DISSENTING OPINION OF JUDGE *AD HOC* DAUDET

[Translation]

Disagreement with the Court's reasoning as to the connection in law in the case at hand — Transformation of the nature of the dispute — Differing legal aims — The Court's discretion as regards the admissibility of counter-claims.

1. By its Application of 27 February 2022 instituting proceedings against the Russian Federation (hereinafter "Russia"), Ukraine seised the Court on the basis of the Convention on the Prevention and Punishment of the Crime of Genocide (the "Genocide Convention") with a view to obtaining a judgment condemning the use of force against Ukraine by means of the "special military operation" launched by Russia three days earlier, on 24 February 2022. Russia having raised preliminary objections, the Court delivered a Judgment on 2 February 2024 in which it rejected five of those objections but upheld the second of them, the principal one, concerning its jurisdiction *ratione materiae*. Taking the view that certain acts complained of by Ukraine, including in connection with the use of force by Russia, were not capable of constituting violations of the provisions of the Convention and consequently did not fall within those provisions[1], the Court ruled in Russia's favour and found that it lacked jurisdiction *ratione materiae* to deal with those aspects of the dispute referred to in its second preliminary objection.

2. Ukraine's claim is therefore now considerably diminished, since in that respect it has been reduced to merely awaiting a declaratory judgment stating that, contrary to Russia's baseless accusations, Ukraine did not commit genocide in the Donbas prior to 24 February 2022.

3. Before continuing its examination of the case on the merits, delayed by Russia's counter-claims of 18 November 2024 referring to Ukraine's commission of acts of genocide in the Donbas, the Court, through this Order, has had to consider the admissibility of those claims, since that was contested by Ukraine in its written observations of 20 May 2025, which called for them to be completely rejected. When the Court delivered its Judgment of 2 February 2024, I appended an opinion in which I noted that the "reverse" nature of this case was "somewhat disconcerting". Indeed, the usual situation is that the party accusing the other of committing genocide is the applicant before the Court. To my mind, that is how the implementation of the Genocide Convention was designed. According to that traditional format, since Russia was levelling various accusations of genocide against Ukraine, one might think that, in bringing proceedings before the Court further to its public statements, it would therefore occupy the role of applicant against Ukraine, with the latter being the respondent. But here the reverse is happening, and it is Ukraine, the victim of accusations made against it by Russia which it describes as untrue, that is the Applicant before the Court, while Russia is the Respondent.

4. Surely, then, Russia's counter-claims imply a return to normal, with each party taking its place as applicant or respondent according to the usual format, as on various occasions in the past, and where the State accusing another of genocide is the applicant bringing proceedings against it before the Court, while the other State is the respondent?

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[1] *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*, p. 421, para. 147.

5. But as I shall try to explain below, for other reasons, the case seems no clearer to me today than it did when the preliminary objections raised by Russia were examined.

6. This time, however, the case seems a very simple one on the face of things, since Ukraine — which has always denied committing any genocidal act in the Donbas and is making ready, when it comes to the merits stage, to ask the Court to place that on record in a declaratory judgment — is here the subject of a counter-attack by Russia, accusing it in turn of genocide, apparently with the very definition of a counter-claim given by the Court in its Order in the *Alleged Violations* case, namely that:

> "[c]ounter-claims are autonomous legal acts the object of which is to submit new claims to the Court which are, at the same time, linked to the principal claims, in so far as they are formulated as 'counter' claims that react to those principal claims"[2].

7. Initially, it is hard to see how satisfaction could not be given to Russia. Jurisdiction is obvious and accepted by the Court. The procedure has been complied with by Russia, which has presented its claim in its Counter-Memorial and the submissions contained therein, as required by Article 80 of the Rules of Court. Both instances concern questions relating to genocide, and at first sight one is led to believe that, with an alleged genocide opposing a contested genocide, the connection between Russia's counter-claim and Ukraine's original claim is plain to see, with a symmetry as perfect as the construction of a Chinese pagoda around its vertical axis. The Court, looking at the matter from this perspective, is therefore deciding in favour of Russia. It accepts its jurisdiction. It recognizes a direct connection between the counter-claims and the original claim. It declines to pronounce on the question of the discretion that would ultimately have allowed it to reject the Russian claim, if it were deemed admissible. The solution adopted by the Court appears all the more justified, in its eyes, because admitting the counter-claims will "achieve a procedural economy whilst enabling [it] to have an overview of the respective claims of the parties and to decide them more consistently" (para. 55).

8. To my great regret, and with all due respect to the majority of the Court, I wish to express my disagreement with it here on these various points, which I shall examine in turn.

9. In order to found its jurisdiction, and I agree with its being accepted by the Court, the latter addresses the question whether a dispute actually exists between the Parties, that being necessary for its jurisdiction to be established. Although the Court does not dwell on the matter, this discussion does not seem strictly necessary to me, for two reasons. First, the Parties are expressing no disagreement in this regard; and second, the existence of this dispute has already been recognized by the Judgment of 2 February 2024 on the preliminary objections.

10. To deal with the question of jurisdiction in the case at hand, it would be better to draw on the views expressed by Judge Yusuf in his declaration appended to the Order of 15 November 2017[3]. According to that declaration, while it may be necessary to consider jurisdiction where the legal basis relied on derives from two different conventions, when the same legal title is invoked in the

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[2] *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. 295, para. 18; see also *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.

[3] *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*, declaration of Vice-President Yusuf, p. 316.

"principal" claim as in the counter-claim (as is the case here), the Court should merely "ensure that [the] counter-claims fall within the scope of the jurisdiction thus prescribed", without having to "establish its jurisdiction over the counter-claims *de novo*"[4].

11. As regards the direct connection which must exist, according to Article 80, paragraph 1, of the Rules of Court, between the counter-claim and the subject-matter of the original claim, the jurisprudence of the Court has made clear that this direct connection is to be determined by reference on the one hand to the facts at issue, and on the other to the law (or legal aim) that lends it support. It follows from this jurisprudence that both these elements must be present, cumulatively, for a connection to be accepted. In the view of the Court, that requirement is met and Russia's claim has been admitted.

12. The connection in law may seem obvious when the same convention is invoked in both claims. However, the fact that the same legal title is being invoked creates no more than the formal appearance of a connection. The important point is to determine whether or not the parties are pursuing the same legal aim through their respective claims, whatever the legal title giving it expression[5].

13. Indeed, it is quite clear that the same text can be used differently and with different aims, with the effect, contrary to appearances, of removing a connection in law between the two claims. Conversely, it is possible that the same legal aim might be achieved by using different legal means.

14. In the present case, despite the identity of legal title (the Genocide Convention), the legal aims pursued by Russia have nothing to do with those expressed by Ukraine. By seeking full reparation from Ukraine (counter-claims, para. 1170 *(g)*) for the damage it claims to have suffered because of genocidal acts by Ukraine as referred to in various articles of the Convention, Russia is engaging in a dispute concerning responsibility.

15. Ukraine's position is on a completely different level. Following the Judgment on the preliminary objections, and at this stage of Russia's counter-claims, Ukraine is not mentioning the claim it made for reparations, with varying terms and content, in its Application (para. 30 *(g)*) and Memorial (para. 179 *(f)* and *(g)*). It may be that this claim will re-emerge and be examined at the merits stage through appropriate procedures which need not be touched on here, since that would be a hypothetical approach and the Court is rightly cautious regarding reasoning of that kind[6]. Today, it is true to say that, strictly speaking, Ukraine is no longer asking anything from Russia. Ukraine's only claim is addressed to the Court itself, asking it to find that it has not committed any violation of the Convention. We are therefore in a dispute as to legality, and Ukraine goes no further than that.

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[4] *Ibid.*, p. 317, para. 8.

[5] *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. 258, para. 35; *Oil Platforms (Islamic Republic of Iran* v. *United States of America), Counter-Claim, Order of 10 March 1998, I.C.J. Reports 1998*, p. 205, para. 38; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Order of 30 June 1999, I.C.J. Reports 1999 (II)*, pp. 985-986; *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo* v. *Uganda), Counter-Claims, Order of 29 November 2001, I.C.J. Reports 2001*, p. 679, paras. 38 and 40.

[6] *Dispute over the Status and Use of the Waters of the Silala (Chile* v. *Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 636, para. 48; *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia), Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 138, para. 123; *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 32, para. 73; *Northern Cameroons (Cameroon* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.

Of course, the same situation can give rise to two different and indeed successive disputes: the first involving recognition of an illegal act, leading to a second addressing the responsibility of the State. While the concept of legality is present in the claims of both sides, in one it is an end and in the other a means.

16. I would observe in passing that if the Court had not upheld Russia's preliminary objection in 2024, Ukraine's claim would also form part of a dispute concerning responsibility (Application, para. 30 *(f)*), and in that scenario, the connection in law with Russia's counter-claims would have been established as a result of the legal aims of the original claim and the counter-claims being identical.

17. However, such is not the case, and the legal aims pursued by each Party differ to the extent that, in a manner of speaking, Russia's counter-claim merges with its defence on the merits as presented in its Counter-Memorial, not to say telescopes into it.

18. By taking this approach, Russia, to my mind, is diverting the incidental proceeding of counter-claims from its normal purpose. It is emptying the proceedings on the merits of their object, as the Court, by finding Russia's counter-claims admissible, is allowing it to set forth and exploit elements that fall so far within the merits that the elements presented in the counter-claim are the same as those contained in the defence on the merits. I am therefore surprised that the Court appears to see an advantage in this situation, as it states in paragraph 55 and repeats in paragraph 62 of the Order. But as the Court found in the case concerning the genocide in Bosnia, "the counter-claim is distinguishable from a defence on the merits"[7].

19. The lack of any distinction between the defence on the merits and the counter-claims is in fact the element of the Order that most deeply concerns me, since to my mind it departs from the position taken in the Court's jurisprudence, which through a number of decisions on the general admissibility of counter-claims, as cited above, has succeeded in striking the difficult balance between the necessary autonomy enabling the counter-claims procedure to play its part and the link that must also be established through the connections in fact and in law, so that the procedure remains coherent. This hybrid nature of the system of counter-claims, as distinct from the original complaint, was brought out clearly in the genocide case:

> "[w]hereas it is established that a counter-claim has a dual character in relation to the claim of the other party; whereas a counter-claim is independent of the principal claim in so far as it constitutes a separate 'claim', that is to say an autonomous legal act the object of which is to submit a new claim to the Court, and, whereas at the same time, it is linked to the principal claim, in so far as, formulated as a 'counter' claim, it reacts to it"[8].

20. We see clearly here how counter-claims are not unlike the bat in La Fontaine's fable[9]. While it is indeed necessary for an initial claim to have been submitted to the Court and developed in the Applicant's Memorial, so that the Respondent is able to present counter-claims in turn in its Counter-Memorial, thereby signalling a form of interdependence between the two procedures, the

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[7] *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.

[8] *Ibid.*

[9] Jean de La Fontaine, *Fables*, Book II, fable 5, "The Bat and the Two Weasels": "I am a bird . . . behold my wings . . . I am a mouse, long live the rats".

Court also allows for a degree of autonomy in the counter-claims proceeding and of identity with the original claim. This enables the counter-claim to go beyond the initial claim and to have a certain attacking nature. In some circumstances, moreover, the counter-claim may prove the only claim at issue and continue to be pursued, for example if the applicant abandons the case. It is for the Court to strike a fair balance, ensuring the integrity of this procedure, which must retain its character as an incidental proceeding without becoming merged with the initial proceedings.

21. I therefore take the view that the distortion of the counter-claims procedure by Russia is sufficient grounds for dismissing its claims. Perhaps the Court could have made use of its power of discretion? I would observe that the question of the Court's discretion in this regard has been raised on several occasions, notably by two important opinions appended to the 1997 Order: the opinion by Vice-President Weeramantry and that of Judge *ad hoc* Lauterpacht. Vice-President Weeramantry considered that the Court had discretion as regards the admissibility of counter-claims and that it should be exercised when justified by the circumstances of the case. He set out a series of reasons why the Court should have exercised that power in respect of the counter-claims of Serbia, in particular the fact that those claims would delay the proceedings and examination of the merits of the case[10]. It could therefore happen that, in certain situations, the counter-claims did not serve the aim of the principle of judicial economy, but on the contrary acted against it. Such is precisely the case in this instance, to my mind, where Russia's substantial counter-claims, supported by multiple annexes, will have the effect of prolonging the proceedings and delaying consideration of the merits of the case. Judge *ad hoc* Lauterpacht rightly asserted that "[e]ach case must be looked at in the light of its own particular facts" and that the Court had the discretion to decline to join the otherwise admissible counter-claims to the principal claims[11].

22. It is true that the Court has never made use of its discretion, which requires the existence of exceptional circumstances. Today, the Court is not pronouncing on whether that power exists and is choosing instead to invoke the sound administration of justice, which in its view — as we have seen — is better served by Russia's counter-claim. As indicated below, I am of precisely the opposite opinion, and I therefore believe that Ukraine had good grounds for invoking the exceptional circumstances resulting from Russia's preference for continuing the use of force rather than seeking a peaceful resolution and from its misuse of the counter-claims procedure.

23. Without a doubt, the present case has already lasted too long without producing any significant effects: Russia did not implement the provisional measures indicated by the Court on 16 March 2022, it then raised preliminary objections which prompted an unheard-of number of interventions, and has now filed counter-claims accompanied by two sets of observations. Ukraine, with the aim of speeding up the progress of the case, has sought to produce just one set of observations. The judgment on the merits has nevertheless been unduly delayed, even if there no longer remains anything very much to judge, unless the Court were asked by Ukraine to consider a claim for compensation for war damage. However that may be, it is time for this matter to be closed, if only to ensure the sound administration of justice, which is indeed essential. In contrast to the position of the majority, I do not think that Russia's counter-claims will enable the Court to have a more precise idea of the situation presented to it by Ukraine's Application, nor that the administration of justice will thereby be improved. On the contrary, I believe that by slowing down progress, they

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[10] *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*, dissenting opinion of Vice-President Weeramantry, p. 287.

[11] *Ibid.*, separate opinion of Judge *ad hoc* Lauterpacht, pp. 284-285, paras. 18 and 19.

will not serve justice. That is why it is to my regret, while acknowledging the work and views of the majority, that Russia's counter-claims have not been dismissed in their entirety.

(Signed) Yves DAUDET.

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