

SEPARATE OPINION OF JUDGE *AD HOC* DAUDET

[*Translation*]

1. I agree with all the Court's responses to the objections to jurisdiction and admissibility raised by Russia, and I fully support the reasoning underlying them. Nonetheless, I would like to add a few thoughts of my own.

2. From the outset, I would note that the "reverse" nature of this case is somewhat disconcerting. Indeed, in cases relating to genocide, it is normally the State that accuses another of committing genocide that is the applicant before the Court. The Genocide Convention itself, whose object and purpose are to prevent and punish genocide, is consistent with such a scenario and was probably designed with that in mind. According to this traditional model, since Russia has alleged that Ukraine is committing genocide, one would think that Russia would be the applicant in proceedings against Ukraine, and the latter would be the respondent accused of violating the Convention. In the present case, however, we see the opposite, and it is Ukraine, the target of Russia's accusation — which Ukraine claims is false — that is the Applicant before the Court, and Russia, the Respondent.

3. Ukraine has seized the Court on the basis of the Genocide Convention. The Court's power to adjudicate in the present case is thus limited to what is covered thereby. While there is no doubt that Russia's conduct is in violation of international law, this question can only be dealt with in relation to the Genocide Convention. The Court's jurisdiction is thus confined to a material scope defined by the limits of that instrument. Finally, in accordance with its Statute, namely Article 36, the Court can rule only and exclusively on the dispute submitted to it under the compromissory clause contained in Article IX of the Convention.

4. The Application of Ukraine was submitted in the wake of the "special operation" launched by Russia to stop a genocide that it claimed was being committed by Ukraine in the Donbas. Ukraine emphatically denies having carried out any such genocide and has asked the Court to make a finding to that effect. Ukraine also claims that Russia's false accusation is merely a pretext for its unlawful use of force.

5. The case as brought by Ukraine thus presents two aspects, which were identified in the Judgment (Judgment, para. 53). The first consists in requesting the Court to declare that, contrary to Russia's false allegations, Ukraine has in no way committed genocide. It thus concerns the absence of responsibility on the part of Ukraine, whereas the second aspect "seeks to invoke the

international responsibility of the Russian Federation by imputing internationally wrongful conduct to it" (*ibid.*, para. 56).

6. With regard to the first aspect, Russia, in its fifth preliminary objection, seeks to have the Court declare inadmissible what it refers to as Ukraine's "reverse compliance request" in respect of the Genocide Convention. Ukraine, which prefers to use the phrase "declaration of conformity" or "declaration of compliance" (Judgment, para. 87), seeks a finding that there is nothing "judicially improper about the Court declaring a State to be in compliance with its obligation" (*ibid.*, para. 89), nor anything "problematic about th[e] judgment being *res judicata*" (*ibid.*, para. 91).

7. The question whether such a request by Ukraine is compatible with the judicial function of the Court is a difficult and delicate one. In its jurisprudence, the Court has stated that "[t]he Court itself, and not the parties, must be the guardian of the Court's judicial integrity" (*Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, p. 29), terms which the Court, in its Judgment in the *Frontier Dispute* case (*Burkina Faso/Niger*), considered to have "a general scope" (*Judgment, I.C.J. Reports 2013*, p. 69, para. 45), making them "perfectly applicable" to that case (*ibid.*, para. 46), in which Burkina Faso requested the Court "to include in the operative part of its Judgment the line of the common frontier in the two sectors on which the Parties have agreed, so as to endow this line with the force of *res judicata*" (*ibid.*, p. 66, para. 37), which the Court declined to do. The Court is thus very careful to ensure that its "judicial function" of dispute settlement remains intact, is not transformed into a function of "authentication" or "certification" and is, on the contrary, consistent with the mission of the Court as defined in Article 38 of its Statute.

8. This is thus, to my mind, a very important question among the preliminary objections to admissibility raised by Russia. In the present case, according to the latter, Ukraine is asking the Court to issue it a certificate of conduct in compliance with the Genocide Convention, which, in Russia's view, the Court cannot do because it would be inconsistent with its judicial function, particularly in the absence, at this stage, of the existence of a dispute, an essential condition for a pronouncement of the Court.

9. Ukraine has a different theory, however. It considers, and by rejecting Russia's first preliminary objection, the Court agrees, that there is in fact a dispute between Ukraine and Russia relating to the Genocide Convention, which thus removes the obstacle claimed by Russia.

10. Even if the condition of the existence of a dispute between the Parties is met in this case, does Ukraine have the ability to seize the Court of the "reverse claim" in question? I saw no compelling reason to deny it this possibility by upholding Russia's fifth objection. Indeed, while it is true that the Convention does not provide for such a situation, nor does it prohibit it, and

without placing a great deal of importance on the formulation “at the request of any of the parties to the dispute”, which some consider to be standard phrasing, I would nonetheless note that it was heavily debated during the *travaux préparatoires* of the Convention, which does not happen when mere standard phrasing is inserted in a text. I therefore see no serious reason not to consider that this phrase allows for any claim that otherwise meets the remaining conditions of validity to be brought by any of the parties to a dispute. The Court has analysed the Parties’ arguments at length and responded to them point by point. There is no need to revisit them here, other than to draw attention to a matter of judicial policy.

11. In paragraph 107, the Court takes a cautious approach towards such requests for a “declaration of conformity”, or “declaration of compliance”, which, if not subject to strict conditions, could be received in increasing numbers from States seeking to ensure recognition of a situation as “authenticated” or “guaranteed” by the authority of the Court, which, as noted above, it cannot agree to do. The Court must therefore regulate and place strict limits on such requests. In this regard, it considers that the question of the admissibility of a State’s request for a declaration that it has not breached its obligations under the Genocide Convention depends on the particular circumstances in which that request is made. In the present case, Ukraine’s request comes in the context of an armed conflict between the Parties. The Court makes clear that “[t]he armed conflict . . . continues to this day”. Without question, the circumstances are “particular” and grave.

12. I regret, however, that the Court did not see fit to express this same idea by means of a more general formulation. Instead of situating the breach of an obligation specifically “under the Genocide Convention”, and thus making explicit reference thereto, the Court could have addressed the matter by means of a dictum on the breach of an obligation, expressing itself in general terms rather than referring to any one text in particular. Following that dictum, the Court could have added that such was precisely the case in the present situation, so as to make it clear that the dictum applied to the case at hand.

13. It was ultimately noted that the circumstances had to be “particular”, according to the formulation used in paragraph 109 of the Judgment, although I myself would have also emphasized their gravity, as is the case in this instance. I would even have been in favour of referring to an extreme situation.

14. I now turn to the second aspect of the case and, more particularly, the third preliminary objection raised by Russia, relating to the Court’s lack of jurisdiction *ratione materiae*.

15. This question is a central and difficult one which, it must be admitted, has been somewhat obscured by textual differences, or the fact that, as the Court put it, “[t]he wording of the claims presented by Ukraine in its Application is . . . not identical to that of the claims set out in the Memorial”. I would like to take a moment to address these points.

16. The Application reads:

- “(c) Adjudge and declare that the Russian Federation’s recognition of the independence of the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’ on 22 February 2022 is based on a false claim of genocide and therefore has *no basis* in the Genocide Convention.
- (d) Adjudge and declare that the ‘special military operation’ declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has *no basis* in the Genocide Convention.”<sup>1</sup>

17. In the Memorial, Ukraine requests the Court to:

- “(c) Adjudge and declare that the Russian Federation’s use of force in and against Ukraine beginning on 24 February 2022 *violates Articles I and IV* of the Genocide Convention.
- (d) Adjudge and declare that the Russian Federation’s recognition of the independence of the so-called ‘Donetsk People’s Republic’ and ‘Luhansk People’s Republic’ on 21 February 2022 *violates Articles I and IV* of the Genocide Convention.”<sup>2</sup>

18. Clearly, asking the Court to find that an act “has no basis in the . . . Convention” is not the same as asking it to find that the same act “violates . . . the . . . Convention”, if for no other reason than the absence of a basis does not necessarily imply a violation. Most importantly, these differences in wording in the Application and the Memorial entail a broadening of the subject-matter jurisdiction of the Court.

19. The texts of the Statute and the Rules place no restrictions on modifications, and the jurisprudence of the Court is liberal in this regard, since it is largely accepting of any changes that may be made. The “allowance” in this respect is that “the result is not to transform the dispute brought before the Court by the application into another dispute which is different in character” (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Jurisdiction and Admissibility, Judgment*, *I.C.J. Reports 1984*, p. 427, para. 80; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1998*, pp. 318-319, paras. 98-99).

20. In so far as the claims, despite having evolved, still relate to the interpretation of the Convention for the purpose of determining, first, whether

<sup>1</sup> Emphasis added.

<sup>2</sup> *Ibid.*

certain elements fall within its scope, and, subsequently and consequently, whether they constitute violations, but now with specific reference to Articles I and IV, it seems to me that the situation in this instance corresponds to what the Court accepts as being within the discretion of States to elaborate on and supplement what has been set out in the application. It is true that the Court has observed in this regard that it is not sufficient that “there should be links between them of a general nature. An additional claim must have been implicit in the application . . . or must arise ‘directly out of the question which is the subject-matter of that Application’” (*Certain Phosphate Lands in Nauru (Nauru v. Australia)*, *Preliminary Objections, Judgment*, *I.C.J. Reports 1992*, p. 266, para. 67). In this instance, however, I consider that a case can in fact be made for a sort of *continuum* between the Application and the Memorial. To decide otherwise would, in my opinion, have been overly formalistic.

21. The Court thus considers (Judgment, para. 128) that the submissions in the Memorial “clarify” Ukraine’s claims and “make them more specific”. I share this point of view but ask myself why Ukraine did not ultimately maintain all the claims, emphasizing the fact that they are complementary, which also would have avoided causing confusion and raising questions as to whether or not the extension of a claim constituted a new claim; Ukraine, in my opinion, has gone to the limits of what is acceptable. This is a very fine and difficult line to walk.

22. The Court upholds the second preliminary objection raised by Russia regarding jurisdiction *ratione materiae* per se, based on particularly clear and precise reasoning, supported by converging jurisprudence, which, in language that sometimes differs slightly, essentially consists in considering whether the breaches in question concern obligations arising under the treaty and not under other rules of international law.

23. I have little to add to the reasoning set out in the Judgment, with which I agree on all points regarding the upholding of Russia’s objection to jurisdiction *ratione materiae*.

24. Indeed, I found it difficult to follow Ukraine’s approach to this aspect of the dispute and to identify a provision of the Convention that Russia may have violated. While there is no doubt that Russia has misused the Genocide Convention to justify its “special operation”, this does not in itself constitute, as Ukraine claims, a breach of obligations under Articles I and IV of the Convention. Whereas the conduct of Russia indisputably demonstrates disregard for other rules of general international law, the Convention has not given the Court jurisdiction concerning the violation of those rules. Pursuant to Article IX, its jurisdiction is confined to the interpretation, application and execution of obligations arising directly from the Convention.

25. Of course, the Court's decision on its jurisdiction in no way prejudices the question whether the conduct of Russia is contrary to international law.

*(Signed)* Yves DAUDET.

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