DECLARATION OF VICE-PRESIDENT GEVORGIAN

Disagreement with the Court's finding on prima facie jurisdiction — Consent as a fundamental principle underlying the Court's jurisdiction — The acts invoked by Ukraine do not fall under the scope of the Genocide Convention — The actual dispute relates to the use of force which is not covered by the Genocide Convention — Importance for the Court to maintain its settled jurisprudence — Support for adoption of the non-aggravation clause.

1. I could not join the majority on the first and second provisional measure indicated by the Court in this Order, purely on a substantial legal ground — I do not believe that the Court has jurisdiction to entertain this case. Ultimately, the jurisdiction of every international court emanates from the consent of States to subject a dispute between them to the binding settlement by a judicial body. This is a well-established principle of general international law and also firmly embodied in the Court's Statute[1]. Accordingly, no State can, without its consent, be compelled to submit its disputes to the Court[2].

2. States can express this consent in several ways, for example by recognizing the Court's jurisdiction as compulsory under Article 36 (2) of its Statute, or by expressing a narrower form of consent via a compromissory clause, which allows the Court to adjudicate disputes relating to a specific treaty. Since neither the Russian Federation nor Ukraine have lodged a declaration under Article 36 (2) of the Statute to accept the Court's jurisdiction as compulsory, Ukraine based its claim exclusively on Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter "Genocide Convention"). Article IX of said Convention states that:

> "Disputes 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] *Status of Eastern Carelia, Advisory Opinion, 1923, P.C.I.J., Series B, No. 5*, p. 27; *Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 16.

3. In a letter to the Court, the Russian Federation indicated its opposition to the Court's jurisdiction and noted that Article IX does not apply to the situation at hand[3]. In particular, the Russian Federation considers that Ukraine seeks to bring before the Court issues relating to the use of force, which are not governed by the Genocide Convention and, therefore, do not come within the jurisdiction of the Court[4].

4. As the Court has stated multiple times, in order to establish jurisdiction under Article IX of the 1948 Genocide Convention, the subject-matter of the dispute must relate to the interpretation, application or fulfilment of the Convention[5]. While it must not decide in a definitive manner that it has jurisdiction over the merits of the case at this stage of the proceedings, the Court must nevertheless ascertain whether the provisions relied on by Ukraine appear, prima facie, to afford a basis on which its jurisdiction could be founded[6]. Accordingly, the Court must analyse whether the acts complained of by Ukraine are capable of falling within the provisions of the Genocide Convention and, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain[7].

5. It is evident that the dispute that Ukraine seeks to bring before the Court, in reality, relates to the use of force by the Russian Federation on Ukrainian territory. However, neither is the use of force regulated by the Genocide Convention nor does the use of force in itself constitute an act of genocide. The Court has been very clear in this regard in the 1999 *Legality of Use of Force* cases, where it held that

> "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention; and whereas, in the opinion of the Court, it does not appear at the present stage of the proceedings that the bombings which form the subject of the Yugoslav Application 'indeed entail the element of intent, towards a group as such, required by the provision quoted above'"[8].

---

[3] Letter by H.E. Mr. Alexander V. Shulgin, Ambassador of the Russian Federation to the Kingdom of the Netherlands, dated 7 March 2022.

[4] *Ibid.*, paras. 4 and 13.

[5] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Yugoslavia (Serbia and Montenegro)), Provisional Measures, Order of 8 April 1993, I.C.J. Reports 1993*, p. 16, para. 26; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 37.

[6] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia* v. *Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020*, p. 9, para. 16.

[7] *Ibid.*, p. 10, para. 20; *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 137, para. 38.

[8] *Ibid.*, p. 138, para. 40.

6. Accordingly, the Court found that it had no prima facie jurisdiction under the Convention to adjudicate upon the bombardment of Serbia by NATO member States[9]. As the Court has noted in *Croatia* v. *Serbia*, it will not depart from its settled jurisprudence *(jurisprudence constante)* unless it finds "very particular reasons to do so"[10]. Yet, the situation in the present case is similar as it concerns the use of force without a legal link to genocide. Nothing in Ukraine's Application for provisional measures indicates that the military operations launched by the Russian Federation demonstrate the element of intent necessary for acts of genocide. Therefore, the dispute Ukraine aims to have adjudicated upon by the Court does not fall within the scope of the Convention. As a result, the Court manifestly lacks jurisdiction *ratione materiae* to entertain this Application, and, consequently, to indicate provisional measures.

7. To circumvent this problem, Ukraine claims that the Convention embodies a right "not to be subjected to another State's military operations on its territory based on a brazen abuse of Article I of the Genocide Convention"[11]. This argument is unconvincing and undermines the fundamental requirement that jurisdiction emanates from consent. Under the interpretation advanced by Ukraine, *any* purportedly illegal act, including the unauthorized use of force, could be shoehorned into a random treaty as long as the subject-matter regulated by this treaty had some role in the political considerations preceding the respective act.

8. With regard to Ukraine's claim that the Russian Federation is falsely invoking Ukraine's responsibility for acts of genocide, an additional problem arises. I remain unconvinced that Ukraine can invoke the compromissory clause under Article IX of the Convention only to have the Court confirm its own compliance. Such "non-violation complaints" cannot be brought before the Court in absence of a *compromis* or specific treaty-based authorization. Applications of this type have only been entertained by the Court when they were brought under the much broader jurisdictional basis of Article 36 (2) of the Statute[12], or in combination with an actual violation complaint of the treaty in question[13].

---

[9] *Legality of Use of Force (Yugoslavia* v. *Belgium), Provisional Measures, Order of 2 June 1999, I.C.J. Reports 1999 (I)*, p. 138, para. 41.

[10] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia* v. *Serbia), Preliminary Objections, Judgment, I.C.J. Reports 2008*, p. 428, para. 53. See also *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 292, para. 28.

[11] Ukraine's Request for the indication of provisional measures, para. 12.

[12] *Rights of Nationals of the United States of America in Morocco (France* v. *United States of America), Judgment, I.C.J. Reports 1952*, p. 176.

[13] *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 9.

9. Taking into account all the legal considerations explained above, I come to the conclusion that the Court lacks prima facie jurisdiction to entertain this case. Accordingly, the Court should have dismissed Ukraine's request for provisional measures.

10. Despite my position on the absence of prima facie jurisdiction in this case, I have voted in favour of the third provisional measure indicated in the Court's Order, namely that both Parties shall refrain from any action which might aggravate or extend the dispute or make it more difficult to resolve. The power to indicate such measure is a power inherent to the Court, and not necessarily linked to the Court's prima facie jurisdiction over the parties' substantive rights or obligations on the merits of a case.

(*Signed*) Kirill GEVORGIAN.