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ALLEGATIONS OF GENOCIDE - UKRAINE'S CASE AGAINST RUSSIA BEFORE THE INTERNATIONAL COURT OF JUSTICE



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INTRODUCTION

On the 26th of February 2022, Ukraine instituted proceedings against the Russian Federation at the International Court of Justice (ICJ) concerning a dispute related to the interpretation, application, and fulfilment of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention). Ukraine contends that the claim of “genocide” in the Luhansk and Donetsk Oblasts, which Russia used as a pretext for its invasion of the country, is completely nonsensical (ICJ, February 2022). As such, Ukraine has requested that the Court reach a judgement and also indicate provisional measures ordering Russia to immediately cease all military operations in the Luhansk and Donetsk Oblasts (ICJ, February 2022). While the Court has not yet reached a final judgement, it has already released its order on the provisional measures, which will be discussed below.

UKRAINE'S REQUEST FOR THE INDICATION OF PROVISIONAL MEASURES

According to Ukraine in its request for provisional measures, Russia has repeatedly tried to destabilise the country by systematically supplying illegal armed groups in the Luhansk and Donetsk Oblasts (ICJ, February 2022). Russia followed this up by recognising the independence of these regions, whereafter they carried out a so-called special military operation with the purpose of “protecting people who, for eight years, have been facing humiliation and genocide perpetrated by the Ukrainian regime” (ICJ, February 2022). In its request, Ukraine rightly claims that there is no factual basis for the existence of this genocide and that consequently, Russia has no legal basis to conduct a military operation (ICJ, February 2022).

According to the Ukrainian Government, a clear dispute exists concerning the interpretation, application, and fulfilment of the Genocide Convention. Moreover, Ukraine has argued that “Russia has turned the Convention on its head because it is Russia that is intentionally killing and inflicting serious injury upon Ukrainian nationals, which is the actus reus of genocide under Article II of the Convention” (ICJ, February 2022).

Therefore, Ukraine has requested the Court to urgently protect it pending its full resolution of the dispute by indicating provisional measures which would “protect its rights not to be subject to a false claim of genocide, and not to be subjected to another State’s military operations on its territory based on a brazen abuse of Article I of the Genocide Convention” (ICJ, February 2022). The provisional measures would thus require Russia to immediately cease all operations that have as their purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk Oblasts (ICJ, February 2022) (Pomson, March 2022).

RUSSIA'S "LACK OF JURISDICTION" ARGUMENTATION

On the basis of two claims, Russia presented that the ICJ had no jurisdiction to hear the case brought by Ukraine. Firstly, Russia argued that there are absolutely no references to the use of force or the recognition of States in the Genocide Convention, as these issues are regulated by the UN Charter and customary international law. According to Russia, “to read them into the Convention by implication would be to substantially amend and distort the object and purpose of the Convention” (ICJ, March 2022). Secondly, in any case, Russia claimed that the measures taken are in line with the right to self-defence as included in Article 51 of the UN Charter. Therefore, Russia decided not to appear in the hearings and consequently requested the Court to refrain from indicating the provisional measures and dismiss the case (ICJ, March 2022).

THE ICJ'S ORDER ON PROVISIONAL MEASURES

The ICJ begins its reasoning by referring to “various State organs and senior representatives of the Russian Federation that have referred, in official statements, to the commission of acts of genocide by Ukraine in the Luhansk and Donetsk regions” (ICJ, March 2022). Consequently, from all of these statements, the Court deduces that “the evidence in the case file demonstrates prima facie that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way” (ICJ, March 2022).

Secondly, for provisional measures to be issued, the ICJ must ascertain that the rights asserted by Ukraine are at least plausible (Pomson, March 2022). Ukraine seeks provisional measures to protect its rights “not to be subject to a false claim of genocide and another State’s military operations on its territory based on a brazen abuse of Article I of the Genocide Convention” (ICJ, March 2022). The ICJ further states that “while States parties have an obligation under Article I of the Genocide Convention to prevent and punish genocide, they must implement this obligation in good faith, taking into account other parts of the Convention” (ICJ, March 2022).

These other parts include, among others, Articles VIII and IX of the Genocide Convention. Article VIII of the Convention provides that a contracting party that considers genocide is taking place in the territory of another party “may call upon the competent organs of the UN to take such action under the UN Charter as they consider appropriate for the prevention and suppression of acts of genocide or any of the other acts enumerated in Article III” (ICJ, March 2022). In addition, Article IX provides that such a party may submit to the Court a dispute relating to the interpretation, application, or fulfilment of the Convention (ICJ, March 2022). However, the ICJ emphasises that, in discharging its duty to prevent genocide, “every State may only act within the limits permitted by international law” (ICJ, March 2022).

In any case, the Court declared that every measure taken “must be in conformity with the spirit and aims of the UN” (ICJ, March 2022). In addition, the Court added that it “is not in the possession of evidence substantiating the allegation of the Russian Federation that genocide has been committed on Ukrainian territory. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorises a contracting party’s unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide” (ICJ, March 2022). The Court thus consequently concluded that “Ukraine has a plausible right not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine” (ICJ, March 2022).

Lastly, the ICJ reiterated that it “has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences” (ICJ, March 2022). The Court considered that “any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment” (ICJ, March 2022).

By thirteen votes to two, the Court declared firstly that Russia should immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine and should ensure that any military or irregular armed units which may be directed or supported by it, as well as any organisations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations (ICJ, March 2022). The Court declared unanimously that both parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (ICJ, March 2022).

INTERNATIONAL SUPPORT FOR THE UKRAINIAN CASE

On the 1st of July 2022, the Ukrainian Government declared that it had submitted its memorial to the ICJ. While the memorial has not yet been publicly released, the press release states that “Ukraine’s memorial catalogues how Russia, since 2014, has put forward a false narrative accusing Ukraine and its officials of committing genocide. Russia has used these allegations as a pretext for launching a new phase of its aggression against Ukraine: invading more territory, committing atrocities against thousands of innocent Ukrainians, displacing millions more, and inflicting tens of billions of dollars in destruction in Ukraine’s cities, towns, and villages. The President of the Russian Federation expressly stated that the purpose of these actions was to stop a so-called genocide. In so doing, Russia has abused and violated its solemn responsibilities under the Genocide Convention. Russia has once again demonstrated to the world its complete disdain for the rule of law, its callous indifference to human suffering, and its utter contempt towards the international legal order” (Ministry of Foreign Affairs of Ukraine, 2022).

Subsequently, on the 13th of July 2022, a joint statement was released supporting Ukraine in its proceedings before the ICJ. The signatories to this statement include Albania, Andorra, Australia, Austria, Belgium, Bulgaria, Canada, Croatia, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, the Marshall Islands, Moldova, Monaco, Montenegro, the Netherlands, New Zealand, North Macedonia, Norway, Palau, Poland, Portugal, Romania, San Marino, Slovakia, Slovenia, Spain, Sweden, the United Kingdom, the United States, and the European Union. The joint statement by the 43 signatories reiterates their intention to intervene in the proceedings before the ICJ (EEAS Press Team, July 2022).

While most of the aforementioned States have already intervened the European Union, which is not a State, nor a party to the Genocide Convention, decided to get involved in the proceedings as an *amicus curiae* under Article 34(2) of the ICJ Statute (ICJ, December 2022). As such, the European Union “furnished the Court with relevant information” (ICJ, August 2022), thereby showing its support for Ukraine in its own way (Melzer, October 2022).

THE NEXT STEPS

On the 3rd of October 2022, Russia filed preliminary objections to the jurisdiction of the Court and the admissibility of the application. In addition, the ICJ fixed February 2023 as the time limit within which Ukraine may present a written statement of its observations and submissions on the preliminary objections raised by the Russian Federation (ICJ, 7 October 2022).

CONCLUSION

Following its historic order on provisional measures in line with all of Ukraine’s demands, the ICJ is now poised to decide the case on its merits somewhere at the end of 2023. With Russia isolated, and most of the international community rallying behind Ukraine, it will be difficult for the Court to take a step back from its reasoning in the provisional order and decide against Ukraine’s demands in the main case.

Whether the case will have any practical effect remains doubtful. Russia already completely disregarded the provisional measures as prescribed by the Court in March of 2022. The ICJ has no formal mechanisms to enforce its decisions upon States, but the UN Security Council can call for full and immediate compliance with the decision. However, given Russia’s veto power in the Security Council, this is very unlikely (European Parliamentary Research Service, April 2022). Nevertheless, the case could further isolate Russia as a rogue State that does not abide by international law and further increase international support for Ukraine.

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