for the Court to decide whether the Russian Federation interpreted and applied the Convention in good faith. In the view of the President, thus formulated, the claims of Ukraine plainly fall within the scope *ratione materiae* of the Convention.

President Donoghue also calls attention to the limited scope of the Judgment. She notes that, in relation to the "special military operation" and the Russian Federation's recognition of the independence of the "Donetsk People's Republic" and the "Luhansk People's Republic", the Court decides only that it lacks jurisdiction under the Genocide Convention to address the claims of Ukraine. It does not decide whether the "special military operation" is consistent with the rights and obligations of the Russian Federation.

Finally, President Donoghue expresses regret that, as a result of the Judgment, the Court will address only the legality of Ukraine's conduct when the case proceeds to the merits. If the Court had instead decided that it had jurisdiction *ratione materiae* in relation to both aspects of the dispute, it would have been in a position to examine the conduct of both Parties, and their respective interpretations and applications of the Convention, at the merits phase.

Dissenting opinion of Vice-President Gevorgian

In his dissenting opinion, Vice-President Gevorgian reiterates his principal position, as previously expressed in his declaration on the Court's Order of 16 March 2022, that the present case constitutes an attempt by Ukraine to undermine the necessity of consent of all parties to judicial settlement. Accordingly, he was pleased to vote in favour of the Court's decision to dismiss Ukraine's main submissions on the ground that the Court lacks jurisdiction to consider them.

At the same time, the Vice-President points out that the Court has taken a very lenient approach towards the existence of a legal dispute at the time of the filing of Ukraine's Application, and he dissents from the Court's admission of Ukraine's claims which seek a declaration by the Court that there is no evidence of genocide attributable to Ukraine in the Donbas. The Vice-President explains that it is incompatible with the judicial function of the Court if a State requests a declaration that no violation of an international legal obligation has occurred.

Finally, the Vice-President notes that the Court has failed to engage in substance with the Russian Federation's preliminary objection based on an "abuse of process". He stresses that the politically orchestrated mass interventions by third States in this case have compromised the sound administration of justice.

Declaration of Judge Tomka

Judge Tomka's declaration discusses Ukraine's submission (*b*), which requests 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. In the present Judgment, the Court finds that it has jurisdiction to pass upon this submission and that this submission is admissible. The case therefore proceeds to the merits, where the Court will hear the Parties on whether this submission is well founded. Judge Tomka agrees with these findings. He nonetheless wishes to offer two observations, specifically on the admissibility of Ukraine's submission (*b*) and on the burden of proof.

Concerning the admissibility of Ukraine's submission (*b*), Judge Tomka begins by noting that it constitutes a request for a declaratory judgment, the purpose of which is to ensure recognition of a situation at law, once and for all and with binding force as between the Parties, so that the legal position thus established cannot again be called in question in so far as the legal effects ensuing therefrom are concerned. In this regard, he notes that Ukraine's submission for a declaratory judgment presents two unusual features. On the one hand, the submission put forward by the Applicant seeks a declaration by the Court that it — the Applicant — did not breach its obligations under the Genocide Convention. On the other hand, Ukraine seeks a declaration by the Court that is essentially negative in form, namely a declaration that Ukraine is not responsible for genocide in the Donetsk and Luhansk oblasts. While acknowledging that these two features make Ukraine's submission a bit unusual, Judge Tomka considers, upon reflection, that the submission is admissible, and that it is in line with precedent and with the Court's judicial function, which is to decide such disputes as are submitted to it. The Court and its predecessor, the Permanent Court of International Justice, have rendered multiple judgments that have declared that a party had not breached its obligations under international law. Moreover, as a matter of admissibility, it is immaterial which party institutes the proceedings to settle a dispute. The character of a dispute and of the issue to be decided is essentially the same, whether it is presented by an applicant or by a respondent. In fact, applicants have on several occasions requested the Court to declare that their conduct was in keeping with their obligations, a recent example being one of Chile's requests in the case concerning the *Dispute over the Status and Use of the Waters of the Silala*. Judge Tomka observes that the Court rightly focuses on the substance of Ukraine's submission when deciding whether it is admissible. Different terms could be used to describe this submission but, in the end, what matters is whether the present case is an appropriate case for the Court to make a declaratory judgment. In Judge Tomka's considered view, Ukraine's submission is admissible. He agrees with the Court's conclusion that a declaratory judgment on whether there exists credible evidence that Ukraine is responsible for committing genocide in violation of its obligations under the Genocide Convention would have the effect of clarifying the Parties' rights and obligations. He also agrees that Ukraine's submission does not contradict the principles of judicial propriety and the equality of the parties.

Concerning the burden of proof, Judge Tomka observes that an issue to be decided on the merits will be that of the proper allocation of the burden of proof. Should Ukraine, as the Applicant, shoulder the burden of showing that there is no credible evidence that it is responsible for committing genocide in violation of the Genocide Convention? Or should it be for the Russian Federation, the Respondent, to shoulder the burden of proving that Ukraine has committed genocide in the Donbass, given that it has — repeatedly and at the highest level — asserted that Ukraine is responsible for such an act? Judge Tomka notes that, when faced with a submission or claim concerning a negative fact, the Court has shown some flexibility in its approach and, on occasion, reversed or partly reversed the burden of proof such that the applicant would not be alone in shouldering that burden. Judge Tomka takes no position on this issue at this stage. He, however, draws the attention of the Parties to this issue, which will be of fundamental importance at the merits stage.

Opinion partiellement dissidente de M. le juge Abraham

Dans son opinion partiellement dissidente, le juge Abraham explique les raisons de son vote négatif concernant le rejet de la cinquième exception préliminaire de la Fédération de Russie. Selon lui, la première demande de l'Ukraine, par laquelle cette dernière vise à obtenir une déclaration de la Cour selon laquelle elle n'a pas violé la convention sur le génocide, aurait dû être déclarée irrecevable.

Le juge Abraham admet qu'il puisse y avoir des circonstances très spéciales dans lesquelles un État qui s'estime mis en cause de manière infondée quant au respect de ses obligations internationales justifie d'un intérêt légitime pour demander à un organe judiciaire international (à condition qu'il existe une base de compétence valide) de déclarer qu'il respecte ses obligations. Mais il n'est pas convaincu que de telles circonstances existent en l'espèce. Le point sur lequel il diverge du raisonnement de l'arrêt concerne la place accordée à l'allégation de génocide formulée par la Fédération de Russie contre l'Ukraine en tant que cause déterminante des décisions prises par la défenderesse concernant la reconnaissance de l'indépendance des deux « républiques » et le déclenchement de l'« opération militaire spéciale ». Sans se prononcer sur la conformité des actions de la Fédération de Russie aux règles du droit international général relatives à la reconnaissance des États et à l'emploi de la force, il conclut que l'Ukraine ne se trouve pas dans l'une de ces circonstances très spéciales qui rendrait recevable une demande tendant à un constat judiciaire de non-violation.

Declaration of Judge Bennouna

Judge Bennouna expresses his disagreement with the Court's decision that Ukraine's claim relating to the first aspect of the dispute concerning a declaration of non-violation by Ukraine of the Genocide Convention is admissible. He finds that such declarations are not part of the Court's judicial function, which is to settle legal disputes between States concerning the interpretation or application of international law. According to him, the only dispute between the Parties in this case concerns the legality of the use of force by Russia. In his view, the Court has not shown that Ukraine had standing before the Court to challenge the allegations of the Russian Federation.

Joint dissenting opinion of Judges Sebutinde and Robinson

In their joint dissenting opinion, Judges Sebutinde and Robinson explain their disagreement with the majority's decision in operative paragraph 151 (2) of the Judgment, whereunder the Court upheld the Russian Federation's objection that Ukraine's claims relating to the Russian Federation's use of force in and against Ukraine (in submission (c) of paragraph 178 of Ukraine's Memorial) and its recognition of the independence of the so called "Donetsk People's Republic" and "Luhansk People's Republic" (in submission (d) of paragraph 178 of Ukraine's Memorial) fell outside the scope of the Court's jurisdiction *ratione materiae*.

Judges Sebutinde and Robinson are of the view that there is no basis for the majority's conclusion that the Court lacks jurisdiction *ratione materiae* over the aforementioned claims. They respectfully take the position that, in arriving at this conclusion, the majority have fallen into error because they have misconstrued the duty imposed by the Genocide Convention on a State party to act in good faith, reasonably and within the limits permitted by international law in any action that it takes to fulfil its undertaking under that Convention to prevent and punish genocide.

According to Judges Sebutinde and Robinson, the majority do not sufficiently appreciate the significance of the principle of good faith in international law and its application to the circumstances of this case. In their view, the principle of good faith 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. With this legal background, they arrive at the conclusion that, by employing the extreme measure of a “special military operation” as the first recourse — when it had available to it the means set out in Articles VIII and IX of the Genocide Convention —, the Russian Federation breached its duty to act in good faith and reasonably in taking measures to prevent and punish genocide. Judges Sebutinde and Robinson also call attention to the majority’s analysis of this issue in paragraphs 142 and 143 of the Judgment, which they believe is misdirected and does not address the substance of Ukraine’s argument that the principle of good faith is a part of the Genocide Convention, and, as a consequence, the Court has jurisdiction *ratione materiae* to adjudicate upon claims alleging a breach thereof.

The dissenting opinion also expresses the judges’ disagreement with the majority’s analysis of the Court’s 2007 ruling in the *Bosnian Genocide* case and its consequences for the present case. In particular, Judges Sebutinde and Robinson challenge the majority’s conclusion in paragraph 146 of the Judgment 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”. In their view, this conclusion is unreasoned and incorrect. According to Judges Sebutinde and Robinson, in paragraph 430 of the *Bosnian Genocide* Judgment, 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 (*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 line with this dictum, they conclude that the Court in the present case has jurisdiction *ratione materiae* 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.

In addition to making the case that the Court has too narrowly construed its jurisdiction in respect of submissions (c) and (d) in paragraph 178 of Ukraine’s Memorial, the dissenting opinion draws attention to how the conclusion of majority exposes “militarily weak State[s] part[ies] to the Genocide Convention to the wanton might, use of force and, quite likely, impunity of . . . militarily stronger State[s] part[ies]” in cases where the latter resort to the use of force against the former on the pretext of discharging their duty under the Genocide Convention to prevent and punish genocide.

Separate opinion of Judge Iwasawa

In his opinion, Judge Iwasawa addresses three topics.

1. Judge Iwasawa points out that Ukraine and many intervening States have used the term “non-violation complaint” to describe Ukraine’s submission (b). He is of the view that this term should be avoided because it has a special meaning in WTO law.

According to Judge Iwasawa, under the WTO dispute settlement procedures, a disagreement may arise between the parties as to whether the measures taken by the respondent State to implement the recommendations and rulings of the Dispute Settlement Body (“DSB”) are consistent with the WTO Agreement. Article 21.5 of the Dispute Settlement Understanding (“DSU”) allows the parties to have recourse to the WTO dispute settlement procedures to resolve this disagreement. Article 6 of the DSU provides that a panel shall be established at the latest at the second meeting of the DSB, unless the DSB decides by consensus not to establish a panel. Judge Iwasawa explains that the practices of the WTO provide no assistance to the Court because they are based on these particular provisions of the DSU.

2. In the present case, the Russian Federation argues that Ukraine could obtain an undue advantage by virtue of the principle of *res judicata*. The Court points out that “whenever a dispute is settled by the Court by way of a judgment, there is a possibility that a future claim is covered by the *res judicata* effect of that judgment”, and then dismisses the Respondent’s objection summarily.

Judge Iwasawa elaborates on the circumstances in which “a future claim is covered by the *res judicata* effect of [a] judgment”. According to Judge Iwasawa, there are three elements required for the application of the principle of *res judicata*, namely identity of the “parties”, the “object”, and the “ground”. The second element, the object of the claim, is generally thought to refer to the relief sought, but has sometimes been understood to mean the issue in dispute. Judge Iwasawa points out that some tribunals have focused on “the question at issue”, without distinguishing “object” and “ground” as two separate elements.

3. In the present case, Ukraine contends that the Russian Federation’s abusive invocation of the Genocide Convention violates the Convention. Judge Iwasawa agrees with the Court that an abusive invocation of a treaty does not, by itself, constitute a breach of the treaty.

Ukraine also argues that Articles I and IV of the Genocide Convention contain an implicit obligation to act within the limits of international law, and that by taking actions which go beyond the limits permitted by international law, the Russian Federation has violated Articles I and IV of the Convention. Judge Iwasawa observes that, in support of this contention, Ukraine relies on the Court’s statement in the *Bosnia Genocide* case that “it is clear that every State may only act within the limits permitted by international law”.

Judge Iwasawa emphasizes that this statement of the Court should not be taken out of context. He points out that the Court made this statement when it was analysing the obligation to prevent genocide under Article I of the Genocide Convention, with a view to determining its specific scope. In his view, by this statement, the Court was merely emphasizing that a State party is not required by Article I of the Convention to take measures which go beyond the limits permitted by international law.

Separate opinion of Judge Charlesworth

In her separate opinion, Judge Charlesworth explains her negative vote on the decision to uphold the Russian Federation’s second preliminary objection and reflects on the Court’s references to the particularity of the circumstances of this case.

Judge Charlesworth questions the finding that the dispute before the Court comprises two aspects or questions. She points out that the two questions arise out of the same factual and legal matrix, and the second question — the lawfulness of the Russian Federation’s conduct — is premised on the first — the allegation of genocide being false. According to Judge Charlesworth, the fact that the second aspect of the dispute involves the invocation of responsibility does not justify the bifurcation of the dispute.

Judge Charlesworth then turns to the question of the Court’s jurisdiction. She points out that, when seised under a compromissory clause in a treaty, the Court has to navigate carefully between the interpretation of the treaty for the purposes of determining its jurisdiction *ratione materiae* and the same task to be performed for the purposes of resolving the dispute on the merits. She also observes that the Court’s recent jurisprudence indicates that the provisions defining the scope of the treaty are to be interpreted at the jurisdictional stage, whereas the interpretation of substantive provisions is assigned to the merits. In her view, today’s Judgment is in tension with this jurisprudence in so far as it adds that the jurisdictional stage also involves interpretation of the provisions alleged by the Applicant to have been violated.

For Judge Charlesworth, the Court is unlikely to have jurisdiction to decide the lawfulness of any given conduct with reference to all of the sets of rules applicable to it, but it does not follow that the Court is without jurisdiction to decide its lawfulness with reference to any set of rules despite the presence of an applicable compromissory clause. She considers that the Applicant's argument in the present case takes a different direction from those in *Immunities and Criminal Proceedings* and *Certain Iranian Assets*, in which the Court had interpreted the provisions of the treaty invoked for jurisdictional purposes with a view to ascertaining whether they incorporated obligations arising under rules extrinsic to the treaty. By contrast, according to Judge Charlesworth, the Applicant in the present case invites the Court to interpret Article I of the Genocide Convention in a manner prohibiting certain types of conduct in certain circumstances, and then to find that these circumstances are present in the case before it. Because this contention raises questions of interpretation and application of the Genocide Convention, Judge Charlesworth considers that it attracts the Court's jurisdiction under Article IX. In her view, the contention that the Genocide Convention does not authorize conduct for the prevention and punishment of genocide where no genocide occurs is a variation of the previous argument, and it should have also been entertained by the Court for jurisdictional purposes.

Judge Charlesworth thinks that the merits stage is the appropriate stage to assess the soundness of the interpretation of Article I put forward by the Applicant, including, if necessary, to determine the means to be used for the interpretation of that provision. She underscores that the Court's approach as to which rules should be taken into account for interpretative purposes has no bearing on the scope of its jurisdiction. Judge Charlesworth finds that the Court's conclusion suggests that the Court went too far into the merits and that it did so without interpreting the provisions of the Genocide Convention in question.

Furthermore, in Judge Charlesworth's view, the Court's enquiry does not squarely address the Applicant's claims, which are not confined to an allegation of a breach of specific obligations under the Genocide Convention. She explains that the Parties are in dispute as to whether the obligation to prevent and punish genocide is inapplicable in the circumstances of the case. While this question may not entail violation of the Respondent's obligations, Judge Charlesworth considers that it remains a question relating to the interpretation or application of the Genocide Convention. She reaches a similar conclusion with regard to the Applicant's invocation of the notion of good-faith performance of treaty obligations.

Judge Charlesworth adds that, despite its references to "particular circumstances", the Judgment rests on the application of legal principle. In this regard, she considers that the Court's reasoning concerning the existence of a dispute is largely in line with its jurisprudence. Specifically, Judge Charlesworth argues that any delay in seising the Court would have at most served to confirm the prospective respondent's views; because those views were otherwise clear, she finds that any such delay would have been legally irrelevant. Judge Charlesworth also thinks that requests for a declaration of conformity do not pose distinct questions of admissibility. Therefore, she finds that the reference in the Judgment to the particular circumstances in which the Applicant's request was made confirms rather than qualifies the conclusion that this request is admissible.

Déclaration de M. le juge Brant

Le juge Brant est d'accord avec la décision de la Cour de rejeter la cinquième exception préliminaire de la Fédération de Russie. Il considère que le cadre juridique applicable à l'action judiciaire devant la Cour permet de sauvegarder les droits de la Fédération de Russie de manière pleinement satisfaisante, sans que les principes d'« opportunité judiciaire » et d'égalité des parties ne soient mis en cause. Il estime toutefois nécessaire de préciser les trois raisons qui l'amènent à une telle conclusion.

Premièrement, il estime que la condition de l'existence d'un différend protège adéquatement les droits des États parties à la convention sur le génocide contre des requêtes « prématurées ». Si la Fédération de Russie souhaitait se prémunir contre l'éventualité de l'introduction d'une instance sur la base de la convention sur le génocide avant qu'elle n'eût réuni les éléments de preuve pertinents, il lui aurait suffi de s'abstenir de formuler des accusations ou de les différer jusqu'au moment où elle se serait estimée en possession des éléments de preuve adéquats. Deuxièmement, s'agissant du caractère soi-disant « incomplet » des éléments de preuve qui seront soumis à la Cour dans la présente affaire, le juge Brant relève que la découverte, par la Fédération de Russie, de faits nouveaux répondant aux exigences de l'article 61 du Statut de la Cour ouvrirait la voie à l'introduction d'une demande en révision. Troisièmement, il considère que l'autorité de la chose jugée conférée à l'arrêt rendu dans la présente affaire n'est pas de nature à mettre en cause les principes d'« opportunité judiciaire » et d'égalité des parties, car la Cour ne serait pas nécessairement empêchée de connaître d'une demande ultérieure de la Fédération de Russie ayant un objet différent de celui de la demande formulée par l'Ukraine dans son mémoire.

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

Dans son opinion, le juge *ad hoc* Daudet indique être en total accord avec les réponses données par la Cour aux exceptions soulevées par la Russie, et juge simplement utile d'apporter quelques réflexions supplémentaires.

D'abord, il souligne le caractère « inversé » de l'affaire dans laquelle, contrairement à ce qui peut être considéré comme le schéma classique, c'est celui qui est accusé de génocide qui saisit la Cour car il s'estime victime d'une accusation mensongère. Le juge *ad hoc* Daudet insiste sur le fait que dans le cadre de la présente affaire, l'Ukraine ayant saisi la Cour sur la base de la convention sur le génocide, seule celle-ci détermine le champ matériel de la compétence de la Cour. C'est pourquoi, selon lui, si le comportement de la Russie viole indubitablement le droit international, la Cour ne peut l'examiner et s'y prononcer que s'il rentre dans le cadre de la convention sur le génocide.

Ensuite, il estime que la Cour a bien identifié les deux aspects du différend dont elle était saisie et a mené une analyse qu'il partage.

Sur le premier aspect du différend, relatif à la « non-responsabilité » pour génocide de l'Ukraine, le juge *ad hoc* Daudet relève que la question de sa compatibilité avec la fonction judiciaire de la Cour est « embarrassante et délicate ». Il comprend donc la prudence avec laquelle la Cour traite la question, mais estime qu'elle aurait pu avoir une formulation plus générale sous la forme d'un *dictum* pouvant s'appliquer aux circonstances de l'espèce mais aussi à des contextes similaires marqués de faits tout aussi graves.

En ce qui concerne le second aspect du différend, le juge *ad hoc* estime comme la Cour qu'il y a eu une évolution des demandes ukrainiennes entre la requête introductive d'instance et le mémoire, sans que cela ne constitue cependant de demandes nouvelles. Comme les autres membres de la majorité dans cette décision, il dit avoir eu du mal à voir quelle disposition de la convention sur le génocide l'invocation abusive de la convention pour justifier son « opération spéciale » par la Russie aurait violée. Ainsi, écrit-il, si le comportement de la Russie constitue indéniablement une méconnaissance d'autres règles de droit international général, la convention sur le génocide n'a pas donné compétence à la Cour pour se prononcer sur la violation de ces règles.
