

DISSENTING OPINION OF VICE-PRESIDENT GEVORGIAN

Agreement with the Court's decision to dismiss the second aspect of Ukraine's claim for lack of ratione materiae jurisdiction — The Court's assessment of the existence and scope of the dispute at the time of the Application is problematic — "Reverse compliance" complaints are not compatible with the Court's judicial function and undermine the object and purpose of the Genocide Convention — The Court fails to engage in a substantive analysis of the Russian Federation's abuse of process argument.

I. INTRODUCTION

1. At the outset, it is important to reiterate the fundamental principle that the Court's jurisdiction emanates from consent¹. No State can, without its consent, be compelled to submit its disputes to the Court. Neither Ukraine nor the Russian Federation accept the Court's jurisdiction as compulsory under Article 36, paragraph 2, of the Statute. Therefore, the only form of consent to binding judicial settlement by the Court that the two States have expressed can be found in compromissory clauses included in specific treaties, which allow the Court to rule on disputes relating to that — and only to that — specific treaty. In the present case, Ukraine based its claim exclusively on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter the "Genocide Convention" or "Convention"). Article IX of the Convention states that

"[d]isputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute".

¹ *East Timor (Portugal v. Australia)*, Judgment, I.C.J. Reports 1995, p. 101, para. 26; *Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom of Great Britain and Northern Ireland, and United States of America)*, Preliminary Question, Judgment, I.C.J. Reports 1954, p. 32.

2. Ukraine's formal submissions in this case have been divided by the Court into two aspects. The first aspect comprises Ukraine's request for the Court to 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 second aspect of Ukraine's claim is the submission that the Russian Federation, by recognizing the "Donetsk People's Republic" and "Luhansk People's Republic", and by using force against Ukraine, has breached Articles I and IV of the Convention.

3. As I have already pointed out in my declaration on the Court's Order on provisional measures of 16 March 2022, the present case constitutes an attempt by Ukraine to circumvent the limits of the Court's jurisdiction and to undermine the principle of consent². While Ukraine's submissions seem ostensibly related to the Genocide Convention, it is evident that the true aim of these submissions is to bring before the Court matters not regulated by the Convention, namely the legality of the use of force by the Russian Federation against Ukraine. I therefore appreciate that, in today's decision, the Court has rejected the notion that the compromissory clause of the Convention provides the Court with jurisdiction to rule on alleged breaches of obligations of international law that are extrinsic to the Convention, including the rules governing the use of force. As a result, the Court dismissed the second aspect of Ukraine's claim, and therefore the majority of Ukraine's submissions, as outside the Court's jurisdiction *ratione materiae*. I concur with this decision.

4. However, the majority of judges also decided to uphold the Court's jurisdiction over the first aspect of Ukraine's claim, namely the request 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". I cannot support this finding for two main reasons: first, I am of the opinion that Ukraine has not adequately demonstrated the existence of a dispute in relation to both aspects of its claims at the time it instituted the present proceedings. And second, I am convinced that the admission of Ukraine's request for a "declaration of compliance" (or "reverse compliance" complaint) is incompatible with the Court's judicial function in contentious cases and also compromises the object and purpose of the Genocide Convention. Therefore, while I agree with the Court's decision to uphold the second preliminary objection, I am convinced that the Russian Federation's first and fifth preliminary objection should have equally been upheld.

² *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022 (I), declaration of Vice-President Gevorgian, p. 234, para. 7.*

II. EXISTENCE AND SCOPE OF THE DISPUTE IN THE PRESENT CASE

5. According to the Court's jurisprudence, in order to establish the existence of a dispute, the evidence must show that the parties "hold clearly opposite views" with respect to the issue brought before the Court³. Moreover, the respondent must have been aware, or could not have been unaware, that its views were "positively opposed" by the applicant⁴. Finally, for the Court to have jurisdiction, the "dispute must in principle exist at the time the Application is submitted to the Court"⁵.

6. The present Judgment concludes 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"⁶. The Judgment draws this conclusion mainly from two statements, namely a speech made by the President of the Russian Federation on national television, which contained a generic reference to victims of genocide, as well as a statement by the Representative of the Russian Federation to the United Nations, who made a similarly vague reference⁷. While it is correct that, in principle, the Court may take statements made in multilateral fora into account⁸, the Court has never established the existence of a dispute based exclusively on statements made in such fora, or to a domestic audience.

7. To overcome this deficiency, the Judgment also refers to the so-called "Investigative Committee" of the Russian Federation, which was tasked, *inter alia*, with the investigation of persons in relation to their individual criminal responsibility for the crime of genocide⁹. However, the apparent dispute identified by the Court is about the commission of genocide "attrib-

³ See e.g. *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (II), p. 850, para. 41; *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (I), p. 26, para. 50, citing *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion*, I.C.J. Reports 1950, p. 74.

⁴ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (II), p. 850, para. 41.

⁵ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 502, para. 64; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022 (II), p. 634, para. 39; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 442, para. 46.

⁶ Judgment, para. 47.

⁷ *Ibid.*

⁸ *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 2016 (II), pp. 849-850, para. 39.

⁹ Judgment, para. 48.

utable to Ukraine”, in other words, the State responsibility of Ukraine for acts of genocide. Moreover, as the Court has previously noted, in assessing statements by a party for the purpose of establishing a dispute, it will pay special attention to “the author of the statement or document, their intended or actual addressee, and their content”¹⁰. In the present Judgment, the Court equally considered whether the relevant statements mentioned above were issued by organs that had the authority to represent the Russian Federation in international relations¹¹. The Judgment fails to mention, however, that the Investigative Committee had no such authority. Accordingly, the activities of the Investigative Committee, and Ukraine’s reaction thereto, are of little evidentiary value in relation to the existence of a dispute over Ukraine’s State responsibility under the Genocide Convention.

8. Finally, the Judgment refers to the statement of 26 February 2022, in which the Ministry of Foreign Affairs of Ukraine denounced “Russia’s false and offensive allegations of genocide”¹². This statement was issued only hours before Ukraine filed its Application before the Court. While the Court has found in previous cases that “positive opposition” of claims can be established by inference or silence where a response is called for¹³, such inference cannot be drawn without giving the opposite party any opportunity at all to react before filing a case. The Judgment merely notes that the “specific circumstances of the case” allowed Ukraine to seise the Court “without further delay”¹⁴. However, it fails to mention what exactly these “specific circumstances” are and why they somehow justify an unprecedented relaxation of legal standards concerning the existence of a dispute. One can assume that the Court refers to the fact that an armed conflict had emerged between the two States. However, cases taking place in the context of ongoing armed hostilities are neither new nor special in the Court’s jurisprudence. Indeed, in comparable cases, the Court did not consider that hostilities affect the criteria necessary to establish the existence of a dispute¹⁵.

¹⁰ *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 100, para. 63.

¹¹ Judgment, para. 47.

¹² *Ibid.*, para. 48.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Preliminary Objections, Judgment, I.C.J. Reports 2022 (II)*, p. 507, para. 75; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, pp. 84-85, para. 30.

¹⁴ Judgment, para. 50.

¹⁵ See e.g. *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation), Preliminary Objections, Judgment, I.C.J. Reports 2011 (I)*, p. 120, para. 113.

9. For these reasons, I believe the Russian Federation's first preliminary objection should have been upheld.

III. ADMISSIBILITY OF "NON-VIOLATION" OR "REVERSE COMPLIANCE" CLAIMS

10. I am also unable to join the majority in relation to another essential aspect of today's decision. As mentioned above, the Court upheld its jurisdiction over Ukraine's request to declare that there is no credible evidence that acts of genocide attributable to Ukraine took place in the Donbas. In doing so, the Court espoused a concept of a "non-violation" or "reverse compliance" complaint that lacks support in the Court's jurisprudence. In the following paragraphs, I will explain why I cannot agree with this finding.

11. At the outset, it bears emphasizing that this is an extremely unusual claim that has no precedent in the Court's jurisprudence. As the Judgment correctly concludes, the two cases discussed by the Parties, *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*), are not apposite and provide no guidance on the admissibility of the present claim¹⁶. This is thus the first time that this Court decides on this issue, and in my view it has not decided correctly.

12. I believe this claim finds no more support in the Genocide Convention's letter or spirit. First, I do not agree that the terms "fulfilment", "responsibility of a State" or "*any* of the parties to the dispute" in Article IX contain any indication about the admissibility of requests for a declaration of compliance under the Genocide Convention, like the Court suggests¹⁷. In particular, the aim of including the phrase "at the request of *any* of the parties to the dispute" was simply to allow the unilateral seising of the Court by the applicant, and thus clarify that the case need not be brought with the agreement of both parties, as acceptance of Article IX expresses the parties' advance consent to the Court's jurisdiction. This position is corroborated by the Convention's *travaux préparatoires*. The possibility of a reverse compliance request was simply not considered during the negotiation of the Convention. In fact, the prototypical example of a case brought under the Convention's compromissory clause was that of

¹⁶ Judgment, para. 101.

¹⁷ *Ibid.*, para. 98.

a State referring a case to the Court against another State when genocide was being committed¹⁸.

13. Moreover, Article IX, like any other treaty provision, must be interpreted in light of the treaty's object and purpose¹⁹, that is, in a way that advances the treaty's goals. The Genocide Convention's object and purpose, which is indicated, *inter alia*, in its title²⁰, is the prevention and punishment of genocide. The compromissory clause must be seen as a mechanism serving those goals of prevention and punishment of genocide by holding States accountable when they may have committed or failed to prevent genocide²¹. The purpose of the Convention, and in particular its Article IX, is not to exculpate States from an allegation of genocide that, according to the applicant, is false. In the present case, Ukraine claims no genocide has occurred. It turns the Genocide Convention on its head when it seeks to use it to establish that there is no genocide to prevent or punish. This use of Article IX in that way cannot serve the Convention's object and purpose.

14. Furthermore, admitting this claim raises issues of judicial propriety. In its fifth preliminary objection, Russia claimed, *inter alia*, that a decision on Ukraine's submission may pre-empt the Russian Federation's right to invoke Ukraine's responsibility under the Convention if and when it considers it appropriate to do so. The Judgment responded to this argument by stating that

¹⁸ See United Nations General Assembly, Sixth Committee, Hundred and Fourth Meeting, 13 November 1948, UN doc. A/C.6/SR.104, p. 444 ("When it became clear that genocide was being committed, any party to the convention could refer the matter to the International Court of Justice." Emphasis added.).

¹⁹ See Article 31 (1) of the Vienna Convention on the Law of Treaties (VCLT). While the VCLT predates the Genocide Convention and is, therefore, not directly applicable, the principles of interpretation enshrined in Article 31 form part of customary international law. See e.g. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Preliminary Objections, Judgment, I.C.J. Reports 2022 (II), p. 510, para. 87; *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (II), p. 598, para. 106; *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), pp. 109-110, para. 160.

²⁰ See *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. 118, para. 39; *Maritime Delimitation in the Indian Ocean (Somalia v. Kenya)*, Preliminary Objections, Judgment, I.C.J. Reports 2017, p. 31, para. 70; *Certain Norwegian Loans (France v. Norway)*, Judgment, I.C.J. Reports 1957, p. 24.

²¹ This is confirmed by the *travaux*. See United Nations General Assembly, Sixth Committee, Hundred and Fourth Meeting, 13 November 1948, UN doc. A/C.6/SR.104, p. 444 ("[T]he United Kingdom delegation had felt that provision to refer acts of genocide to the

“[i]t 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.”²²

However, due to the principle of *res judicata*, a judgment declaring that there is no credible evidence that Ukraine is responsible for committing genocide in the Donetsk and Luhansk oblasts precludes the Russian Federation from invoking Ukraine’s responsibility for such a genocide on the basis of the factual record and time period considered in the original proceedings. If the Russian Federation were to uncover new evidence after that judgment, its only option would be to apply for a revision of the judgment under Article 61 of the Statute. But this option is not equivalent to bringing a new case and subject to very strict temporal conditions. As a result, admitting this claim deprives Russia of the opportunity of proving that acts of genocide have been committed and should not be permissible for reasons of judicial propriety and the equality of parties.

15. The problem is compounded by the fact that the Court has adopted a low threshold for the existence of a dispute in relation to this claim. In the present Judgment, the Court cites political statements made in the context of multilateral fora or addresses to Russian citizens in support of its finding that a dispute existed²³. I believe the majority fails to appreciate the potential repercussions of admitting a declaration of compliance claim under these circumstances. One can imagine a situation whereby a State official would make good-faith allegations of genocide or other serious human rights violations in multilateral fora in order to ring the alarm bell and provoke a reaction from the international community without necessarily having gathered sufficient evidence to meet the high standard of proof (“fully conclusive” evidence)²⁴. Such States could then be prevented from collecting evidence and proving the existence of genocide through the admission of a “reverse compliance” claim leading to a judgment barring any future claims through the force of *res judicata*. This undermines the very object and purpose of the Convention.

International Court of Justice, and the inclusion of the idea of international responsibility of States or Governments, was necessary for the establishment of an effective convention on genocide.”).

²² Judgment, para. 105.

²³ *Ibid.*, paras. 30 and 47.

²⁴ *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. 74, para. 178.

16. Finally, I must address the Court's view that the "particular circumstances" in which the "reverse compliance request" was made weigh in favour of its admissibility. The Court here refers to the armed conflict between the Parties as such a "particular" circumstance²⁵. Unfortunately, however, the existence of an armed conflict between parties is not an unusual situation. Therefore, I do not believe this is an adequate limiting factor, and I see no reason why it would in this case justify, above all concerns, the admission of a claim completely unprecedented in the Court's jurisprudence.

IV. ABUSE OF PROCESS

17. Finally, I would like to mention that the Court has failed to engage in substance with the Russian Federation's objection based on an alleged "abuse of process". As the Judgment mentions, an abuse of process concerns the question of whether a State has misused the procedure of the Court to such an extent that its case should be rejected at the preliminary phase of the proceedings²⁶. As I have mentioned in my declaration on the Order of 5 June 2023, I have serious concerns regarding how the tool of intervention has been utilized in the present case²⁷. In particular, I fear that the Court has set a precedent that incentivizes States to orchestrate politically motivated mass interventions.

18. Nevertheless, in today's Judgment, the Court notes that the Respondent failed to demonstrate "exceptional circumstances that would warrant rejecting Ukraine's claim on the ground of abuse of process" without further inquiry into the background of the present mass intervention²⁸. While I acknowledge that the Court has never upheld an objection based on abuse of process in the past, I believe that the circumstances of the present case can indeed be categorized as "exceptional". I therefore think the Court should have inquired more seriously into whether such conduct would compromise the sound administration of justice to an extent that might require it to declare an application inadmissible.

19. For these reasons, I respectfully dissent.

(Signed) Kirill GEVORGIAN.

²⁵ Judgment, para. 109.

²⁶ *Ibid.*, para. 113.

²⁷ *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Admissibility of the Declarations of Intervention, Order of 5 June 2023, I.C.J. Reports 2023 (II)*, declaration of Vice-President Gevorgian, p. 381, para. 1.

²⁸ Judgment, para. 118.