PARTIALLY DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Agreement with the Court's finding on the admissibility of the claims in the Memorial — Difference in nature between the two claims constituting the two aspects of the dispute identified by the Court — Lack of jurisdiction ratione materiae *over the second aspect of the dispute — Unusual character of Ukraine's first claim — No precedents in which the Court found admissible such a claim seeking a judicial finding that an allegation made against a State is false — Article IX leaves the question open — General scope of the question — Degree of gravity of the accusation made against the applicant State is irrelevant — Fundamental principle that a State that brings legal action must have a legitimate and sufficient legal interest for the action to be admissible — No procedures under international law to permit States to preserve their reputation and defend their honour — Lack of sufficient legal interest to justify the admissibility of such an action except in very special circumstances — No such special circumstances in the present case — Allegations of genocide do not constitute the determining reason for the decisions taken by the Respondent regarding the recognition of the independence of the two "republics" and the launch of the "special military operation" — Question of the conformity of the Russian Federation's actions with the rules of general international law does not fall within the jurisdiction of the Court — Serious doubts in this regard.*

1. On 26 February 2022, Ukraine seised the Court of an Application against the Russian Federation, in which it submitted two claims of a very different nature.

First, it requested that the Court issue a declaratory judgment whereby it would find that the Applicant had not committed genocide against the Russian-speaking population of the Donbas region, as it had been accused of doing in certain public statements made by the highest authorities of the Russian State.

Second, it requested the Court to find that, by recognizing the independence of the two "so-called" republics of Donetsk and Luhansk and by launching the "special military operation" from 24 February 2022 based on this false claim of genocide, the Russian Federation had acted in a manner which "has no basis in the Genocide Convention".

2. The wording of these two claims was modified in Ukraine's Memorial, without the subject of the dispute being altered however: the first claim now seeks a declaration by the Court that "there is no credible evidence that Ukraine is responsible for committing genocide . . . in the Donetsk and Luhansk oblasts"; the second claim now requests the Court to declare that the Russian Federation's use of force against Ukraine and the recognition of the two "so-called" republics violate the Convention, specifically Articles I and IV.

Taking the view that the claims in the Memorial are admissible and validly replace those in the Application, the Court therefore considered that it was seised of the submissions in the Memorial — with which I agree.

3. The difference in nature between Ukraine's two claims, which the Court has characterized as constituting the "two aspects of the dispute", is striking. The second claim is presented, in classic manner, as that of a State coming before the Court to invoke the international responsibility of another State for an internationally wrongful act that is allegedly attributable to it. Applying the criteria from its jurisprudence in the case concerning *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16) with a view to determining its jurisdiction *ratione materiae* to entertain such a claim, the Court found that it lacked jurisdiction, from which it follows that the claim in question falls outside the scope of the compromissory clause of Article IX of the Convention. I fully subscribe to the analysis in the Judgment in this respect, and that is why I voted in favour of subparagraph (2) of the operative clause.

The first claim, on the contrary, is presented in particularly unusual terms, to the extent that there is no example to be found of such a claim having been accepted, either in the Court's jurisprudence or that of its predecessor. The two precedents relied on by Ukraine to justify the admissibility of a claim of such a nature are irrelevant, as the Court rightly states (Judgment, para. 101). The applicant State is not seeking here to engage the international responsibility of the Respondent for a wrongful act. It wishes to obtain, through a purely declaratory judgment, a kind of "certificate of good conduct", that is to say a judicial finding that an allegation made against it by another State in an extra-judicial context — an allegation that it has violated an international legal obligation — is false or at least that it is not based on any credible evidence. Such a claim raises a question which, in my view, does not relate to the jurisdiction of the Court to entertain it but to its admissibility. It is, in fact, from this angle that the Court broaches the question, in response to the fifth preliminary objection raised by the Russian Federation.

4. I first note that it is futile to look for the answer to this question in the actual wording of the compromissory clause that founds the Court's jurisdiction in this case, namely Article IX of the Genocide Convention. Ukraine has sought to use certain distinctive features in the wording of Article IX as an argument to convince the Court that at least when this provision is applied it allows a claim of the kind submitted in this case. In reality, there is nothing in the actual terms of Article IX that distinguishes this provision from most compromissory clauses, in any event as regards the question before us. Article IX cannot therefore be considered to provide by itself a legal basis for the admissibility of a claim of this kind (which we could call a "request for a declaration of non-violation of an international obligation"), and the Court does not find such a basis in the terms of Article IX. That is nevertheless not to say that Article IX, by its language, is itself an obstacle to the admissibility of such a claim, as paragraph 99 of the Judgment states. The examination of Article IX thus leaves the question open.

5. It is in fact in the general international law applicable to inter-State disputes that the answer to this question must be sought. This means that the answer cannot be limited to the context of the Genocide Convention, but must necessarily have a general application.

6. It often happens that a State publicly accuses another State of conduct that is incompatible with a particular international obligation, or, more simply, without referring explicitly to any specific obligation, of committing acts that may be determined to constitute breaches of the legal obligations incumbent on the State so accused. In such an event, where there is a valid basis of jurisdiction, it is certain that the accusing State can seise the Court of its complaints against the State it is accusing — if it considers it appropriate to institute such proceedings, which is never an obligation. The question that was before the Court was whether the accused State could itself seise the Court (still on condition that there is a basis of jurisdiction, which in this case there is) in order to obtain a declaration that the accusation made against it is unfounded.

7. In this regard, it is difficult to make the answer dependent on the gravity of the accusation to which the accused State is responding. It is true that an accusation of committing genocide is the gravest of all accusations that can be made against a State, from a two-fold legal and moral perspective. But other complaints also reach a high threshold of gravity (in particular all those that impute to a State conduct that is contrary to a *jus cogens* obligation), and, no matter how grave the accusation, it is difficult to see on what ground the "action for a declaration of non-violation" would be admissible in respect of certain accusations and not others, nor on what clear and indisputable criterion such a distinction could be based.

8. It is in the general principles applicable to the admissibility of legal actions in inter-State disputes that the answer must be sought to the question raised in the present case by Ukraine's unusual claim.

There is a fundamental principle whereby a State that brings a legal action must have a legitimate and sufficient legal interest of such a nature as to make the action admissible, unless special provisions otherwise govern the matter.

The legal interest of the applicant party is not often discussed as such before the Court; in the majority of cases, it is questions of jurisdiction that occupy the Court when it has to examine preliminary objections raised by the respondent party, or questions of admissibility of a different nature to that of legal interest. This can be explained by the fact that the latter condition only somewhat rarely gives rise to any doubt that it is met.

The question of legal interest scarcely ever arises in cases concerning land boundaries and maritime delimitations, nor in those concerning issues of territorial sovereignty. As regards proceedings in which the applicant party seeks to engage the international responsibility of the respondent, the main question is whether the party seising the Court has the status of injured State within the meaning of the customary law of responsibility, or whether, the respondent having an *erga omnes* obligation towards the applicant, the latter has standing to seise the Court as would any other State to which the same obligation is owed.

9. In the present proceedings, the question arises in highly original terms because the action itself is original: it does not seek to engage the responsibility of the Respondent (in the part of the dispute we are considering here) but to obtain a purely declaratory judgment stating that an allegation made by the Respondent, and which comprises an accusation that the Applicant has violated an international obligation, is false.

10. I am of the opinion that, in such a situation, the applicant State does not, as a general rule, have a sufficient legal interest for its claim to be admissible; only very special circumstances are, in my view, capable of reversing this presumption.

States are not, in the international legal order, in a comparable situation to that of private persons in the domestic order. Private persons, whether individuals or companies, are legitimately concerned with preserving their reputation and defending their honour, on which a large part of their activity and social life depends. That is why national laws generally place at their disposal various procedures to that end: for example, criminal defamation action, or civil liability action under ordinary law whereby a person seeks reparation from another person for harm they have suffered as a result of the latter's misconduct, without it most often even being necessary

to establish the existence of a wrongful act. Such procedures are available in most national legal systems.

11. There is no such thing in international law. This does not mean that States are not legitimately concerned about their reputation. But they are not unaware that in international life a State's allegations calling into question certain conduct of another State with regard to the law, morality or the needs of international society are extremely common. When a State considers that such an accusation against it is unjust or false, it may defend itself by responding through the same channel as that used by its accuser, namely by way of a statement refuting the previous one. It does not need a judge to that end, and its standing to take legal action is therefore, in my view, not generally established. That is how the society of States functions on a daily basis.

12. I accept, however, that there may be very special circumstances in which a State that considers itself to have been accused without basis of violating its international obligations has a legitimate interest in requesting an international judicial organ (on condition that there is a valid basis of jurisdiction) to declare that it is complying with its obligations, contrary to what it has been accused of by the respondent.

Are we faced with such very special circumstances in the present case? The Court's response is that we are. I am not convinced.

13. The reasoning in the Judgment is, in this respect, based on a combination of two assertions. There is an armed conflict, which continues to this day, between Ukraine and the Russian Federation; this conflict was started by the Russian Federation "with a stated purpose of preventing and punishing genocide allegedly committed in the Donbas region" (Judgment, para. 108).

14. I do not disagree with the idea, implicit in this reasoning, that one of the particular hypotheses in which a State has a legitimate interest in seeking a judicial finding that it has not breached an international obligation is one in which the accusation made against it has had and continues to have serious harmful consequences for it, and that obtaining such a judicial finding is the only means, or at least the most effective means, of guarding against such consequences.

The point on which I diverge from the reasoning of the Judgment — which incidentally is very brief in this regard — concerns the emphasis placed on the Russian Federation's allegation of genocide against Ukraine as the determining reason for the decisions taken by the Respondent regarding the recognition of the independence of the two "republics" and the launch of the "special military operation". In my view, it is distorting the reality of the facts to ascribe such a causal role to the allegation in question.

15. It is clear from all the statements made by the responsible authorities of the Russian Federation during the relevant period and from all the official documents in the case file that the Respondent only ever relied on a single

legal basis to justify the launch of the "special military operation", namely the right of self-defence within the meaning of Article 51 of the Charter of the United Nations, combined with the "mutual assistance treaties" concluded by it with the two "republics" whose independence it had just recognized. At no point, either before the institution of proceedings before the Court or during the proceedings themselves, did the Russian Federation claim to hold a legal title under the Genocide Convention entitling it to take action on the territory of Ukraine, or to use armed force against it, in order to prevent or end a genocide (if it had, it would have been wrong to do so, for the reasons the Court adeptly set out in paragraph 146 of the Judgment).

Nor, in my view, is it established that the Russian Federation's allegation of genocide in fact played a determining role in the decisions it took with regard to the recognition of the two "republics" as independent States and the launch of military operations.

16. It is true that in both the speech made on 21 February 2022 by the Russian Head of State in order to justify the decision to recognize the two "republics" and in the speech made subsequently on 24 February to announce and justify the launch of military operations, it is clearly alleged that the Russian-speaking inhabitants of Donbas were victims of "genocide" on the part of the central Ukrainian Government.

But that allegation was made in a very particular context. It was made in order to emphasize the reasons (which were legitimate in the view of the Russian Federation) that the population of Donbas might have to secede from a State that was subjecting it to such abuse, and, as a result, the (equally legitimate) reasons for the Russian Federation to recognize the two "republics" that had unilaterally proclaimed their independence and to conclude "treaties" with those entities. To describe what it saw as the "abuse" of the population of Donbas, the Russian Federation used a variety of terms: "killing of civilians", "horror", "bloody crimes", "bloodshed", "atrocities" and "genocide". There is no indication that the particular term "genocide" played a determining role in the decisions taken by the Russian authorities with regard to Ukraine during that period. The use of the term was instead intended to emphasize that the "abuse" and "humiliation" complained of were reaching the gravest possible level, that of the most unacceptable and most shocking crime for the world's conscience. But seeing this term, in itself, as being the catalyst for the actions implemented by the Russian Federation against Ukraine is to give it an importance that it did not in fact have.

17. It goes without saying that, in writing the foregoing, I am in no way pronouncing on the conformity of the Russian Federation's actions with the rules of general international law on the recognition of States and the use of force, which in my view is seriously in doubt. I refrain from doing so because these questions do not fall within the Court's jurisdiction in the present case.

An analysis of the facts that I believe to be impartial and rigorous leads me to the conclusion that Ukraine has not justified that it is in any of the very special circumstances that would make a request for a judicial finding of non-violation admissible.

18. To finish, I add a consideration which, without being decisive by itself, can nonetheless not be disregarded. On the basis of the present Judgment on the preliminary objections, the Court will, at the next stage of the proceedings, engage in the exercise of determining whether there is any "credible evidence" that Ukraine is responsible for committing genocide in the eastern part of the country. The Russian Federation, which is not the applicant in this case, will not be obliged to produce before the Court any evidence that it has in support of the allegations it has made outside the judicial context, assuming that it has such evidence. Whatever the outcome of the case — or rather of what remains of the case — it is likely to have only a very limited impact on clarifying the Parties' rights and obligations. Even if the Court finds that there is no credible evidence of the existence of a genocide committed by Ukraine, this will not demonstrate the unlawfulness of the actions undertaken by the Russian Federation from February 2022, which in all likelihood was Ukraine's main concern in deciding to institute these proceedings. This will not preclude the Russian Federation from potentially bringing new proceedings seeking to invoke Ukraine's international responsibility. Nor will it mean that the Respondent, by making such an accusation against the Applicant, has committed a wrongful act and that its responsibility is engaged on this count. It will thus not create any right to reparation for Ukraine. In short, the decision that the Court is called upon to make will most likely be frustrating for the Parties and rather futile in its effects; at a time when the Court is very busy, it was a further reason for it not to engage in a largely meaningless exercise.

19. All this can be explained by the fact that Ukraine sought to shoehorn its dispute with the Russian Federation into the framework of the Genocide Convention, within which this dispute cannot fall. The Court only partially resisted this attempt to force content into an inappropriate container — for understandable reasons — by dismissing the "second aspect" of the dispute as not falling within its jurisdiction. In my view, it would have been better for the Court to put a definitive end to these proceedings.

(Signed) Ronny Abraham.