SEPARATE OPINION OF JUDGE IWASAWA

It is ill-advised to describe Ukraine's submission (b) *as a "non-violation complaint" because this term has a special meaning in WTO law — The practices of the WTO provide no assistance to the Court because they are based on particular provisions of the DSU.*

There are three elements required for the application of the principle of res judicata*, namely identity of the "parties", the "object" and the "ground" — Some tribunals have focused on "the question at issue", without distinguishing "object" and "ground" as two separate elements.*

An abusive invocation of a treaty does not, by itself, constitute a breach of the treaty — In the Bosnian Genocide *case, in stating that "it is clear that every State may only act within the limits permitted by international law", the Court was merely emphasizing that a State party is not required by Article I of the Genocide Convention to take measures which go beyond the limits permitted by international law.*

1. In this opinion, I will address three topics. First, I will offer my views on World Trade Organization (hereinafter the "WTO") law. I will explain why it is ill-advised to refer to Ukraine's submission *(b)* as a "non-violation complaint", and elaborate on the Court's reasons for concluding that the practices of the WTO provide no assistance to the Court in the present case. Second, I will explain the circumstances in which a claim is covered by the *res judicata* effect of a judgment. Third, I will examine the acts complained of by Ukraine in submissions *(c)* and *(d)*, and affirm that they are not capable of constituting violations of obligations under the Genocide Convention.

I. WTO Law

2. The Russian Federation argues that Ukraine's request for a declaration that it did not breach its obligations under the Genocide Convention is inadmissible. The Respondent refers to Ukraine's request as a "reverse compliance request". It contends that requests of such a kind are extremely rare in inter-State dispute settlement and that they are currently reserved

for the WTO, whose practices are not transposable to the Court (see Judgment, para. 82).

3. The Court notes a significant variation in the terms employed by the Parties and some intervening States to describe Ukraine's request. While the Russian Federation refers to it as a "reverse compliance request", Ukraine uses terms such as a request for "a declaration of conformity", "a declaration of compliance", and "a non-violation declaration". The intervening States have employed terms such as "non-violation complaints" and requests for "negative declarations". The Court does not find it necessary to explore the legal significance of the various terms used (Judgment, para. 93).

4. In my view, the term "non-violation complaint", used by Ukraine and many intervening States (Austria-Czechia-Slovakia, Belgium, Bulgaria, Croatia, Cyprus, Denmark, Estonia, Finland, Ireland, Italy, Latvia, Luxembourg, Malta, and Sweden), is misleading and should be avoided because it has a special meaning in WTO law.

5. Under Article XXIII, paragraph 1, of GATT 1994, a member of the WTO can submit a complaint under the WTO dispute settlement procedures when any benefit accruing to it under the WTO Agreement is being nullified or impaired as a result of "*(a)* the failure of another contracting party to carry out its obligations under [the WTO] Agreement" or "*(b)* the application by another contracting party of any measure, whether or not it conflicts with the provisions of [the WTO] Agreement". In WTO law, the former are referred to as "violation complaints" and the latter as "non-violation complaints" (see Article 26 of the Dispute Settlement Understanding ("DSU"), Annex 2 of the WTO Agreement). Thus, a member of the WTO can submit a complaint under the WTO dispute settlement procedures, claiming that its benefits are being nullified or impaired by another member's measure, even if that measure does not violate the WTO Agreement. Given the special meaning attributed to the term "non-violation complaints" in WTO law, it is confusing and ill-advised to describe Ukraine's submission *(b)* as a "non-violation complaint".

6. As for the Respondent's contention that the practices of the WTO are not transposable to the Court, the Court merely states that "the practices of the WTO provide no assistance to the Court for determining the admissibility of Ukraine's request because they are based on particular provisions of the [WTO] Agreement" (Judgment, para. 95). I will elaborate on the reasons why the practices of the WTO provide no assistance to the Court.

7. Under the WTO dispute settlement procedures, a panel or the Appellate Body examines a dispute and issues a report containing findings and recommendations. If the Dispute Settlement Body ("DSB") adopts the report, the parties to that dispute are required to implement the recommendations and rulings of the DSB. After the respondent has taken measures to implement those recommendations and rulings, a disagreement may arise between the parties as to whether such measures are consistent with the WTO Agreement. Article 21.5 of the DSU allows the parties to have recourse to the WTO dispute settlement procedures to resolve this disagreement. These proceedings are referred to as a "compliance review" in the WTO.

8. Article 21.5 of the DSU provides that

> "[w]here there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel".

It is not clear from this provision whether a respondent of the original dispute can have recourse to a compliance review. In practice, however, respondents of the original disputes have requested compliance reviews regarding disagreements on the consistency with the WTO Agreement of measures they have taken to implement the recommendations and rulings of the DSB. Article 6 of the DSU provides that, if the complaining party so requests, "a panel shall be established" at the latest at the second meeting of the DSB, "unless at that meeting the DSB decides by consensus not to establish a panel". In accordance with this provision, if a respondent of the original dispute requests the establishment of a panel for a compliance review, a panel "shall be established" at the second meeting of the DSB. Thus, in practice, both applicants and respondents of the original disputes have had recourse to compliance reviews, and panels have been established to conduct such reviews[1].

9. The DSU specifically provides for a compliance review (Art. 21.5) and stipulates that a panel for a compliance review shall be established at the second meeting of the DSB, even when the review is requested by the respondent of the original dispute (Art. 6). The practices of the WTO provide no assistance to the Court because they are based on these particular provisions of the DSU (see Judgment, para. 95).

[1] See e.g. European Communities — Regime for the Importation, Sale and Distribution of Bananas — Recourse to Article 21.5 by the European Communities, Report of the Panel, adopted 6 May 1999, WT/DS27/RW/EEC.

II. *Res Judicata*

10. In the present case, the Russian Federation contends that Ukraine's submission *(b)* contradicts the principles of judicial propriety and the equality of the parties, arguing that Ukraine could obtain an undue advantage by virtue of the principle of *res judicata*. The Court dismisses this objection summarily. It points out 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". It then concludes that 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 (Judgment, para. 105). I will elaborate on the circumstances in which "a future claim is covered by the *res judicata* effect of [a] judgment" (*ibid*.).

11. It is widely accepted both in international law and in national law that there are three elements required for the application of the principle of *res judicata*. In international law, this idea can be traced to Judge Anzilotti's dissenting opinion in the *Chorzów Factory: Interpretation* cases, in which he explained:

> "The first object of Article 60 being to ensure, by excluding every ordinary means of appeal against them, that the Court's judgments shall possess the formal value of *res judicata*, it is evident that that article is closely connected with Article 59 which determines the material limits of *res judicata* when stating that 'the decision of the Court has no binding force except between the Parties and in respect of that particular case': we have here the three traditional elements for identification, *persona, petitum, causa petendi*, for it is clear that 'that particular case' (*le cas qui a* été *décidé*) covers both the object and the grounds of the claim." (*Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów), Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, dissenting opinion of Judge Anzilotti, p. 23. See also *Interpretation of the Statute of the Memel Territory, Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, dissenting opinion of Judge Anzilotti, p. 350.)

These three elements were endorsed by the arbitral tribunal in the *Trail Smelter* case, which referred to the identification of "parties, object, and cause"[2]. In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, the Court referred to "*les mêmes parties*" ("the same parties"), "*le même objet*" ("the same object"), and "*la même*

[2] *Trail Smelter case (United States of America/Canada)*, Award of 11 March 1941, United Nations, *Reports of International Arbitral Awards*, Vol. III, p. 1952.

base juridique" ("the same legal ground") (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 59)[3].

12. The first element, *persona* or identity of the parties, is not especially complicated in inter-State disputes; it requires that the same "parties" (States) are involved in two proceedings. For the second element, Judge Anzilotti used the Latin term, *petitum*, which means the "relief sought". On this basis, the second element is generally thought to require that the same relief is sought in two proceedings[4]. However, in the subsequent part of his opinion, Judge Anzilotti described *petitum* as "*la chose demandée*" in French and "the object of the claim" in English. The term "object" has an ambiguous meaning in English. Some tribunals and authors have understood the "object" of the claim to mean the "subject-matter" of the dispute or the "issue" in dispute[5]. As for the third element, *causa petendi*, Judge Anzilotti described it as "*la cause de la demande*" in French and "the grounds of the claim" in English. Thus, the third element, which is often explained as identity of "cause" or "ground", is thought to require that the same "legal grounds" are relied on by the parties in two proceedings.

13. Some tribunals have considered that the principle of *res judicata* applies where there is identity of the parties and of "the question at issue", without distinguishing "object" and "ground" as two separate elements. For example, the tribunal in the *Pious Fund Arbitration* stated that *res judicata* applies where "there is not only identity of parties to the suit, but also identity of *the subject-matter*"[6]. In *Re S.S. Newchwang*, the tribunal declared that "the doctrine of *res judicata* applies only where there is identity of the parties and of *the question at issue*"[7]. The Permanent Court of International Justice took the view that "the doctrine of *res judicata* [applies when] not only the Parties but also *the matter in dispute* [are] the same" (*Polish Postal Service in Danzig, Advisory Opinion, 1925, P.C.I.J.,*

[3] Other tribunals have also endorsed the three-element test. *Helnan International Hotels A/S* v. *Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Award of 7 June 2008, para. 126. See also Iran-US Claims Tribunal, *Islamic Republic of Iran* v. *United States of America*, IUSCT Award No. 601-A3/A8/A9/A14/B61-FT, Partial Award of 17 July 2009, para. 114; *Apotex* v. *United States of America*, ICSID Case No. ARB(AF)/12/1, Award of 25 August 2014, para. 7.13.

[4] E.g. *Helnan*, *supra* note 3, para. 126; *Apotex*, *supra* note 3, para. 7.14.

[5] E.g. *CME Czech Republic B.V.* v. *Czech Republic*, Final Award of 14 March 2003, para. 435; *Helnan*, *supra* note 3, para. 126; Vaughan Lowe, "*Res Judicata* and the Rule of Law in International Arbitration", *African Journal of International and Comparative Law*, Vol. 8, 1996, p. 40.

[6] *Pious Fund of the Californias (Mexico/United States)*, 14 October 1902, James Brown Scott (ed.), *The Hague Court Reports*, 1916, p. 5 (emphasis added).

[7] In *Re S.S. Newchwang (Great Britain* v. *United States of America)*, Decision of 9 December 1921, *American Journal of International Law*, Vol. 16, p. 324 (emphasis added).

Series B, No. 11, p. 30; emphasis added)[8]. Indeed, although Judge Anzilotti in *Interpretation of Judgments Nos. 7 and 8 (Factory at Chorzów)* explained that "'the particular case' ('*le cas qui a été décidé*') covers both the object and the grounds of the claim" (*Judgment No. 11, 1927, P.C.I.J., Series A, No. 13*, dissenting opinion of Judge Anzilotti, p. 23), he subsequently used the phrase "the subject of the dispute" ("*objet du différend*") in the sense of "*petitum et causa petendi*" in *Interpretation of the Statute of the Memel Territory* (*Merits, Judgment, 1932, P.C.I.J., Series A/B, No. 49*, dissenting opinion of Judge Anzilotti, p. 350). Thus, "object" and "ground" could be considered as a subdivision of identity of "the question at issue"[9].

14. In *Question of the Delimitation of the Continental Shelf between Nicaragua and Colombia beyond 200 Nautical Miles from the Nicaraguan Coast (Nicaragua* v. *Colombia)*, the Court further explained that for the application of the principle of *res judicata*, it is not sufficient to ascertain that the case at issue involves the same parties, the same object, and the same legal ground. It is also necessary to determine the content of the decision whose finality is to be ensured. The Court cannot be satisfied merely by the fact that successive claims submitted to it by the same parties are identical. It must determine whether and to what extent the first claim has already been definitively settled. If a matter has not in fact been determined, expressly or by necessary implication, no force of *res judicata* attaches to it. A general finding may have to be read in context in order to ascertain whether a particular matter is or is not contained in it (*Preliminary Objections, Judgment, I.C.J. Reports 2016 (I)*, p. 126, para. 59).

III. The Alleged Violations by the Respondent of the Genocide Convention

15. In the present case, the Applicant seeks to found the Court's jurisdiction on Article IX of the Genocide Convention. As the Court points out, "when the Court is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State party for

[8] See also *Waste Management Inc.* v. *United Mexican States*, ICSID Case No. ARB(AF)/00/3, Decision of 26 June 2002 on Mexico's Preliminary Objection, para. 39; *Petrobart Limited* v. *Kyrgyz Republic*, Stockholm Chamber of Commerce, No. 126/2003, Arbitral Award of 29 March 2005, p. 64; *Vivendi* v. *Argentina*, ICSID Case No. ARB/97/3, Decision on Jurisdiction of 14 November 2005, para. 72; *Inceysa Vallisoletana, S.L.* v. *El Salvador*, ICSID Case No. ARB/03/26, Award of 2 August 2006, para. 214; *EURAM Bank* v. *Slovakia*, PCA Case No. 2010-17, Award on Jurisdiction of 22 October 2012, para. 394; *Apotex*, *supra* note 3, paras. 7.15-7.16; *Iran* v. *United States*, *supra* note 3, para. 114.

[9] See e.g. Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, 1953, pp. 340, 343 and 346; Leonardo Nemer Caldeira Brant, *L'autorité de la chose jugée en droit international public*, 2003, pp. 114-123.

the breach of obligations under the treaty", it has jurisdiction only if "'the violations of the [t]reaty . . . pleaded . . . fall within the provisions of the [t]reaty' [the *Oil Platforms* case]" (Judgment, para. 135).

16. Ukraine contends that "Russia's abuse and misuse of the [Genocide] Convention violates the Convention" (Written Statement of Ukraine, paras. 122-128; see also CR 2023/14, p. 78, para. 48 (Thouvenin); Memorial of Ukraine, paras. 91-92). The Applicant cites several decisions of the Court and a report of the WTO Appellate Body to support such a contention[10]. However, the cases cited by Ukraine do not support its contention. I agree with the Court that, although "[i]t is certainly not consistent with the principle of good faith to invoke a treaty abusively", an abusive invocation does not, "by itself, [] constitute[] a breach of the treaty" (Judgment, para. 143), even if it may breach other rules of international law. "In the present case, even if it were shown that the Russian Federation had invoked the Convention abusively . . ., it would not follow that it had violated its obligations under the Convention" (*ibid*.).

17. Ukraine also argues that Articles I and IV of the Genocide Convention contain an implicit obligation to act within the limits of international law when preventing and punishing genocide. By taking actions which go beyond the limits permitted by international law based on a false allegation of genocide, the Respondent has violated Articles I and IV of the Genocide Convention (Memorial of Ukraine, paras. 94-100 and 126; Written Statement of Ukraine, paras. 129-142; see also CR 2023/14, pp. 79-80, paras. 51-56 (Thouvenin)). In support of this contention, Ukraine relies on the Court's statement in the *Bosnian Genocide* case that "it is clear that every State may only act within the limits permitted by international law" (*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)*, p. 221, para. 430). Some intervening States have expressed similar views.

18. The Court's statement in the *Bosnian Genocide* case should not be taken out of context. The Court made this statement when it was analysing the obligation to prevent genocide under Article I of the Genocide Convention, with a view to determining its specific scope. The Court explained that the obligation to prevent genocide is one of conduct and not one of result; the obligation is "to employ all means reasonably available to [the States parties], so as to prevent genocide so far as possible". A State must "take all measures

[10] *Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7*, p. 30. *Certain Iranian Assets (Islamic Republic of Iran* v. *United States of America), Judgment, I.C.J. Reports 2023 (I)*, p. 90, para. 93. *Immunities and Criminal Proceedings (Equatorial Guinea* v. *France), Preliminary Objections, Judgment, I.C.J. Reports 2018 (I)*, p. 317, para. 73. United States — Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, adopted 6 November 1998, WT/DS58/AB/R, pp. 61-62, para. 158.

to prevent genocide which [are] within its power". The Court then observed that "it is clear that every State may only act within the limits permitted by international law" (*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)*, p. 221, para. 430). With this statement, the Court was merely emphasizing that a State party is not *required* by Article I of the Genocide Convention to take measures which go beyond the limits permitted by international law. The Court explains the meaning of this statement in a similar manner in the present Judgment (para. 146).

19. For these reasons, I agree with the Court that, even assuming that the actions taken by the Respondent are contrary to international law, "it is not the [Genocide] Convention that the Russian Federation would have violated but the relevant rules of international law" (Judgment, para. 146). It is clear that States may not act beyond the limits of international law when preventing and punishing genocide. However, Articles I and IV of the Convention do not contain an implicit obligation to act within the limits of international law. "Those limits are not defined by the Convention itself but by other rules of international law." (*Ibid*.)

(Signed) IWASAWA Yuji.