Confronting the court with its past: winds of change over the Old Specter of 'Civilization'

Lo Giacco, L.

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[Dr Letizia Lo Giacco is Assistant Professor of Public International Law at the Grotius Centre for International Legal Studies of Leiden University]

The International Court of Justice (ICJ, ‘the Court’) has recently heard the preliminary objections in the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation: 32 States intervening)*. At this preliminary stage, the Court shall determine whether there existed a dispute between the parties under the terms of Article IX of the Genocide Convention at the time Ukraine (the Applicant) seized the Court. While the case has been regarded as unprecedented for the ‘mass intervention’ of third states (McGarry), the hearings also offered an unparalleled opportunity to observe the differing discourse choices applied to the same legal issue and appraise them comparatively. Discourse is here used to indicate ‘unwritten rules and practices that produce particular utterances and statements that, in turn, generate patterns of

practice' within an interpretive community (Bianchi). It is ultimately these discourse choices that shape shared understandings about international law and what is accepted as a permissible argument in international law.

Amid the persuasive arguments advanced by Ukraine, international lawyers might have felt a sense of alienation (a Brechtian *Verfremdungseffekt*) in the course of the Applicant's pleadings on 19 September 2023. In particular, to interpret the object and purpose of the Convention, Counsel Thouvenin referred to the expression 'humanitarian and civilizing' used by the Court in its Advisory Opinion on *Reservations to the Genocide Convention* (1951), page 23, and considered it 'des jolis termes' (Verbatim Record 2023/14, 19.09.2023, para 57). On closer scrutiny, the vast majority of written declarations by third states intervening also reiterated the 'humanitarian and civilizing' formula contained in the 1951 Advisory Opinion. While terms like 'civilization', 'civilized' and 'civilizing' were commonly used in international legal instruments drafted in the first half of 20th century, scholarship over the span of at least two decades has levelled significant criticism against this vocabulary. Terms like 'civilized' have in fact been conducive to justify and facilitate structures of exclusion, domination and the reproduction of hierarchies (eg Cheng, Koskenniemi, Anghie, Sloan, Mazower, Shahabuddin, Gozzi, Tzouvala, Nyawo, among others). One could thus argue that the meaning of 'civilized' has changed over time in relation to the prevailing discourse among international lawyers, that is, an interpretive community. Throughout this post I will refer to these terms as the 'civilizing discourse' or 'civilizing vocabulary' as umbrella terms.

Moving from this, the present reflection addresses two salient features arising from the pleadings: first, how the civilizing vocabulary has been uncritically invoked and reiterated by international lawyers in the case at hand; second, how departure from this discourse has been initiated in the argumentation of some third-state interventions. Both aspects are conducive to understanding how judicial decisions operate as vehicles of legal meaning as well as of legal arguments in international law.

The 'Civilizing Discourse' Among International Lawyers

Expressions drawing on 'civilization' and 'civilizing nations' permeate international law. A first example is offered Article 1 of the Statutes of the Institut de Droit International (1873), which refers to 'the legal conscience of the civilized world'. Several documents dating back to the first half of the 20th century were drafted using such terminology. For instance, Article 22 of the Covenant of the League of Nations (1919) referred to the 'sacred trust of civilization' which came later under the scrutiny by the ICJ in the 1966 *South West Africa* cases. Article 38(1)(c) of the ICJ Statute includes the notorious expression 'general principles of law recognized by civilized nations' inherited from the Statute of the Permanent Court of International Justice. The Preamble of the Genocide Convention (1948) refers to the 'civilized world'. As noted above, the ICJ, too, has resorted to the 'civilizing language' to connote the object and purpose of the Genocide Convention. Similarly, Article 7(2) of the European Convention on Human Rights (1950), concerned with the respect to the principle

of legality, also contains the expression ‘civilized nations’: ‘This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilized nations.’ Interestingly enough, the proposal to introduce this second paragraph was initially put forward by the UK, which sought to avoid any impugning of the Nuremberg judgments (preparatory works to Article 7, page 4). Against this backdrop, the expression ‘criminal according to the general principles of law recognised by civilized nations’ was intended to draw a distinction from general principles of law that, although being valid for the purposes of the principle of legality, were not reflective of a ‘civilized nation’, as several criminal laws issued by Germany during the Nazi regime were (see also comments by Luxembourg, ibid, page 6). What is more, based on the preparatory works of the European Convention, no state commented upon the specific term ‘civilized’ used in Article 7, while the Committee of Ministers of the Council of Europe simply noticed the ‘great affinities’ of Article 7 with Article 15 of the draft International Covenant on Civil and Political Rights (ibid, page 14). As is well-known, the latter only refers to ‘general principles of law recognized by the community of nations’ with no reference to ‘civilized’. Drawing from this, it appears that the ‘civilizing discourse’ was commonplace among international law professionals, used as a criterion for discriminating and enabling distinctions between nations. Hence, it is perhaps in this context in which this vocabulary was considered not only appropriate but necessary to mark the ideals of the new post-war international order that the passage of the 1951 Advisory Opinion was delivered and in which it should also be read.

Recently, the issue of reiterating the ‘civilizing’ vocabulary has come – among other possible examples – within the purview of the International Law Commission (ILC) in the framework of its project on *General Principles of Law* (2017-2023). As recalled above, Article 38(1)(c) of the ICJ Statute employs the expression ‘general principles recognized by civilized nations’ with which the ILC extensively engaged. As reported by the ILC, within the Sixth Committee the representatives of Guatemala and Mexico criticised the wording of Article 38(1)(c) as ‘anachronistic’ and ‘a verbal relic of old colonialism’ (see First report of *Special Rapporteur* Marcelo Vázquez-Bermúdez, 71st session of the ILC (2019), A/CN.4/732, paras 177, 179-80). Accordingly, the ILC decided to abandon the expression in favour of ‘community of nations’ which was instead considered ‘the most appropriate term to employ’ (see Second Report of *Special Rapporteur* Marcelo Vázquez-Bermúdez, 72nd session of the ILC (2020), A/CN.4/741, para 13). This confirms that, even assuming that the ‘civilizing’ discourse could have some place in international law of last century, today it would hardly reflect the spirit of the time, let alone current intellectual and legal trends among international lawyers.

In spite of these winds of change, during the hearings of 19 and 20 September 2023 in the *Allegations of Genocide* case, Ukraine as well as most third states intervening reiterated the ‘humanitarian and civilizing purpose’ of the Genocide Convention by referring *verbatim* to the passage on page 23 of the 1951 Advisory Opinion to affirm the foundational character of the Convention within the international legal order (see Ukraine’s oral submissions, Verbatim

Record 2023/14, 19.09.2023, paras 20 and 57); Portugal Declaration, para 12; Greece Declaration, para 39; Luxemburg Declaration, para 32; Liechtenstein Declaration, para 23; Slovenia Declaration, para 28; Slovakia Declaration, para 47; Belgium Declaration, para 43; Norway Declaration, para 21; Bulgaria Declaration, para 26; Croatia Declaration, para 29; Australia Declaration, para 26; Spain Declaration, para 28; Finland Declaration, para 32; Denmark Declaration, para 28; Poland Declaration, para 21; Romania Declaration, para 21; France Declaration, para 23; Sweden Declaration, para 36; USA Declaration, para 9; Germany Declaration, para 12; UK Declaration, para 60; New Zealand Declaration, para 21). This is not a novel practice. As I have argued elsewhere, some interpretations, eg those concerned with the concept of armed conflict, have also been reproduced *verbatim* in a number of judicial decisions across international jurisdictions determining what I call 'a perfect alignment' between interpretive outcomes (Lo Giacco, pp 128-140).

What though emerges even more neatly from the proceedings before the Court is the impact of rehearsing past interpretive utterances that results from the language deployed by international lawyers. As such, the iterative reference to the 1951 Advisory Opinion not only exhibits the role that courts' pronouncements play in stabilising legal meaning, but also legal language. In fact, on the one hand, judicial interpretations embed standards of correctness regularly wielded to advance legal arguments by international law professionals. On the other hand, these pronouncements are often used *verbatim* in international legal argumentation, thus having a bearing on the very discourse on international law. By referring to past interpretations, international lawyers often use the very terms that are embedded in interpretive utterances and make them their own.

Against this background, the increased attention of the ILC and of the Institut de Droit International for subsidiary means to determine rules of law and jurisprudence and precedents (see, respectively, A/76/10, Special Rapporteur Charles Jalloh, and the 2023 preparatory work on 'Jurisprudence and Precedents in International Law', Rapporteurs Mohamed Bennouna and Alain Pellet) should be particularly welcomed for they will hopefully contribute to raising further attention on the structure of international law argumentation and to shedding new light on how authority and authoritativeness are constructed in international law practices, including through language.

Paving the Way for Change

Notwithstanding, a few states intervening in the *Allegations of Genocide* case refrained from referring to the 'humanitarian and civilizing' formula of the 1951 Advisory Opinion. More precisely, there is no remnant of the civilizing discourse in either the written or oral submissions of Cyprus, Latvia and Lithuania. Other third states intervening have instead described the object and purpose of the Convention differently in their oral submissions than in their written declarations. For instance, in its oral declaration, the UK solely referred to the 'humanitarian purposes' omitting the term 'civilizing', although it used the formula of the 1951

Advisory Opinion in its written declaration. Likewise, New Zealand orally referred to the ‘high ideals’ of the Convention without repeating the expression *verbatim*, which instead appears in its written declaration.

The fact that these States, consciously or unconsciously, did not reiterate the civilizing vocabulary shall not go unnoticed. It shall instead be viewed as a departure from accepted legal arguments and language no longer in tune with current cultures and sensitivities within an interpretive community. Importantly, the case at hand not only offers the Court the opportunity to depart from the civilizing vocabulary but it also shows how the Court itself could actually revisit its own past utterances and reaffirm the ideals enshrined in the Genocide Convention through more appropriate discursive choices.

The example of Cyprus, Latvia and Lithuania also invites international lawyers to refrain from uncritically using judicial pronouncements as conduits of legal meaning and of legal language. After all, international lawyers are not just recipients of past judicial interpretations but, through their performative speech, can play an active role in forging the very discourse of international law, especially in the courtroom.