
On genocide claims, provisional measures and double-edged swords: Ukraine's case against Russia in the International Court of Justice

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On 26 February 2022, Ukraine filed an application instituting proceedings against the Russian Federation before the International Court of Justice (ICJ)², alleging that Russia has violated the 1948 Convention on the Prevention and Punishment of the Crime of Genocide ('Genocide Convention') by falsely accusing Ukraine of genocide and using this as justification for mounting a military operation against it. Ukraine also asked the ICJ to indicate provisional measures to calm down the situation until the ICJ has ruled on the case. After a brief oral hearing, the Court issued an order on 16 March for Russia to immediately suspend all military operations in Ukraine. The next step is to actually hear the case. The preparations for that, however, will take some time: Ukraine has been given a deadline of 23 September 2022 to get its arguments before the ICJ, after which Russia has until 23 March 2023 to submit a written response. No date has yet been set for an oral hearing.

The objective of this paper is to describe, on a general level, the progression of the conflict between Ukraine and Russia so far and to analyse some of the rather unusual arguments put forward in the context of the conflict, the underlying reasons, and issues relating to the ICJ's jurisdiction and provisional measures. The paper also seeks to examine the strategic benefits and disadvantages of Ukraine's legally controversial lawsuit from the perspective of the parties (especially Ukraine) and the ICJ itself.

The first part of the paper sets out the main points of Ukraine's application and addresses certain issues relating to the jurisdiction of the ICJ. The second part provides a more detailed analysis of the lawsuit and the challenges it poses in terms of international law. The third part summarises the arguments made by Russia up to this point. The fourth part discusses the ICJ's

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² Ukraine's application and all the documents referred to in this paper that relate to the case are available online at www.icj-cij.org/en/case/182 (visited on 5 April 2022).

order on provisional measures. The fifth and final part focuses on drawing conclusions and analysing the strategic benefits and disadvantages of Ukraine's lawsuit from a wider political perspective.

On unusual lawsuits and the jurisdiction of the International Court of Justice

You may wonder why Ukraine based its lawsuit on the Genocide Convention³ when Russia has blatantly violated the prohibition on the use of force by invading Ukraine and infringed international humanitarian law, i.e. the laws of armed conflict, by attacking multiple civilian targets as well as targets that are subject to special protection, such as a nuclear power plant.⁴ The reason for what at first glance appears to be a strange course of action by Ukraine lies in the ICJ's jurisdiction – or rather the lack thereof. The International Court of Justice (ICJ) in The Hague is an organ of the United Nations (UN), which is competent to settle disputes between state parties in accordance with international law. The ICJ does not have universal jurisdiction, however, and instead it can only act with the consent of the parties.

The ICJ's jurisdiction is provided for in Article 36, paragraphs 1 and 2 of the Statute of the International Court of Justice, according to which the Court is competent to hear a case if one of three conditions is satisfied.⁵ Firstly, the parties to the dispute can enter into a special agreement and refer the case to the ICJ together. Secondly, there may be a treaty between the parties to the dispute that contains a clause whereby any disputes concerning the treaty are to be settled by the ICJ. Thirdly, any state can, at any time, declare that it recognises as compulsory *ipso facto*, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes.

Since Russia has not made such a declaration and has refused to sign a special agreement with Ukraine referring the case to the ICJ, the only option left for Ukraine was to resort to a method it had already used in connection with the invasion of Crimea and base its lawsuit on a treaty to which both Ukraine and Russia are parties and that contains a clause recognising the jurisdiction of the ICJ. In the case of Crimea, Ukraine based its case on the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination. This time around, Ukraine's lawsuit is based on the Convention on the Prevention and Punishment of the Crime of Genocide and statements made by President *Putin* and other high-ranking officials, in which they appear to justify the attack on Ukraine by claims of ongoing genocide there. Article IX of the Genocide Convention includes the kind of clause that activates the ICJ's jurisdiction.

Ukraine's lawsuit is not, however, legally straightforward. The fact that the case concerns genocide in some way is not enough, and instead Ukraine will need to be able to prove that

³ The events in the city of Bucha are not part of the lawsuit, as they occurred after the application was filed and as they do not – contrary to what has been claimed in certain statements made by representatives of Ukraine – satisfy the definition of 'genocide', albeit that they may well constitute 'crimes against humanity'. Russia's attack also does not satisfy the definition of 'genocide' in other respects, despite the rhetoric used by the US President *Biden* and the Canadian Prime Minister *Trudeau*. Russia has, however, blatantly committed various war crimes.

⁴ The use of force is prohibited under Article 2(4) of the Charter of the United Nations and under customary international law. International humanitarian law has its origin in the 1949 Geneva Conventions.

⁵ There is, in practice, a fourth way, if the respondent state does not object to the proceedings ('forum prorogatum').

the dispute relates to its rights under the Convention. The Genocide Convention provides a definition for, and a prohibition of, crimes that constitute genocide, but it imposes very few obligations on the state parties. It is therefore by no means established that Russia's accusations violate Ukraine's rights under the Convention or that its use of force falls within the scope of application of the Convention. This is why we must look at Ukraine's arguments more closely.

Ukraine's allegations

Under Article IX of the Genocide Convention, disputes between the Contracting Parties relating to the 'interpretation, application or fulfilment' of the Convention shall be submitted to the International Court of Justice at the request of any of the parties to the dispute. Both Ukraine and Russia are parties to the Convention, and neither has any valid reservations in respect of the Convention. Ukraine argues that its dispute with Russia concerns the interpretation of Articles I and IV of the Convention, in the context of Article II. Article I confirms that genocide is a crime under international law which the Contracting Parties undertake to prevent and to punish, and Article IV obligates the Contracting Parties to punish anyone involved in the commission of genocide, while Article II sets out the definition of 'genocide'. In its oral arguments, Ukraine has also referred to Article VIII, according to which any Contracting Party may call upon the competent organs of the United Nations to take such action as they consider appropriate for the prevention and suppression of acts of genocide.

Although the dispute between Ukraine and Russia is clearly about whether Ukraine has committed genocide, the application filed by Ukraine is burdened by the ICJ's previous case law, in which it has found that the onus is on the applicant to prove that the dispute is not purely abstract and theoretical but that the applicant has rights under the Convention that are affected by the dispute. Ukraine has attempted to overcome this obstacle in its application by linking Russia's claims to its use of force against Ukraine. Ukraine may be helped in this respect by the fact that Article IX of the Genocide Convention – unlike the majority of similar clauses in other Conventions – mentions not only the interpretation and application of the Convention but also its *fulfilment* among the legitimate reasons for disputes, which could be seen to extend the scope of the Article to also cover deliberate misapplication of the Convention. The link that Ukraine has built between the allegations and the use of force is also crucial for the symbolic value that Ukraine is hoping for, as well as for helping to justify Ukraine's request for provisional measures, which focus specifically on Russia's use of force (more on this later).

Ukraine claims that Russia has interpreted its obligations under the Genocide Convention in bad faith ('*mala fide*') and, by basing its use of force on unsubstantiated claims of genocide, abused its rights and violated the object and purpose of the Convention, which, according to Ukraine's interpretations of the preamble to the Convention, is not just to prevent and punish the crime of genocide but also to maintain peace pursuant to the spirit and aims of the United Nations.⁶ Ukraine argues that it is this use of force that violates its rights under the Convention. In his oral arguments, Ukraine's representative *Jean-Marc Thouvenin* clarified that there is nothing in the Genocide Convention that could justify a violation of another Contracting Party's territorial integrity. Thouvenin argued, with reference to Articles VIII and IX of the Convention, that Russia did not have the right, under the Convention, to take unilateral action but should

⁶ Ukraine's application, paragraph 27.

have asked the UN for permission to use force or filed an application against Ukraine with the ICJ.

Immediately after filing its application against Russia, Ukraine also submitted a request for the indication of provisional measures, seeking an order from the ICJ for Russia to suspend all military operations in Ukraine until the Court has ruled on the case. The Court gave its order on provisional measures on 16 March 2022. Before delving deeper into that order, however, it is pertinent to examine how Russia has responded to Ukraine's allegations so far.

Russia's response

Russia did not attend the oral proceedings concerning the provisional measures but had submitted a letter to the ICJ indicating that it did not intend to participate in the proceedings due to the short notice given and that it does not recognise the ICJ's jurisdiction in the matter. It is unclear at this stage whether Russia's non-attendance was a form of protest or due to legitimate practical obstacles – although Russia's decision to pull out of the Council of Europe (which chose to expel Russia before it had a chance to withdraw) is not a good omen in this respect. The ICJ's history includes numerous examples of non-attendance out of protest, especially in cases such as this, where the Court's jurisdiction is based on clauses in a treaty. Iran refused to attend the proceedings in the *Tehran Hostages* case, France failed to appear in the *Nuclear Tests* case, and the United States did the same in the *Nicaragua* case. A party's non-attendance does not, however, prevent the ICJ from hearing a case, as long as it first satisfies itself, in accordance with Article 53 of the Statute of the International Court of Justice, that the claim is well founded in fact and law.

Russia's non-acceptance of the ICJ's jurisdiction is founded on three partially intertwined and partially alternative arguments. The strongest of these is the aforementioned argument that the Genocide Convention does not give Ukraine any rights that it could invoke against Russia, as the Convention contains no provisions relating to the use of force.

Russia's other two arguments are based on its claims that the case is not even about the interpretation of the Genocide Convention. The weaker of these arguments is that, when Russian authorities used the term 'genocide', they were referring to the prohibition of genocide within the meaning of customary international law and not the Genocide Convention, as they never specifically mentioned the Convention by name.

The more interesting of the arguments – despite its artificiality – is that the use of force really constituted self-defence under Article 51 of the Charter of the United Nations and common law. Russia's representatives defended this argument by referring in their letter to a speech given by Putin regarding the 'special operation', an unabridged version of which was enclosed with the letter and in which Putin does indeed mention self-defence (albeit that he also mentions genocide). It is very difficult to tell what Russia is basing its claims of self-defence on and whether this self-defence is meant to be for the benefit of Russia itself or for the benefit of the Donetsk People's Republic and the Luhansk People's Republic, whose independence Russia has recognised. Russia is also unable to present any facts based on which the definition of self-defence under international law would be satisfied. None of this is particularly relevant from the perspective of Russia's argument, however. If Russia is able to prove that the Russian authorities based their military operation even technically speaking on self-defence and not (even partially) on the prevention of genocide, the ICJ is not competent to hear the case, regardless of how weak Russia's claim of self-defence is in legal terms.

The International Court of Justice's order on provisional measures

The ICJ gave its ruling on the provisional measures requested by Ukraine on 16 March 2022. Article 41 of the Statute of the International Court of Justice gives the Court the power to indicate these kinds of provisional measures if it considers that circumstances so require to preserve the respective rights of either party during the proceedings.

According to its previous case law, the ICJ can indicate provisional measures if three criteria are satisfied. Firstly, the Court must have 'prima facie' jurisdiction. The ICJ's having prima facie jurisdiction does not necessarily mean that it will have jurisdiction to ultimately hear the case, but at this stage it must conclude that, on first impression, it appears to have a plausible basis on which its jurisdiction could be founded.⁷ The test of prima facie jurisdiction is therefore easier to satisfy than the test to establish the Court's jurisdiction at later stages of the proceedings.

Secondly, the Court must satisfy itself that the rights asserted by the party requesting provisional measures are at least plausible and that there is a link between the rights whose protection is sought and the provisional measures being requested.⁸ This test, too, is easier to pass than the test required for the final judgment, as the Court only needs to decide that the rights asserted appear, on first impression, to exist. Since Ukraine had asked the Court, among other things, to order Russia to suspend all military operations in Ukraine, Ukraine therefore had to satisfy the Court that the existence of Ukraine's rights under the Genocide Convention was plausible and that Russia's military operations had violated those rights.

Thirdly, the ICJ can only indicate provisional measures when there is an urgent risk that irreparable prejudice could be caused before the Court gives its final decision.⁹ The condition of urgency is met when the acts susceptible of causing irreparable prejudice can 'occur at any moment' before the Court makes a final decision on the case.¹⁰ This test was easy for Ukraine to satisfy, since, by the time of the oral hearing, Russia had already demonstrably embarked on military operations that threatened the very existence of Ukraine as a sovereign nation and had claimed the lives of multiple civilians.

The ICJ voted in favour of Ukraine's request for provisional measures with a clear majority. The Court granted three of the four provisional measures sought by Ukraine, only rejecting the request to order Russia to report, at regular intervals, on the implementation and maintenance of the measures. A clear majority of the members of the Court supported the decision, with thirteen judges voting in favour and just two (Judge *Gevorgian* of Russia and Judge *Xue* of China) against. The Court concluded that, based on the statements made by Russian authorities, it appeared, *prima facie*, that Russia was basing its military operation on claims of genocide instead of (or in addition to) self-defence, and that it was sufficiently plausible at this stage that the Genocide Convention gives Ukraine rights that it can invoke in its applications against Russia. As the Court also saw a clear connection between these rights and the use of force against Ukraine, it was furthermore established that there was a sufficient link between the provisional

⁷ 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, ICJ. Reports 2020, p. 9, para. 16.

⁸ Ibid., para. 43.

⁹ Alleged Violations of the 1955 Treaty of Amity, Economic Relations, and Consular Rights (Islamic Republic of Iran v United States of America), Provisional Measures, Order of 3 October 2018, ICJ. Reports 2018 (II), p. 645, para. 77.

¹⁰ Ibid., para. 78.

measures sought by Ukraine and its rights, and that the need for provisional measures was real and urgent. The Court even went beyond what Ukraine had requested in respect of two of the measures sought, so as to leave Russia with no legal loopholes. While Ukraine had asked the Court to order that Russia immediately suspend its military operations and support to any military units 'that have as their stated purpose and objective the prevention and punishment of a claimed genocide in Ukraine', the Court omitted the references to genocide from its ruling and simply ordered Russia to suspend its military operations and support to military units in Ukraine – unconditionally.

Analysis: a double-edged sword?

It is clear that Russia has violated international law by invading Ukraine in contravention of Article 2(4) of the Charter of the United Nations and common law and by bombing and firing at targets and individuals protected under international humanitarian law. Due to the limited jurisdiction of the ICJ in the matter, it nevertheless remains to be seen whether Ukraine will ultimately win its case, which is based exclusively on the Genocide Convention, and who will benefit the most from the proceedings in a symbolic sense.

Ukraine is continuing down the same path on which it first embarked during the conflict in Crimea, attempting to challenge Russia's actions in the light of international law in various courts – regardless of their jurisdictional limitations. Cases relating to Russia's most recent use of force are already pending not just before the ICJ but also before the International Criminal Court and the European Court of Human Rights. Ukraine's strategy seeks legal confirmation of the lawlessness of Russia's actions and the violations suffered by Ukraine, even if the courts cannot directly comment on Russia's use of force (although the International Criminal Court has the power to find individual persons guilty of international crimes in wartime). These cases, which often drag on for long periods of time, also help to keep the attacks fresh in the minds of the world after the media might otherwise have moved on to new stories.

This kind of litigation can also potentially be beneficial for the courts, as it gives them visibility and a chance to demonstrate their sometimes challenged relevance and usefulness. A case in point is the unusually passionate and stern tone that the ICJ adopted in its order on provisional measures, which was a clear departure from its typical dry and diplomatic style. In paragraph 18 of the order, for example, the Court states that it is profoundly concerned about the use of force by the Russian Federation in Ukraine, which 'raises very serious issues of international law', and mindful of its own responsibilities in the maintenance of international peace and security, and that it deems it 'necessary to emphasise that all States must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law'. In connection with its assessment of the urgency and necessity of the provisional measures in paragraph 75, the Court calls attention to the vulnerability of the civilian population of Ukraine and dedicates several sentences to describing the destruction and suffering that Russia's actions are causing. Although these statements are unlikely to raise many eyebrows in the current climate, they are markedly different from the Court's usual grey and cautious style.

Using creative arguments in litigation to overcome international courts' limited jurisdiction in matters concerning Russia is not without risk, however. From the perspective of Ukraine and the West, this opens the door for Russia to put forward relatively convincing, albeit conservative, arguments, since Ukraine often has to considerably stretch the treaties on which it bases its

claims in order to satisfy the courts' jurisdictional criteria. Although the order on provisional measures is a victory for Ukraine, it is by no means guaranteed that the same will happen at later stages of the proceedings. For example, Judge *Bennouna* explains in his declaration that he voted in favour of the order indicating provisional measures because he was touched by the suffering of the Ukrainian people and felt compelled to try to bring an end to the war. He did add, however, that he was not convinced that the Genocide Convention confers the kinds of rights to which Ukraine is appealing. The test of jurisdiction will be considerably more difficult to satisfy at the later stages of the proceedings when *prima facie* jurisdiction is no longer enough. Although it may be clear from a Western point of view that Russia has shamelessly violated international law and is now simply hiding behind legal technicalities, this view may not be shared by people everywhere, especially in those parts of the world where the Russian propaganda machine is particularly powerful. The West is already fighting an information war with Russia in, for example, Africa, to determine whether the economic and social consequences of the crisis that African countries are now facing are due to Russia's illegal actions or Western sanctions. Prolonged, technical legal proceedings can, in such circumstances, help Russia to sow doubt as to whether the situation really is as clear-cut as it might first appear.

Taking on the case is also risky for the ICJ. Although being involved gives the ICJ a chance to show that it is a dynamic force in society, the case can also underline the powerlessness of the ICJ and international law in general, if Russia blatantly disregards its rulings. This has already happened with the provisional measures; Russia is continuing its military operation regardless of the Court's order. There is therefore a risk that the ICJ, for all its dynamism, ultimately proves powerless and turns into a 'paper tiger' in the eyes of the world.

Litigation in the context of tragedies such as the one facing Ukraine is, from a strategic perspective, a double-edged sword. Nevertheless, it is clear that both Ukraine and the ICJ have a lot to win in this case, and the complicated procedural issues involved take nothing away from the fact Russia's use of force and military actions against Ukraine violate the rules on the use of force and international humanitarian law – regardless of whether or not the ICJ has jurisdiction to intervene. Ukraine's decision to take its case to court also helps to protect and maintain the rule of international law during a time when it could otherwise be stifled by superpower politics.