DISSENTING OPINION OF JUDGE ABRAHAM

[Translation]

Disagreement as to the admissibility of the counter-claims — Requirement of direct connection not met, the principal claim and the counter-claims being of a fundamentally different nature and not pursuing the same legal aim — Overturning of the principle of equality of arms.

1. I take the view that the Court should have declared inadmissible the counter-claims filed by Russia in the proceedings instituted by Ukraine in February 2022. I have therefore voted against point (A) of the operative part of the present Order. My reasons are as follows.

2. In the submissions contained in its Memorial, which modified slightly the terms of the Application instituting proceedings, Ukraine made two categories of claims which the Court characterized as the "two aspects of the dispute" in its Judgment of 2 February 2024 on the preliminary objections (*Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine* v. *Russian Federation: 32 States intervening), Preliminary Objections, Judgment, I.C.J. Reports 2024 (II)*). First, Ukraine requested the Court to find, by way of a purely declaratory judgment, "that there [was] no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention". Second, Ukraine asked the Court to adjudge that by using force against it and recognizing the independence of two "so-called" republics, Russia had violated certain provisions of the Genocide Convention. The first claim did not seek to engage Russia's international responsibility for a wrongful act, but merely to obtain a judgment declaring that the accusations publicly levelled against Ukraine by Russia were unfounded. The submissions in the second category sought a finding that Russia had violated the Convention in several respects (though without the Applicant accusing the Respondent of itself committing genocide).

3. The Judgment on the preliminary objections dismissed the "second aspect of the dispute" on the grounds that the Court lacks jurisdiction *ratione materiae* to entertain it: according to the Judgment, even if the acts of Russia complained of by Ukraine were established, they would not be capable of constituting violations of obligations under the Genocide Convention (it is worth emphasizing once again that Ukraine did not claim that Russia had committed genocide or allowed it to be committed).

Hence only the "first aspect" of the dispute now remains before the Court, which essentially concerns the question whether Russia was justified in publicly accusing Ukraine, in an extrajudicial context, of having committed or committing genocide in the eastern parts of its territory.

4. Russia's submissions in its Counter-Memorial seek first to have the Court dismiss Ukraine's request for a declaratory judgment corresponding to the "first aspect" of the dispute (since the second has fallen away). They further seek a declaration from the Court that Ukraine has committed genocide, attempted to commit genocide, been complicit in genocide and breached its obligation to prevent genocide, and that its international responsibility is engaged as a result of all these violations of the Convention.

It is these latter claims that must technically be regarded as counter-claims, since beyond merely seeking the dismissal of the Applicant's allegations, they are aimed at obtaining judgment against that State. And it is on the admissibility of these counter-claims that the Court is pronouncing in the present Order.

5. I have no doubt that the first requirement for the admissibility of counter-claims — namely, and according to Article 80, paragraph 1, of the Rules of Court, that they come within the jurisdiction of the Court — is satisfied in this case. I therefore have no objection to the conclusion reached by the Court on this point in paragraph 36 of the Order.

6. However, I consider that the second requirement, that of being "directly connected with the subject-matter of the claim of the other party", in the words of that same first paragraph of Article 80, is not met.

7. I fully appreciate that at first sight, there appears to be a "direct connection", and it even seems obvious: is it not the case that the claims of Ukraine and Russia both concern the alleged commission of genocide by Ukraine in the same territories and roughly at the same time? This seems to be more than a mere connection — almost an identity of subject-matter.

However, I am of the opinion that we are not dealing here with a "connection" within the particular meaning of that term in the specific context of counter-claims, and for three closely related reasons.

8. The first is that Russia's so-called counter-claims have the unusual characteristic of resembling far more a defence on the merits than a counter-claim *stricto sensu*.

The Court has consistently emphasized that a counter-claim is not a defence on the merits but "reacts to [the principal claim]" (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia), Counter-Claims, Order of 17 December 1997, I.C.J. Reports 1997*, p. 256, para. 27). In the classic phrase, it is a sword and not just a shield. It allows the respondent not merely to defend itself against the claims directed at it, but in turn to assert equivalent — and more or less symmetrical — claims against the applicant. Previous cases concerning the application of the Genocide Convention in which counter-claims were filed are particularly telling in this regard: an accusation by the applicant that the respondent had violated the Convention has been met with a symmetrical accusation by the respondent against the applicant (*Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Order of 17 December 1997*, cited above; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Judgment, I.C.J. Reports 2015 (I)*, p. 59, paras. 120-123).

9. Nothing of that kind is to be found in the present case. Through its counter-claims, Russia is not responding to a claim by Ukraine that the Respondent has violated the Convention, since such a claim, which was originally part of Ukraine's submissions, was excluded from the proceedings by virtue of the Judgment on the preliminary objections; consequently, the only claim that now remains on the part of Ukraine is the request for a judicial finding that it has not itself violated the Convention. In short, through its counter-claims, Russia is accusing Ukraine of violations of the Convention, whereas Ukraine is not (or no longer) accusing Russia of similar violations.

10. What, then, is the object of the counter-claims? They are, in substance and for the most part, a defence on the merits. Ukraine argues in its principal claim that Russia has wrongly accused it publicly of committing genocide; the arguments in support of Russia's "counter-claims" are intended to show that Ukraine has committed genocide and various other violations of the Convention, and that Russia's accusations are well founded. This is much more of a defence than a counter-attack.

11. It is true that Russia also requests the Court to declare that Ukraine is bound by certain obligations arising from its international responsibility, including in terms of reparation — a request that certainly goes beyond a mere defence on the merits. In this respect, Russia's claims are indeed consistent with the definition of counter-claims. In my view, however, there is a further objection to their admissibility.

12. It is established jurisprudence that for a counter-claim to be admissible, it must not only concern "the same geographical area or the same time period" as the facts invoked in support of the principal claim, and rely on the same legal instruments, but must also relate to "facts of the same nature", in the sense that the parties "allege similar types of conduct". It is also necessary to examine "whether the applicant and the respondent c[an] be considered as pursuing the same legal aim by their respective claims" (see, for example, *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica* v. *Nicaragua)* and *Construction of a Road in Costa Rica along the San Juan River (Nicaragua* v. *Costa Rica), Counter-Claims, Order of 18 April 2013, I.C.J. Reports 2013*, p. 212, para. 32).

13. While it may be readily accepted that the requirements relating to the geographical area concerned, the relevant time period and the legal instrument relied upon are met in this instance, the same does not hold true, in my opinion, of the requirements relating to the similarity of the conduct complained of by the two parties and the sameness of the legal aim pursued by each of them.

14. This is because of the fundamental difference in nature between the principal claim and the counter-claims. As has been noted, Ukraine's claim seeks to obtain a purely declaratory judgment establishing that Russia's allegations against it are false. Russia's claims seek to engage the responsibility of Ukraine for internationally wrongful acts. It certainly cannot be said that both Parties "allege similar types of conduct" within the meaning of paragraph 32 of the above-mentioned 2013 Order in the joined cases concerning *Certain Activities* and *Construction of a Road* (see also, in this respect, *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua* v. *Colombia), Counter-Claims, Order of 15 November 2017, I.C.J. Reports 2017*, p. 303, para. 44).

Nor can it be said that the facts relied upon by each side are "of the same nature".

Ukraine is not claiming that Russia has performed material acts constituting violations of the Convention; it is accusing Russia of having publicly made false "allegations" (the title of the case) of genocide against it. Russia, on the other hand, is contending that Ukraine has committed acts of genocide. Thus, the "type of conduct" of which the Parties are accusing each other is in no way "similar". It is of a fundamentally different nature.

15. The same negative conclusion is reached by applying the requirement — also present in the jurisprudence — for the legal aim pursued by the parties' respective claims to be identical. This requirement cannot be regarded as met when the principal claim seeks to obtain a purely declaratory judgment, while the counter-claim seeks to introduce a claim of international responsibility into the proceedings. This is a far cry from the *Genocide (Bosnia and Herzegovina* v. *Yugoslavia)* case, for instance, in which the Court found, in declaring the counter-claim admissible, that "the two Parties pursue, with their respective claims, the same legal aim, namely the establishment of legal responsibility for violations of the Genocide Convention" (1997 Order, cited above, p. 258, para. 35); or the case concerning *Sovereign Rights*, in which it likewise observed that "the Parties are pursuing the same legal aim by their respective claims since they are both seeking to establish the responsibility of the other by invoking violations of a right to access and exploit marine resources in the same maritime area" (*Sovereign Rights*, 2017 Order, cited above, p. 304, para. 45).

16. My conclusion is supported by a third reason. Declaring Russia's counter-claims admissible amounts to overturning a certain procedural equality between the Parties, which is one of the *raisons d'être* of the counter-claims procedure.

17. Indeed, this procedure does not merely reflect a desire for procedural economy, by sparing the respondent from having to file a new, separate application and allowing the Court to examine two closely related claims together within the same proceedings.

It also addresses a concern relating to the principle of equality of arms, in that it allows the respondent both to defend itself and to counter-attack, to respond in kind. In addition, it serves to make the applicant aware that, by initiating judicial proceedings, it exposes itself to the possibility of its opponent making claims against it, in turn, that are symmetrical to its own. It is to ensure this equality that the Court has held that jurisdiction to entertain a counter-claim must be determined by reference to the titles of jurisdiction that were in force at the date of the initial application, even if those titles have lapsed in the meantime, on the grounds, in particular, that "the opposite approach would have the disadvantage of allowing the applicant, in some instances, to remove the basis of jurisdiction after an application has been filed and thus insulate itself from any counter-claims" (*Sovereign Rights*, 2017 Order cited above, p. 311, para. 67).

18. However, the Court's finding that Russia's counter-claims are admissible not only fails to ensure this equality of arms, but overturns it.

If Russia had filed its claims in the form of a new application — as I believe it should have done — Ukraine would have been able to react by submitting, within those new proceedings, a counter-claim seeking to accuse Russia of genocide (an accusation that it has never previously made in judicial proceedings).

Now that the Court has allowed Russia to present its claims in this respect as part of the proceedings instituted by Ukraine —in the form of counter-claims — it seems highly unlikely that Ukraine would be permitted to make a symmetrical accusation against Russia within the same case. A claim with such an object could not be examined as a counter-claim, since Ukraine is the Applicant in the proceedings; and as a new claim it would fall far short of the admissibility requirements set out in the Court's jurisprudence (as recalled, for example, in paragraphs 67 to 69 of the above-mentioned Judgment on the preliminary objections in the present case). Ukraine could, of course, institute new proceedings, but it would not benefit from the protective legal régime of counter-claims, as the Court is allowing Russia to do today.

19. That is why it would have been preferable, in my opinion — not as a matter of discretion (my view on which is that the Court cannot avoid examining a counter-claim if the requirements of Article 80 of the Rules are met), but as a matter of law — to invite Russia to make its claims in the form of a separate application, if it wished to maintain them. In that way, Russia's rights would have been preserved, and those of Ukraine would not have been compromised.

(Signed) Ronny ABRAHAM.

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