

## SEPARATE OPINION OF JUDGE CHARLESWORTH

*Subject of the dispute — Indivisibility of the two “aspects” of the dispute.*

*Jurisdiction ratione materiae — Enquiry whether acts “fall within” the treaty containing the compromissory clause — Distinction from the enquiry whether acts are capable of constituting violations of the treaty — Relationship between the Genocide Convention and extrinsic rules — Interpretation of Article I as a question for the merits — Incomplete nature of the Court’s enquiry — Jurisdiction under compromissory clauses encompassing questions not involving violation of a treaty.*

*Particular circumstances of the case — Consistency of the reasoning concerning the existence of a dispute with the Court’s jurisprudence — Irrelevance of any delay prior to the seisin of the Court — Absence of jurisdictional preconditions in Article IX of the Genocide Convention.*

*Requests for a declaration of compliance with obligations under a treaty — Compatibility of such requests with the Court’s judicial function — Admissibility of such requests under Article IX of the Genocide Convention.*

1. I have voted in favour of almost all of the subparagraphs of the operative clause of the Judgment. This separate opinion explains why I have voted against upholding the Russian Federation’s second preliminary objection. It also reflects on the Court’s references to the particularity or specificity of the circumstances of this case.

2. This is the first time in the history of the Court and its predecessor that a large number of States have decided to participate in the proceedings invoking the right to intervene under Article 63 of the Statute. As in previous cases of intervention under Article 63, the intervening States’ arguments are presented only briefly in today’s Judgment. They nevertheless enriched the Court’s consideration of the Parties’ arguments.

### I. THE SUBJECT OF THE DISPUTE

3. The concept of a dispute is central to contentious cases before the Court as, under its Statute, the Court’s function is to decide disputes<sup>1</sup>. In the present case, the jurisdictional basis invoked — Article IX of the Genocide Convention — also hinges on the existence of a dispute. The subject of the dispute is the point of reference for the determination, among other things, of whether a dispute exists between the parties<sup>2</sup>; whether the Court has jurisdiction to entertain it<sup>3</sup>; and whether the parties’

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<sup>1</sup> Art. 38, para. 1, of the Statute of the Court; see *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. 88.

<sup>2</sup> See *Prince von Pless Administration, Order of 4 February 1933, P.C.I.J., Series A/B, No. 52*, pp. 13-14.

<sup>3</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, p. 810, para. 16.

claims, to the extent that they evolve during the proceedings, are admissible<sup>4</sup>. In short, a contentious case gravitates around the dispute and its subject.

4. Therefore, identification of the subject of a dispute is a consequential exercise, and the task of the Court itself. In this regard, the Court is required, by virtue of its judicial function, to pay close attention to the instrument instituting proceedings, because the Court's mandate covers "such disputes *as are submitted to it*" and not others<sup>5</sup>. In line with this, the Rules of Court require that the subject of the dispute be indicated in the Application instituting proceedings or in the notification of the special agreement<sup>6</sup>. In its jurisprudence, the Court has confirmed that, for the purpose of determining the subject of the dispute "on an objective basis", it relies on the application, as well as the written and oral pleadings of the parties, while giving particular attention to the formulation of the dispute chosen by the applicant and to the facts identified as the basis for its claim<sup>7</sup>.

5. The Court today concludes that the subject of the dispute relates to the question "whether acts of genocide attributable to Ukraine had been committed in the Donbas region and [of] the lawfulness of the Russian Federation's actions allegedly undertaken on the basis of such an accusation" (Judgment, para. 51). The subject of the dispute thus framed, it is not evident that the dispute comprises two aspects "the essential characteristics of which are distinct" (Judgment, para. 53), even less so that the two aspects are "fundamentally different in nature" (Judgment, para. 56). A dispute may comprise multiple "aspects" when, for example, the applicant alleges that the respondent's conduct violates multiple sets of rules<sup>8</sup>. Here, however, the two questions that the Court identifies both arise out of the same factual and legal matrix put forward by the Applicant. As evidenced by the Court's formulation of the dispute, Ukraine claims that the Russian Federation's actions were taken *on the basis* of its accusation that genocide was being committed and that they were unlawful *because* this accusation was false. In other words, the second question — the lawfulness of the Russian Federation's conduct — is premised on the first — the allegation of genocide being false<sup>9</sup>. Indeed, in a way, Ukraine's contention that the allegation against it was false is little more than a proposition in support of its claim that the Russian Federation's conduct is unlawful. Such propositions are often included in the parties' submissions<sup>10</sup>, and sometimes even in

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<sup>4</sup> *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I.C.J. Reports 1992, p. 267, para. 69; also *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, Judgment, I.C.J. Reports 2022 (I), p. 294, para. 47. Because the Court's jurisdiction is determined with reference to a dispute rather than to specific claims, once the jurisdiction is affirmed, the parties are free to amend their claims and submissions to the extent that those amendments do not transform the character (or subject) of the dispute.

<sup>5</sup> Art. 38, para. 1, of the Statute (emphasis added).

<sup>6</sup> Art. 38, para. 1, and Art. 39, para. 2, of the Rules of Court.

<sup>7</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 26, para. 53; *Obligation to Negotiate Access to the Pacific Ocean (Bolivia v. Chile)*, Preliminary Objection, Judgment, I.C.J. Reports 2015 (II), p. 602, para. 26.

<sup>8</sup> See, for example, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), pp. 315-316, paras. 68-70; also *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. 577, para. 32.

<sup>9</sup> See CR 2023/19, p. 77, para. 13 (Zionts); see also Memorial of Ukraine, para. 73.

<sup>10</sup> See *Fisheries (United Kingdom v. Norway)*, Judgment, I.C.J. Reports 1951, p. 126. See also *Temple of Preah Vihear (Cambodia v. Thailand)*, Merits, Judgment, I.C.J. Reports 1962, p. 11; *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. 14, para. 14; *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022 (II), p. 625, para. 25.

the Court's own operative paragraph<sup>11</sup>, but they have never been treated as distinct aspects of the dispute brought before the Court.

6. The only difference between the two questions identified in the Judgment consists in the fact that the second "aspect" of the dispute, as identified in the Judgment, involves the invocation by the Applicant of the Respondent's responsibility for alleged internationally wrongful acts (Judgment, para. 56). This fact alone does not suffice to divide the dispute into two aspects. The bifurcation of the dispute becomes more confusing in light of the Court's reasoning in relation to the Russian Federation's fifth preliminary objection. There, the Judgment concludes that requests for a declaration of compliance, such as the one contained in the first aspect of the present dispute, may be entertained no less than requests for a declaration of a violation, such as the one contained in the second aspect of the present dispute. If the two types of requests do not pose fundamentally different legal questions for the Court, it is difficult to see why they are fundamentally different in nature.

7. In my view, the division of the dispute into two aspects, which are in turn defined with reference to Ukraine's submissions, complicates the Court's reasoning unnecessarily. It also affects the Court's discussion of its jurisdiction *ratione materiae*, to which I now turn.

## II. THE COURT'S JURISDICTION

8. The compromissory clause relied on by Ukraine grants the Court jurisdiction over disputes "relating to the interpretation or fulfilment of the [Genocide] Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III". The Court must therefore ascertain whether the dispute brought by Ukraine relates to the interpretation, application or fulfilment of the Genocide Convention.

9. The Judgment describes the Court's enquiry as follows:

"it must be ascertained whether the actions or omissions of the respondent complained of by the applicant fall within the scope of the treaty allegedly violated, in other words whether the facts at issue, if established, are capable of constituting violations of obligations under the treaty." (Judgment, para. 136.)

As I try to explain below, this enquiry deviates from the Court's jurisprudence (A); it is not applied correctly in the present case (B); and it does not squarely address the circumstances of the present case (C).

### A. The Court's enquiry

10. The question whether a given act "falls within" a provision, which is at the heart of the Court's enquiry, is a metaphor<sup>12</sup>: it does not signal the type of relationship between the conduct (which is essentially a fact) and the legal rule that would allow the conclusion that the former "falls within" the latter. The Court observes today, as it has done in the past, that this enquiry may require, to a certain extent, the interpretation of the relevant treaty containing the compromissory clause (Judgment, para. 136). At the same time, the Court must not engage in too intensive an interpretation of the treaty at hand because, if this interpretation is a matter of dispute, this is precisely the type of

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<sup>11</sup> See, for example, *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Judgment, I.C.J. Reports 2020, p. 338, para. 126, point (1), and compare *ibid.*, p. 310, para. 24.

<sup>12</sup> As is the French expression that the conduct "entre dans les prévisions du traité".

question over which the Court enjoys jurisdiction under the compromissory clause. So, the Court has to navigate carefully between the interpretation of the treaty for the purposes of determining its jurisdiction *ratione materiae* and the same task to be performed for the purposes of resolving the dispute on the merits<sup>13</sup>.

11. In its recent jurisprudence, the Court has charted this course by stating that, for the purposes of determining its jurisdiction *ratione materiae*, it will interpret “the provisions that define the scope of the treaty” in question<sup>14</sup>. By contrast, the Court has assigned to the merits phase the task of interpreting provisions “relat[ing] to the scope of certain obligations relied upon by the [a]pplicant”<sup>15</sup>. The wisdom of this solution lies in the fact that it defers the interpretation of substantive provisions to the stage at which the Court will have heard full argument by both parties, as well as by any intervening States — namely to the stage of the merits. In my view, today’s Judgment goes off course when it adds that, for the purposes of the jurisdictional enquiry, the Court will also interpret the provisions that are alleged by the applicant to have been violated in a given case (Judgment, para. 136).

12. In any event, according to the Judgment, the aim at the jurisdictional stage is to ascertain whether “the facts at issue, if established, are capable of constituting violations of obligations under the treaty” (Judgment, para. 136). So, in the present case, if the facts put forward by the Applicant could constitute violations of the Respondent’s obligations under the Genocide Convention, the Court has jurisdiction *ratione materiae* to hear the case on the merits. Then, at the stage of the merits, the Court will decide whether the Russian Federation’s conduct would, or would not, violate the Convention. Following the same logic, the Court’s jurisdiction *ratione materiae* must be denied if the Court concludes that the Russian Federation’s conduct could not ever violate the Genocide Convention. In other words, the conclusion that the Court does not have jurisdiction *ratione materiae* assumes that the Russian Federation’s conduct can in no circumstances violate the Genocide Convention.

## **B. Application in the present case**

13. In this case, the Court’s conclusion on its jurisdiction is surprising. This is best illustrated in the discussion of what the Judgment labels as the contention that the Russian Federation’s measures allegedly “go beyond the limits permitted by international law” (Judgment, para. 141). There, the Judgment observes that an act in breach of international law is not, for this reason alone, in breach of the Genocide Convention (Judgment, para. 146). But it is perfectly possible that an act is in breach of the Genocide Convention and of other rules of international law at the same time. As

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<sup>13</sup> See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), separate opinion of Judge Shahabuddeen, p. 828: “The more limited [interpretative] function is undertaken by the Court in exercise of its *compétence de la compétence*; the more definitive function is undertaken in exercise of its substantive jurisdiction.”

<sup>14</sup> *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. 584, para. 57; *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, pp. 31-32, para. 75.

<sup>15</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, pp. 33-34, para. 82; see also *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. 586, paras. 62-63.

the Court has noted, any given conduct may engage multiple sets of rules<sup>16</sup>. The Court will likely not have jurisdiction to decide the lawfulness of that conduct with reference to all of the applicable sets of rules, but it does not follow that the Court is without jurisdiction to decide its lawfulness with reference to any set of rules despite the presence of an applicable compromissory clause<sup>17</sup>.

14. Moreover, there is no reason to assume that a specific type of conduct (for example, the use of force) is incapable by its nature of violating the Genocide Convention<sup>18</sup>. So, the observation that the Russian Federation's conduct might violate rules of international law beyond the Genocide Convention does not suffice to conclude that the same conduct "is "not governed by the Genocide Convention" (Judgment, para. 146).

15. It may be, of course, that the violation of the extrinsic rule is linked — or claimed by the applicant to be linked — to the violation of the obligations under the treaty containing the compromissory clause. In this connection, it is useful to compare the present case with *Immunities and Criminal Proceedings* and with *Certain Iranian Assets*. In both those cases, the applicants contended that certain provisions of the relevant treaty invoked incorporated, by way of renvoi, obligations arising under rules extrinsic to the treaty<sup>19</sup>. On that basis, the applicants argued that a breach of the latter obligations entailed, in and of itself, violation of the treaty in question by virtue of the alleged incorporation<sup>20</sup>. In both cases, the Court at the stage of preliminary objections interpreted the provisions relied on by the applicant with a view to ascertaining whether they contained the alleged renvoi<sup>21</sup>.

16. The Applicant's argument in the present case takes a different direction. Ukraine does not argue that the provisions of the Genocide Convention were violated *because* the rules of general

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<sup>16</sup> *Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2021, p. 27, para. 56; see also *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), p. 223, para. 46.

<sup>17</sup> *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. 576, para. 28: "The fact that a dispute before the Court forms part of a complex situation that includes various matters, however important, over which the States concerned hold opposite views, cannot lead the Court to decline to resolve that dispute, provided that the parties have recognized its jurisdiction to do so and the conditions for the exercise of its jurisdiction are otherwise met." See already *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Judgment, I.C.J. Reports 1980, p. 20, para. 37; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984, pp. 439-440, para. 105; *Border and Transborder Armed Actions (Nicaragua v. Honduras)*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 92, para. 54. This view is shared by several intervening States: see, for example, Written Observations of Austria, Czechia and Slovakia, para. 38; Written Observations of Belgium, para. 12; Written Observations of Canada and the Netherlands, para. 18; Written Observations of Sweden, para. 12; Written Observations of New Zealand, para. 32.

<sup>18</sup> See *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), pp. 811-812, para. 21: "A violation of the rights of one party under the Treaty by means of the use of force is as unlawful as would be a violation . . . by any other means." This view is supported by several intervening States: see, for example, Written Observations of Lithuania, para. 9; Written Observations of Norway, para. 24.

<sup>19</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 318, para. 81; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 26, paras. 50-51.

<sup>20</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 318, para. 81; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 22, para. 33.

<sup>21</sup> *Immunities and Criminal Proceedings (Equatorial Guinea v. France)*, Preliminary Objections, Judgment, I.C.J. Reports 2018 (I), p. 322, para. 96; *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, Preliminary Objections, Judgment, I.C.J. Reports 2019 (I), p. 26, para. 52.

international law on the recognition of States and the use of force were violated<sup>22</sup>. Rather, Ukraine argues that the Genocide Convention, properly interpreted, contains a rule prohibiting certain types of conduct as means for the prevention or punishment of genocide, at least in certain circumstances — namely where there is insufficient evidence of genocide<sup>23</sup>. So, on my understanding, Ukraine’s argument does not invite the Court to apply the rules on the recognition of States and the use of force and, upon finding that they are violated, declare that the Genocide Convention has also been violated. Instead, Ukraine’s argument invites the Court to interpret the Genocide Convention (notably Article I) in a manner that prohibits certain types of conduct (or indeed any conduct) in certain circumstances, and then to find that these circumstances are present in the case before it. This contention by the Applicant, which is resisted by the Respondent, raises questions of interpretation and application of the Genocide Convention, specifically of the substantive obligations stipulated in Article I. Therefore, in my view, it attracts the Court’s jurisdiction under Article IX.

17. A variation of this argument was first put forward in Ukraine’s Application, which submitted that the Russian Federation’s conduct “had no basis” in the Genocide Convention<sup>24</sup>. I understand this as a contention that the Genocide Convention does not authorize conduct for the prevention and punishment of genocide where no genocide occurs. In this connection, I support the finding that the submissions in the Memorial clarify and specify Ukraine’s claims (Judgment, para. 128). Indeed, both in the Application and in the Memorial, Ukraine contests the compatibility of the Russian Federation’s conduct with the Genocide Convention. The only difference is that, in the Application, the alleged incompatibility arises out of the absence in the Convention of a rule authorizing (or perhaps prescribing) the Russian Federation’s conduct, while in the Memorial the alleged incompatibility arises out of the existence of a rule prohibiting such conduct. In other words, “[w]hat has changed is the legal basis being advanced for the claim” but not the claim itself or the subject of the dispute<sup>25</sup>. For that reason, I think that the Court should have ascertained its jurisdiction to entertain the question whether the Genocide Convention authorizes conduct such as that undertaken by the Russian Federation in alleged discharge of its obligations thereunder. Given the object and purpose of the Genocide Convention, as well as the time of its adoption, it cannot be ruled out that the Convention regulates, at least in part, the modalities for the invocation of a State party’s responsibility for failure to prevent or punish genocide<sup>26</sup>.

18. On either variant of the Applicant’s argument, the question whether the interpretation put forward by the Applicant — and supported by many intervening States — is sound, and whether it can be applied to the facts of this case, is a matter for the merits. In particular, the merits are the appropriate stage for the Court to determine the interpretative means that ought to be used for the interpretation of Article I of the Genocide Convention<sup>27</sup>. This may entail a decision about which rules, if any, shed light on the interpretation of that provision pursuant to the interpretative tool reflected in Article 31, paragraph 3 (c), of the Vienna Convention on the Law of Treaties<sup>28</sup>. This is a decision that the Court has invariably taken at the stage of the merits, because it is precisely the type

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<sup>22</sup> CR 2023/14, p. 80, para. 55 (Thouvenin); see also Written Observations of Ukraine, para. 138.

<sup>23</sup> Memorial of Ukraine, para. 119; CR 2023/19, p. 68, para. 28 (Thouvenin).

<sup>24</sup> Application of Ukraine, para. 30 (c)-(d), cited in Judgment, para. 24.

<sup>25</sup> *Territorial and Maritime Dispute (Nicaragua v. Colombia)*, Judgment, *I.C.J. Reports 2012 (II)*, p. 665, para. 111.

<sup>26</sup> See Articles on Responsibility of States for Internationally Wrongful Acts with commentaries, Yearbook of the International Law Commission, 2001, Vol. II, Part Two, p. 116, para. 5 (Commentary to Part Three, Chap. I).

<sup>27</sup> To the same effect, Written Observations of the United Kingdom, para 44.

<sup>28</sup> Vienna Convention on the Law of Treaties (concluded 23 May 1969; entered into force 27 January 1980), United Nations, *Treaty Series*, Vol. 1155, p. 331.

of exercise that involves the interpretation of the applicable treaty in question<sup>29</sup>. Certainly, the Court may not rule on breaches of rules of international law beyond the Genocide Convention at the stage of the merits<sup>30</sup>. At the same time, the potential relevance of other rules of international law does not prevent the Court from proceeding to the merits<sup>31</sup>. Put simply, the Court's approach as to which rules should be taken into account for interpretative purposes has no bearing on the scope of its jurisdiction.

19. It is striking that the Judgment, despite suggesting in paragraph 136 that it will interpret the provisions claimed by the Applicant to have been violated, reaches its conclusion without engaging explicitly in the interpretation of the provisions in question — namely Articles I and IV of the Genocide Convention. I am also troubled by the fact that, although the Judgment announces that it will set out to explore whether the Russian Federation's conduct *could* violate the Genocide Convention, its conclusion reveals that it examines whether the Russian Federation's conduct *would* constitute a violation of the Convention (Judgment, para. 139). To borrow Judge Higgins's language in *Oil Platforms*, I think that this shift from "could" to "would" "would seem to go too far", because it is only at the merits stage that "could" may be converted to "would"<sup>32</sup>.

### C. Beyond treaty violations

20. Even if correctly applied, the enquiry that the Court selects in order to determine its jurisdiction in the present case — whether the Russian Federation's conduct is capable of constituting a violation of the Genocide Convention — seems wanting for an additional reason. As the Judgment concedes, this enquiry applies "when the Court is seised on the basis of a treaty's compromissory clause by a State invoking the international responsibility of another State for the breach of obligations under the treaty" (Judgment, para. 135). Here, however, Ukraine's claims are not confined to an allegation of a breach of specific obligations under the Genocide Convention.

21. Instead, the Applicant here also contends — and the Respondent disputes — that the obligation to prevent and punish genocide is inapplicable in the circumstances. In this connection, the Judgment points out that, in light of Ukraine's contention that no genocide has been committed, it is difficult to see how the Russian Federation's obligations to prevent and punish genocide could have been violated (Judgment, para. 140). Although this may be true, it does not follow that the Court is without jurisdiction under Article IX. Not all disputes concerning the interpretation or application of a treaty need to involve an alleged breach of the obligations arising under it<sup>33</sup>. The Court's predecessor has affirmed that its jurisdiction under a compromissory clause covers disputes concerning "the extent of the sphere of application" of the provisions of the treaty containing the

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<sup>29</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Judgment, I.C.J. Reports 2003, p. 182, para. 41; *Certain Questions of Mutual Assistance in Criminal Matters (Djibouti v. France)*, Judgment, I.C.J. Reports 2008, p. 219, para. 113.

<sup>30</sup> *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. 68, para. 153; see also *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), pp. 46-47, para. 66; *Jadhav (India v. Pakistan)*, Judgment, I.C.J. Reports 2019 (II), pp. 454-455, para. 135.

<sup>31</sup> *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. 68, para. 153; *Appeal relating to the Jurisdiction of the ICAO Council under Article 84 of the Convention on International Civil Aviation (Bahrain, Egypt, Saudi Arabia and United Arab Emirates v. Qatar)*, Judgment, I.C.J. Reports 2020, p. 101, para. 49.

<sup>32</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America)*, Preliminary Objection, Judgment, I.C.J. Reports 1996 (II), separate opinion of Judge Higgins, p. 856, para. 33.

<sup>33</sup> *Interpretation of the Statute of the Memel Territory, Preliminary Objection, Judgment, 1932, P.C.I.J., Series A/B, No. 47, p. 248; Certain German Interests in Polish Upper Silesia, Merits, Judgment No. 7, 1926, P.C.I.J., Series A, No. 7, pp. 18-19.*

compromissory clause<sup>34</sup>. And this Court has held that the question whether a treaty governs a specific event is a question concerning the interpretation and application of that treaty<sup>35</sup>. Here, the Parties disagree with respect to the question whether the circumstances triggering the Russian Federation's obligation to prevent genocide are present — the Russian Federation claims that these circumstances are present, whereas Ukraine denies it<sup>36</sup>. The Parties' dispute over this question relates to the interpretation and application of the Genocide Convention<sup>37</sup>; it is not deprived of this character even if we accept that, regardless of the answer to the question, the Russian Federation has not breached its obligation to prevent and punish genocide.

22. The same is true for Ukraine's invocation of the notion of good faith performance of treaty obligations. The Judgment notes that performance of the Genocide Convention in bad faith does not in itself constitute a violation of obligations under Article I and IV of the Convention (Judgment, para. 142). Even if this is correct, it does not imply that Article IX excludes jurisdiction over disputes concerning the performance of the Genocide Convention in good faith. In the comparable case of *Appeal Relating to the Jurisdiction of the ICAO Council*, the Court held that a dispute concerning the lawful suspension of a treaty is a dispute concerning the interpretation or application of that treaty<sup>38</sup>. This is so because, in order to decide this dispute, the interpretation and application of the treaty in question is inevitable<sup>39</sup>. Of course, the Court in that case was dealing with the jurisdiction of a different body, rather than its own jurisdiction, but, as several Members of this Court have observed, this is immaterial<sup>40</sup>. I think that the same conclusion must apply in relation to a dispute, such as the one in the present case, concerning the performance of the Genocide Convention in good faith<sup>41</sup>.

23. For the purposes of determining its jurisdiction *ratione materiae*, the Court today understands the Applicant's claims as being confined to allegations of breach of the Genocide Convention. This, in my view, caused it to shift its focus from the enquiry that governs the question of its jurisdiction under Article IX — whether the dispute at hand relates to the interpretation,

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<sup>34</sup> *Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 16. Several intervening States concur: Written Observations of Australia, paras. 18-19; Written Observations of Cyprus, paras. 19-20; Written Observations of Slovenia, para. 30.

<sup>35</sup> *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. 18, para. 25.

<sup>36</sup> In this connection, Ukraine contends that the obligation to prevent genocide is only triggered where there exists "reasonable basis to conclude that a genocide or serious risk of genocide is occurring" (Memorial of Ukraine, para. 79). Some of the intervening States support this interpretation: for example, Written Observations of Germany, para. 10; Written Observations of Poland, para. 42; Written Observations of Romania, para. 30.

<sup>37</sup> The Court has entertained similar disputes in the past: see, among others, *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia), Judgment, I.C.J. Reports 2022 (II)*, p. 649, para. 102; *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), Merits, Judgment of 31 January 2024*, para. 91.

<sup>38</sup> *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 66, para. 36.

<sup>39</sup> *Ibid.*

<sup>40</sup> *Oil Platforms (Islamic Republic of Iran v. United States of America), Preliminary Objection, Judgment, I.C.J. Reports 1996 (II)*, separate opinion of Judge Shahabuddeen, p. 826; *ibid.*, separate opinion of Judge Higgins, p. 855, para. 31. See also *Appeal Relating to the Jurisdiction of the ICAO Council (India v. Pakistan), Judgment, I.C.J. Reports 1972*, p. 61, para. 27: "As has already been seen in the case of the competence of the Court, *so with that of the Council*, its competence must depend on the character of the dispute submitted to it and on the issues thus raised" (emphasis added).

<sup>41</sup> Several intervening States concur: see, for example, Written Observations of France, para. 42; Written Observations of Norway, para. 32; Written Observations of Sweden, para. 48; Written Observations of the United Kingdom, paras. 42-43.



application or fulfilment of the Convention — to a much narrower question: whether the conduct complained of by the Applicant would necessarily amount to a violation of the Convention. The answer to the latter question may be debated. What is clear, however, is that a negative answer to the latter does not entail a negative answer to the former.

### III. THE PARTICULAR CIRCUMSTANCES OF THIS CASE

24. At times in its Judgment, the Court emphasizes the “particular” or “specific” circumstances of this case. Every judgment of course addresses specific factual circumstances, but its decision may only rest on the application of legal principle. For this reason, the references to “specific circumstances” in this Judgment do not affect the legal significance of its reasoning.

#### A. The existence of a dispute

25. When discussing the Russian Federation’s first preliminary objection, the Court makes reference to the “specific circumstances” of the case (Judgment, para. 50). Despite this, the Court’s reasoning concerning the existence of a dispute largely tracks the Court’s jurisprudence. As reflected in paragraphs 47-49, at the time that Ukraine’s Application was filed, the Parties held opposite views on the subject-matter of the Application and the Respondent was aware or could not have been unaware that its views were opposed by the Applicant. In particular, the Russian Federation’s position emerges from its conduct before the statement issued by Ukraine on 26 February 2022 and the ensuing institution of proceedings before the Court. The positions of both Parties have remained largely unchanged since then. In such circumstances, seisin of the Court “without further delay” is available to the applicant (Judgment, para. 50), because such a delay would not have affected the Court’s jurisdiction.

26. At most, a delay might have allowed for the prospective respondent’s views to be confirmed, whether through its explicit response or through its silence, as happened in *The Gambia v. Myanmar*<sup>42</sup>. However, such confirmation is legally irrelevant where these views are otherwise clear and where there is no suggestion that they have changed. The Court has rejected the view that the prospective respondent must have articulated its views individually to the prospective applicant prior to the seisin of the Court<sup>43</sup>. Besides, the Court’s jurisdiction under Article IX of the Genocide Convention, unlike under other compromissory clauses, is not dependent on an unsuccessful attempt at negotiations or other means of dispute settlement. So, when two States parties to the Genocide Convention hold opposing views in relation to its interpretation, application or fulfilment, neither is required to accept the other’s offer to resolve the dispute through means other than judicial settlement: the Court is open to both of them under Article IX.

#### B. Admissibility of requests for a declaration of compliance with obligations under a treaty

27. While the Judgment rejects the contention of inadmissibility of Ukraine’s request for a declaration that it did not breach its obligations under the Genocide Convention, it may give the impression that this conclusion is based on the “particular circumstances” of the present case (Judgment, para. 109). Yet such requests are not uncommon and, in my view, they do not pose any particular issues of admissibility. The Judgment acknowledges that requests such as that made by Ukraine do not contradict the principles of judicial propriety and the equality of the parties

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<sup>42</sup> *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. 76.

<sup>43</sup> *Ibid.*, p. 505, para. 71.

(Judgment, para. 106). This has been implicitly affirmed by the Court in various other cases in which such requests were put forward, including in *Rights of Nationals of the United States of America in Morocco*<sup>44</sup>. In this regard, the fact that the respondent, the United States, did not raise a preliminary objection in that case seems immaterial, because it would not cure any potential inadmissibility in France's request<sup>45</sup>. If a request for a declaration of conformity posed questions about the Court's judicial function or the general admissibility of claims, then the Court would have been required to raise those questions even in the absence of a specific objection by the litigant parties<sup>46</sup>.

28. Today's Judgment also holds that such requests are not precluded by the terms of the compromissory clause invoked (Judgment, para. 99)<sup>47</sup>. This is consistent with the Court's observation in *The Gambia v. Myanmar* that the Genocide Convention does not attach conditions on the admissibility of claims additional to those generally applicable<sup>48</sup>.

29. Against this background, I understand the reference to the particular circumstances in which Ukraine's request was made (Judgment, paras. 107-109) as confirming rather than qualifying the Court's preceding reasoning. In circumstances where there is a dispute between two States concerning the compliance by one of them under a treaty in force between them, both have a legal interest in the resolution of the dispute, and clauses such as Article IX of the Genocide Convention give them an avenue for it.

(Signed) Hilary CHARLESWORTH.

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<sup>44</sup> *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. For a more recent example, see the applicant's final submissions (b) and (c) in *Dispute over the Status and Use of the Waters of the Silala (Chile v. Bolivia)*, Judgment, I.C.J. Reports 2022 (II), p. 628, para. 27.

<sup>45</sup> In any event, the character of France's request was not transformed by the fact that the United States positively opposed it in its own submissions. If it were so, then there would be many more examples of cases involving requests for declarations of compliance, because such requests are a common submission by respondent States in the face of claims of violation: see, among others, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), p. 31, para. 24; *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Judgment, I.C.J. Reports 2012 (II), p. 430, para. 14.

<sup>46</sup> *Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment, I.C.J. Reports 1963, p. 29: "There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity."

<sup>47</sup> This view is shared by various intervening States: see, among others, Written Observations of Australia, para. 15; Written Observations of Austria, Czechia and Slovakia, para. 20; Written Observations of Belgium, para. 21; Written Observations of Bulgaria, para. 21; Written Observations of Canada and the Netherlands, para. 25; Written Observations of Germany, para. 21; Written Observations of France, para. 23; Written Observations of Malta, para. 21; Written Observations of Norway, para. 22; Written Observations of Poland, para. 29; Written Observations of Romania, para. 37; Written Observations of Slovenia, para. 14; Written Observations of Spain, para. 58; Written Observations of the United Kingdom, para. 38.

<sup>48</sup> *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. 517, para. 110.