

JUDGMENT ON THE MERITS OF THE INTERNATIONAL COURT OF JUSTICE OF JANUARY 31, 2024, CASE UKRAINE VS RUSSIAN FEDERATION

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The subject. The number of authors who consistently try in their works to “bury” international justice, as well as international law itself, behind the ideas of politicization, bias and unenforceability, has grown significantly today. The political and legal developments of modern international law should still be assessed comprehensively and in detail. First of all, legal events are the is Judgment on the merits of the International Court of Justice of January 31, 2024, case of 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 vs. Russian Federation).

Materials and methods. This research carried out a scientific analysis of the Judgment on the merits of the ICJ dated January 31, 2024. The subject of the study also included other law enforcement acts of the International Court of Justice in this case and in other cases, as well as normative acts of international law.

Discussion. The judgment on the merits of the UN International Court of Justice dated January 31, 2024 was one of the most expected and unexpected for many. It is an ambiguous event that requires multifactor analysis. The author analyzed the procedure for considering this dispute, the stated subject and basis of the dispute in conjunction with the decisions of the Court itself on jurisdiction, and assessed the adopted final decisions on the merits of the dispute. It is safe to say that for Russia this decision of the Court is in many ways positive. The positions of the Court in the examined act allow us to draw conclusions not only on the issues of the dispute itself, on the merits of which it was decided, but also regarding the advisability of preserving international justice, which has shown viability and independence. The main results and conclusions. The author analyzes the case review process, the subject of the dispute, which was declared by the applicant and actually considered by the Court, in conjunction with the judgments of the Court on the issue of jurisdiction, and the author gave a legal assessment of the final judgment on the merits of the case. It is safe to say that

this Courts judgment has a positive meaning in many aspects for Russian Federation. The positions of the Court in the act examined allow us to draw conclusions not only on the issues of the case itself, on the merits of which it was rendered, but also on the expediency of preserving international justice, which has shown viability and independence.

In addition, the International Court limited itself to proving Russia's guilt in only two minor episodes of international legal violations of the International Convention for the Suppression of the Financing of Terrorism of 1999 and of the International Convention on the Elimination of All Forms of Racial Discrimination of 1965. The Court avoided from orders for damages.

1. Introduction

Judgment of the International Court of Justice (hereinafter - ICJ, the Court) of 31.01. 2024 in the case on the case of 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)¹ is remarkable in that the word “for the first time” can be safely applied to it in several aspects. Thus, the judgment was the first decision in the history of the UN ICJ and modern Russia on the merits of a dispute where the Russian Federation was the respondent. In addition, this decision marked the end of one of the key stages of the ongoing international legal confrontation between Ukraine and Russia since 2014, which involved almost all international courts and arbitration tribunals available to Ukraine. This confrontation has already aroused considerable interest on the part of specialists in the field of international justice, being called Lawfare [See about this: 1; 2; 3; 4], which can be translated as the use of judicial and legal means by the state to achieve military and political goals in an ongoing conflict. In addition to Ukraine, this strategy was effectively used by Qatar, which literally flooded a coalition of Arab states that had imposed sanctions on it with lawsuits and forced them to backtrack and conclude an amicable agreement with it [See about this: 5].

The factual circumstances of the case. In January 2017 (almost three years after the beginning of the armed confrontation in the south-east of Ukraine and the entry of Crimea into the Russian Federation), Ukraine filed a lawsuit against Russia with the ICJ, claiming that the defendant had violated its obligations under the 1999 International Convention for the Suppression of the Financing of Terrorism (hereinafter also the 1999 Convention) in relation to Russia's actions in Donbas and the 1965 International Convention on the Prohibition of All Forms of Racial Discrimination (hereinafter also the 1965 Convention) in relation to its actions in Crimea.

¹ ICJ. 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). Judgment of 31 January 2024.

Both states are parties to these conventions, and both conventions provide for the compulsory jurisdiction of the ICJ over disputes related to their interpretation and application. The reservation made by the USSR regarding the non-recognition of the jurisdiction of the ICJ under the 1965 Convention was withdrawn in 1990 by a decree of the President of the USSR M.S. Gorbachev², and the 1999 Convention was ratified by Russia without any such reservations [See about clause to a treaty][See about this: 6]. This approach meant an irrevocable consent of a state to the compulsory jurisdiction of the ICJ when any future action is brought against it by any state party to these conventions. It has already been noted in the literature that today the vast majority of disputes considered by the ICJ are submitted to it by applicants on the basis of such treaty provisions (compromissory clauses), despite the widespread objections of the respondents [See about this: 7, c. 6]. This active use of the mandatory jurisdiction of the ICJ (including for Lawfare purposes) calls into question the very appropriateness of including such provisions in international treaties[See about this: 8, c. 14].

Attention should be paid to the long period preceding the application to the International Court of Justice, which was caused by Ukraine's thorough preparation in order to avoid a repetition of the situation with Georgia's claim against Russia filed in 2008, where the Court refused to examine Georgia's claim against Russia due to the applicant's failure to comply with the mandatory pre-trial procedures provided for by the 1965 Convention³. The literature has already noted the importance for the ICJ of treaty-based pre-trial procedures as a condition for states to agree to have a dispute heard by the ICJ[See about this: 9].

² Decree of the Presidium of the Supreme Soviet of the USSR of February 10, 1989, No. 10125-XI “On the withdrawal of the USSR's earlier reservations on the non-recognition of the compulsory jurisdiction of the International Court of Justice on disputes over the interpretation and application of a number of international treaties”.

³ 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, p. 70.

Simultaneously with the statement of claim, Ukraine also submitted to the ICJ an application for provisional measures (provisional measures) to be taken by the Court. In its ruling of 19.04.2017. the ICJ⁴ indicated the following provisional measures. With regard to the situation in Crimea, Russia should (in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination):

(a) refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis;

(b) ensure the availability of education in the Ukrainian language. Also, both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (order p. 106).

At the same time, the ICJ refused Ukraine's request for interim measures under the 1999 Convention, considering that there is no criterion of the possible existence of the rights claimed by the applicant (Plausibility test). It has already been noted in the literature that this was the first time that the ICJ refused to take interim measures only on the basis of this criterion, which it had recently introduced into its practice[See about this: 10, c. 54; 11; 12], the uncertainty of which has been criticized in domestic and foreign doctrine[See about this: 13; 10, c. 88-102].

In a judgment dated 08.11.2019, in which the UN ICJ concluded that there was jurisdiction over the dispute, it rejected all preliminary objections (preliminary objections) raised by Russia regarding the Court's jurisdiction.

2. Claims on the merits of the dispute.

Ukraine's claims were aimed at establishing by the Court that Russia had breached its international obligations under the two conventions referred to above and at applying to Russia the rules on liability

for its violations.

Ukraine requested the Court to render judgment and declare («declare»):

1. In relation to the International Convention for the Suppression of the Financing of Terrorism of 1999, establish that the Russian Federation is responsible for violation of Articles 8, 9, 10, 12 and 18 of the Convention (failed to take measures to prevent the financing of terrorism on the territory of Ukraine ..., failed to implement on its territory measures to investigate and prosecute the financing of terrorism in Ukraine ..., failed to provide Ukraine with maximum assistance in the investigation of crimes ..., responsible for the commission of terrorist acts in Ukraine ... - p. 19, par. (a) - (e));

2. With respect to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, find that the Russian Federation has violated Articles 2, 4, 6, 7 of the Convention (the defendant's alleged acts of racial discrimination against the Crimean Tatar and Ukrainian communities in Crimea - "pursuing a policy and practice of racial discrimination against these communities, sponsoring, protecting, supporting, inciting racial discrimination..., violation and restriction of rights ..., failure to provide effective remedies against acts of racial discrimination, failure to take immediate and effective measures in the area of teaching and education, holding of an illegal referendum, closure of Crimean Tatar media ... - p. 20, par. (f)-(k)).

As international responsibility for the internationally wrongful acts attributed by Ukraine to Russia, the applicant claimed that Russia should take immediate action to suppress the commission of the terrorist acts, including the immediate cessation of all support for the DNR and LNR and other groups and entities involved in terrorist activities. In addition, in the applicant's opinion, Russia is obliged to pay financial compensation both to Ukraine itself for its violated rights and as *parens patriae* to its citizens who suffered from the acts of terrorism referred to in the statement of claim. In Ukraine's view, moral damage suffered by the applicant was also liable to compensation, the amount of which, as well as the amount of compensation, was to be determined in

⁴ ICJ. 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). Provisional Measures. Order of 19 April 2017. P. 131. Para. 75.

separate proceedings before the ICJ after the court had established Russia's responsibility.

With regard to Russia's liability for breaches of its obligations under the 1965 Convention, Ukraine requested the Court, in the judgment on the merits, to order Russia to take immediate action to restore the rights of the Ukrainian and Crimean Tatar communities, including the restoration of the activities of the Mejlis, and to pay financial compensation both to Ukraine itself for its violated rights and as *parens patriae* to its nationals affected by the said actions. Similarly, the specific amount of damages was also to be determined in a separate proceeding before the ICJ.

Separately, Ukraine's statement of claim singled out a claim to hold Russia liable for Russia's failure to enforce the provisional measures order by ICJ from 2017 and its consequent claim for compensation for material and moral damage to Ukraine and its Ukrainian citizens who suffered as a result of such failure.

3. The subject matter of the dispute.

It is evident that Ukraine, by asserting claims simultaneously under two Conventions, which in essence do not overlap in the process of proof, pursued more global aims, united exclusively by the Ukrainian assessment of Russia's activities in relation to the annexation of the Crimean peninsula and Russia's policy in relation to the DNR and LNR, which existed at the time of application to the Court in 2017.

Apparently, the main goal was to obtain legal assessments from the ICJ, which could then be used to strengthen its legal argumentation in other bodies of international justice, as well as to inflict maximum reputational damage on Russia. Such a phenomenon has been referred to in the literature as “disaggregation of disputes” [See about it:14]. In this regard, of particular note is Ukraine's demand for a judgment and declaration that, as a result of the Russian Federation's violations of the 1999 International Convention for the Suppression of the Financing of Terrorism, its financiers were provided with funds that enabled them to commit numerous terrorist acts (such acts include, among others, the crash of flight MH17, the shelling of Volnovakha,

Mariupol, Kramatorsk and Avdeevka).

The ICJ noted, to begin with some relief, that the applicant was not asking the Court to decide on the legality of Russia's alleged «aggression» and illegal “unlawful occupation”, nor to determine the status of Crimea under international law (para. 30).

The Court has endeavored to specify the limits of its jurisdiction to entertain this dispute. In relation to the 1999 Convention, this was done in par. 74 of the judgment, where the Court noted that and the main issue before the Court was whether the Respondent had breached its obligations under the 1999 Convention to take measures to prevent, suppress and cooperate in the financing of terrorism. In doing so, the Court stated that it considered it necessary to examine Ukraine's allegations of crimes allegedly committed by Russia in connection with the financing of terrorism only to the extent necessary to resolve Ukraine's claims under the 1999 Convention. To that end, the Court quite firmly rejected Ukraine's attempt to give an expansive interpretation to the term “funds” in Article 1 of the Convention. Ukraine believed that the term also included the supply of arms, which the Court strongly disagreed with. Relying on the *travaux préparatoires* and interpreting the term in the light of the object and purpose of the Convention, the Court considered that the Convention referred only to funds and financial resources and not to arms transfers (para. 53).

On this basis, in the Court's view, there is no need to assess the alleged numerous terrorist acts, the commission of which by the DNR, LNR and other groups was possible, in Ukraine's view, solely due to Russia's supply of weapons or other means used to commit such acts. In other words, the legal qualification of the acts themselves within the declared subject matter is not within the Court's competence in the present dispute. This restrained approach of the Court is obviously seriously at odds with Ukraine's expectations.

With regard to the 1965 Convention, in par. 156 of the judgment of 31.01.2024, the ICJ reiterated the conclusion reached as early as in the 2019 Decision on Jurisdiction (para. 131) that it would consider at the merits stage of the case “whether the Russian Federation has indeed participated in the campaign of racial discrimination alleged by Ukraine,

thereby violating its obligations” under the 1965 Convention.

The Court's maximum avoidance of politicized statements in the text of the judgment on the merits is also indicative. In particular, when considering the question of the prevalence of education in the Ukrainian language in Crimea (on this point the Court recognized that Russia had breached its international obligations), it took into account the data set out in the report of the High Commissioner for Human Rights (par. 358)⁵. It is noticeable from the text of the judgment that the ICJ finds that Russia exercises full control over the public school system in Crimea, in particular over the language of instruction and the conditions of its use by parents and children, but refrains from qualifying the legal grounds for such control (incorporation into the Russian Federation - in accordance with Russia's legal position or occupation - in accordance with Ukraine's legal position).

4. The outcome of the consideration of the case Ukraine vs Russian Federation on the merits.

The International Court of Justice has analyzed the scope of the evidence submitted through the prism of its subject matter jurisdiction (*ratio materiae*) with respect to each Convention and each of the claimed episodes of the internationally wrongful acts imputed.

As a result, most of the episodes as alleged by Ukraine and imputed by it to Russia turned out to be either **not established** or not proved by the applicant.

The International Court of Justice found only two violations by the Russian Federation of the norms of the Conventions (one episode for each Convention).

In particular, the Court found that Russia had breached its obligations under the 1999 Convention, under which a State Party is under an obligation to conduct a thorough investigation of information received about alleged financing of terrorism

committed by a person on its territory.

The Court noted that Russia was “required to seek cooperation with Ukraine to carry out the necessary investigations and to indicate to Ukraine what additional information might have been required” (par. 111). Regarding the objections of the Russian side that the data provided by Ukraine were insufficient to investigate the crimes (par. 101), the Court pointed to the low threshold of proof for triggering Russia's obligation to investigate the facts of the alleged terrorist financing offense («The threshold set by Article 9, paragraph 1, is relatively low» - par. 103).

The second violation was found by the Court in relation to Russia's obligations under Article 2(1)(a) and Article 5(e)(v) of the 1965 International Convention on the Elimination of All Forms of Racial Discrimination, namely “the manner in which it implemented its education system in Crimea after 2014 in relation to the Ukrainian language”.

In support of its position on this issue, the ICJ pointed to Russia's lack of “a convincing explanation for the sudden and radical changes in the use of Ukrainian as the language of instruction, which have had a disparate negative impact on the rights of ethnic Ukrainians” (par. 360).

With regard to Russia's international legal responsibility for the violations found by the Court, the Court considered that the mere fact that it had declared those violations in its judgment on the merits would be sufficient for these purposes, and therefore it saw no need to point to other modes of responsibility of Russia, including reparation by it for pecuniary and non-pecuniary damage. In other words, the ICJ considered it sufficient in the present case to limit itself in its final judgment to merely establishing in its final judgment the facts of Russia's breach of its obligations.

Separately, the Court's conclusion that Russia's ban on the activities of the Mejlis was not related to the ethnic origin of its members (which would have qualified the ban as a violation of the 1965 Convention) should be noted (par. 272). On the basis of the evidence submitted by Russia, the Court concluded that the ban imposed by Russia on the Mejlis was motivated precisely by the political activities of its members (par. 271). This conclusion of

⁵ OHCHR report, *Situation of human rights in the temporarily occupied Autonomous Republic of Crimea and the city of Sevastopol* (Ukraine) (22 February 2014 to 12 September 2017), UN doc. A/HRC/36/CRP.3 (25 Sept. 2017) (<https://digitallibrary.un.org/record/1305326>).

the Court is in sharp contrast to its own request to Russia in the 2017 Interim Measures Determination to take measures to resume the activities of the Mejlis. Obviously realizing that the Court was hasty in 2017 with some assessments in comparison with its own conclusions in the 2024 judgment on the merits, the ICJ, in the part of the judgment on the merits, which considered Ukraine's claims for damages caused by the non-execution of the Court's interim measures, also limited itself to the fact of recognizing on its part the facts of Russia's violation of such measures as lifting the ban on the activities of the Mejlis and preventing the aggravation of the dispute (par. 401-403). In this sense, the principle of legal certainty worked in terms of ensuring the legitimate expectations of the defendant[See on this: 15, p. 175], against whom hasty and unjustified interim measures were taken.

In addition, it is worth noting the change of the team representing Russia's interests in this process. At the stage of establishing the jurisdiction of the ICJ in this dispute, the leading role was played by a team of Western lawyers headed by a prominent international lawyer Alain Pellet (France). A different picture emerges from the judgment of the International Court of Justice in 2024, where the Russian team is led by Gennady Kuzmin, Ambassador-at-Large of the Ministry of Foreign Affairs of the Russian Federation, and the team includes international lawyers from China and Iran. Apparently, this is not a random choice, especially as far as Iran is concerned. It is worth noting that it is Iran that convincingly shows how one can effectively use appeals to the ICJ to protect its national interests, which has already been the subject of a separate review in the literature[See about it: 16; 17].

5. Conclusions.

The considered decision of the International Court of Justice of 31.01.2024 is undoubtedly a victory for the Russian Federation. Victory not only in the procedural part, when in fact the Court preferred to refrain from assessing the highly disputable facts of the conflict in Ukraine, and remained on the

position of solely legal assessment of the claims to be investigated on the merits of the claimed dispute. In addition, there is also a clear victory in the material component of the judgment - the Court limited itself to proving two minor episodes of international legal violations on the part of Russia, avoiding the formulation of orders for reparation by Russia.

It is clear that Ukraine, using a very peculiar interpretation of the norms of international law, was counting on the authority of the International Court of Justice and the establishment by it of a number of facts that could become a starting point for its attempts to bring Russia to justice. The ICJ refrained from such an interpretation of the events taking place.

The Court chose to proceed on the basis of a very restrained interpretation of its subject-matter jurisdiction over the dispute, based, as indicated above, on the provisions of both conventions on the compulsory jurisdiction of the ICJ over disputes concerning the interpretation and application of these international treaties. The Court remained strictly within the framework of these conventions and did not venture to apply other rules of international law. However, the literature has already noted the lack of stability and consistency on the part of the ICJ in these matters, and that the court often exploits such uncertainty for instrumental purposes[See on this: 7]. When it feels it can, it is willing to go beyond the applicable international treaties, as was the case in *Oil Platforms (Iran v. United States of America)*, where the court devoted a significant part of the decision to the issues of use of force and self-defense[See on this: 18; 19]. On the other hand, this ambiguity helps the Court to avoid addressing thorny issues by stating that these issues are outside the scope of the international treaty it is applying in the dispute (as was the case in the case of certain Iranian assets (*Iran v. United States*), where the Court did not assess the compliance of the US regulations on the foreclosure of Iranian Central Bank assets with modern rules on State immunities)[See on this: 20].

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