

INTERNATIONAL COURT OF JUSTICE AND PROVISIONAL MEASURES UNDER THE GENOCIDE CONVENTION: CURIOUS CASE OF *UKRAINE V. RUSSIAN FEDERATION*

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Abstract: The ongoing Russian aggression on Ukraine has prompted Ukrainian President Zelensky to seek the assistance of States and international institutions. One such institution that Ukraine approached is the International Court of Justice (ICJ), requesting provisional measures. Ukraine contends that the Russian Federation has falsely claimed that acts of Genocide have occurred in the Luhansk and Donetsk oblast in Eastern Ukraine. In this article, the author details the provisional measures rendered by the ICJ; in doing so, it is contended that the interpretation of the ICJ vis-à-vis the Genocide Convention is flexible and broad, a stark contrast to its previous cases.

Keywords: Genocide, Ukraine, Russia, International Court of Justice, Provisional Measures.

1. INTRODUCTION

The ongoing Russia-Ukraine conflict has snowballed into a matter of international concern (United Nations, 2022f). Unabated literature has flowed pertaining to international law and the said conflict; these writings have covered aspects of *jus ad bellum* and *jus in bello* (Green, Henderson, Ruys, 2022; McLaughlin, 2022). Despite the justifications provided by the Russian President Vladimir Putin to intervene in Eastern Ukraine, States from all quarters have condemned the Russian actions (United Nations, 2022a). With the backing of Western allies, the United States of America (USA) has come out all guns blazing, issuing sanctions to dissuade the actions of Russia (Russell, 2022).² However, sanctions have been unable to halt the Russian march in Ukraine (Dugan, 2022). In addition to sanctions, various international law avenues are being explored by States to corner Russia. In this regard, a proposal was placed in the United Nations Security Council (UNSC), which the Russian Federation vetoed (United Nations, 2022d). The United Nations General Assembly (UNGA) resolution demanded that Russia end the offensive in Ukraine (United Nations, 2022b). The UN Human Rights Council voted to establish a commission to investigate the violations committed by Russia in Ukraine (United Nations, 2022c). Ukraine's Ambassador Yevheniia Filipenko states, "the establishment of a Commission of Inquiry will investigate all alleged violations and abuses of human rights and violations of international humanitarian law and related crimes in the Russian Federation's aggression

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² Claire Mills, *Sanctions against Russia*, <https://researchbriefings.files.parliament.uk/documents/CBP-9481/CBP-9481.pdf>

against Ukraine, including their root causes.”³ Moreover, the International Criminal Court (ICC) prosecutor has proceeded with opening an investigation into the situation in Ukraine (Siddiqui, Liu, Posthumus, Zvobgo, 2022).

Further, Ukraine approached the ICJ for provisional measures and the ICJ took cognisance of the happenings in Ukraine and rendered provisional measures on 16th March 2022.⁴ In this article, the author provides a detailed analysis of the provisional measures, thereby highlighting the approach of the ICJ in the overall scheme of provisional measures vis-à-vis the *Convention on the Prevention and Punishment of the Crime of Genocide* (Genocide Convention). The author has accordingly split the article into four segments – the first part details the provisional measures and their utility, the second portion maps the interaction between provisional measures and the Genocide Convention, the third part covers the ICJ’s provisional measures of 16th March 2022 and the final portion curates the general outlook of the ICJ on the Genocide Convention and provides recommendations.

2. PROVISIONAL MEASURES: UTILITY

The ICJ is conferred with the task of maintaining peace and security (Akande, 1996). To realise these objectives, it can exercise its discretionary power to render provisional measures to create a binding obligation on the States. Article 41 of the ICJ Statute states that,

“1. The Court shall have the power to indicate if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party. 2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and to the Security Council.”⁵

The competence to render provisional measures is the ‘inherent power’ of the court. As Professor Prabhas Ranjan and Achyuth Anil put it, ‘provisional measures are interim measures to preserve the rights of the parties pending the final decision (Ranjan, Anil, 2022).’ The power to order provisional measures falls within the scope of ICJ’s ‘incidental jurisdiction’ (Rosenne, 2004). Since the beginning of the 21st century, there has been a considerable increase in the provisional measures sought by the State. As pointed out by Andreas Kulick, the ICJ has rendered 27 provisional measures in the last 21 years, a stark contrast from the earlier years (Andreas Kulick, 2022). Jorg Kammerhofer contends that the PCIJ and the ICJ, until June 2001, had never uttered the legal binding force of provisional measures (Kammerhofer, 2003). Some scholars even considered provisional measures as having only moral force. Sztucki observes, ‘The obligation has become

³ *Ibid.*

⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) The Court indicates provisional measures, <https://www.icj-cij.org/public/files/case-related/182/182-20220316-PRE-01-00-EN.pdf>

⁵ *Statute of The International Court of Justice*, <https://www.icj-cij.org/en/statute>

a moral norm, or, as it has been called, quasi-obligatory' (Sztucki, 1983). At the same time, others like Hersch Lauterpacht regard provisional measures as more than a moral obligation on the States, as the court examines the circumstances that allow it to issue provisional measures (Lauterpacht, 1958).

The nature of the provisional measure was put to rest in the *LaGrand case*, here the ICJ ascertained its binding effect, and its breach entails State responsibility (Lee-Iwamoto, 2012). As the Japanese Professor Yoshiyuki Lee-Iwamoto opines, 'Since the recognition of its binding force in the *LaGrand* judgment, more and more attention has been shifted to the interpretation and application of the Court's power to indicate provisional measures due to its discretionary character (Lee-Iwamoto, 2012; Kempen, He, 2009).' Also, it could be observed that the ICJ is not reluctant to provide remedies at the provisional measures stage. The ICJ granted restitution in grant, for instance, in the *Tehran Hostage case*, wherein it was observed that 'Iran should ensure that the premise of the embassy has to be restored to the possession of the United States' and cessation was granted in the *Avena and Nicaragua case* (Stoica, 2021).

Additionally, provisional measures play multiple roles beyond settling disputes between the States; as Michael Ramsden opines, "The court employed different tactics to ensure its relevance on a wider set of issues (Ramsden, 2023)". Ramsden adds that provisional measures could serve a wider purpose in interpreting international law and assist the States in taking a broader vision regarding resolving the wider dispute. Also, provisional measures provide a fine balance between bilateral dispute settlement and the attainment of collective goods (Ramsden, 2023). For instance, in the Russia-Ukraine provisional measures, the ICJ observed, '...all states must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law'⁶, at the same time, it was also stated that, '...case before it was limited in scope, raising issues only under the Genocide Convention'⁷, thus indicating the fact that it is limited by jurisdictional constraints.

The provisional measures rendered by the ICJ also ensure that disputes do not aggravate (Rieter, 2010). Provisional measures are granted in cases of urgency, prejudice, and irreparable harm (Miles, 2017). Since provisional measures are rendered on short notice, it ensures that immediate measures are taken; in the recent case of Russia-Ukraine, the provisional measures order was rendered within 20 days. As provisional measures are rendered urgently, the ICJ need not peel into the merits or the substantive questions, whereby it merely looks to the minimum requirement concerning prima facie jurisdiction, plausibility, and irreparable prejudice to human life and property (Miles, 2018).

⁶ Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation), 16 March 2022, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> at p.5.

⁷ Allegations Of Genocide Under The Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation), 16 March 2022, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> at p.5.

Previously, the ICJ wrestled with the question of merits while rendering provisional measures vis-à-vis the Genocide Convention. This was apparent during the North Atlantic Treaty Organization (NATO) States' bombing of Yugoslavia, wherein the ICJ rendered a slew of provisional measures on request by Yugoslavia, and Serbia and Montenegro (Nanda, 2022). However, there appears to be a shift in the mindset of the ICJ wherein it has adopted a flexible interpretation of the Genocide Convention at the provisional measures stage through its recent cases.

3. GENOCIDE CONVENTION: A SLICE FROM THE PAST

Genocide is a massive human rights violation that shakes the conscience of humanity (Vrdoljak, 2011). Thereby, it becomes imperative for the State to tackle the crime of Genocide. Thus, the UN has evolved jurisprudence to curb acts of Genocide (United Nations, 2022e). Pursuant to this, the Genocide Convention was enacted.⁸ The earliest encounter of ICJ with the Genocide Convention was the advisory opinion rendered in the *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, 1948*⁹. The advisory opinion, requested by the UNGA, was regarding the position of States making reservations to the Genocide Convention. The ICJ had a golden opportunity to enumerate in depth the nature of the Genocide Convention. According to the ICJ,

“The object and purpose of the Convention thus limit both the freedom of making reservations and that of objecting to them. It follows that it is the compatibility of a reservation with the object and purpose of the Convention that must furnish the criterion for the attitude of a State in making the reservation on accession as well as for the appraisal by a State in objecting to the reservation. Such is the rule of conduct which must guide every State in the appraisal which it must make, individually and from its own standpoint, of the admissibility of any reservation.”¹⁰

Albeit the States are not prohibited from reserving the provisions of a Convention, the nature of the Genocide Convention is such that States are proscribed from reserving its object and purpose. Considering the humanitarian character of the Convention as evinced in the 1948 advisory opinion, coupled with the nature of the prohibition of genocide Genocide as a *jus cogens* norm (Linderfalk, 2007), the ICJ attached importance to the Genocide Convention as early as the 1950s. Subsequently, in the *Barcelona Traction case*, it was clearly pointed out that the duty to respect fundamental human rights constitutes *erga omnes* obligation, which are obligations owed by States to the international community as a whole, and in the court's opinion, Genocide constitutes one such obligation. As Gentian

⁸ *Convention on the Prevention and Punishment of the Crime of Genocide. Paris, 9 December 1948*, https://treaties.un.org/doc/Treaties/1951/01/19510112%2008-12%20PM/Ch_IV_1p.pdf

⁹ *Reservations To the Convention on The Prevention and Punishment of The Crime of Genocide*, International Court of Justice May 28, 1951, Advisory Opinion, 1951 I.C.J. Rep.15.

¹⁰ *Ibid* at 8.

Zyberi opines in the context of the ICJ, ‘...recognition of many principles of human rights such as the prohibition of genocide... as part of customary international law or even *jus cogens* finds support in the case-law of the Court (Zyberi, 2007).’

Apart from the 1951 Advisory opinion and the Barcelona Traction dictum, until the 1990s, the ICJ was not presented with cases pertaining to the Genocide Convention. This was because of the mushrooming international criminal tribunals, which shed light on the contours of the crime of Genocide. The contribution of the two ad-hoc tribunals established by the UNSC, i.e., the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are worth mentioning (Northwestern, 2022). These tribunals have clarified the definition, prosecution, and punishment for the crime of Genocide. One of the key requirements for proving the crime of Genocide is the specific intent (mental element) or *dolus specialis* (Burns, 2010) apart from the material element. In the *Kayishema* (Rabi, 2019) and *Ruzindana cases*,¹¹ several factors such as the death toll, the use of deadly weapons, the mental agony to the victims and the targeting of a particular group, were used to establish the mental element. As stated, the threshold for proving Genocide is high; moreover, the act should be proven beyond a reasonable doubt (Abass, 2007). As a result of the enormous literature flowing from these international tribunals, the interpretation of the nature of the Genocide Convention, both in advisory opinion and contentious cases from ICJ, is fairly limited.

4. GENOCIDE CONVENTION AND PROVISIONAL MEASURES

In the aftermath of the Bosnian Genocide, the ICJ was presented with an opportunity to interpret the Genocide Convention. On 20 March 1993, Bosnia and Herzegovina instituted proceedings against the Federal Republic of Yugoslavia (Serbia and Montenegro) for the alleged violation of the Genocide Convention. The first question before the ICJ was to examine whether it had jurisdiction *ratione materiae* under Art. IX of the Genocide Convention. After analysing the case, the ICJ found that it has prima facie jurisdiction ‘...as both the States are parties to the Genocide Convention.’¹² Although the ICJ affirmed the massive killings in the territory of Bosnia and Herzegovina, the claim was not supported by ‘specific intent’, one of the fundamental requirements for proving the commission of ‘Genocide.’ However, the ICJ concluded that specifically in ‘Srebrenica’ Genocide was committed with the specific intent to kill the Bosnian Muslims by the VRS (Army of the Republika Srpska) Main Staff. Ironically, the ICJ also concluded that, albeit the acts of the VRC cannot be attributed to Serbia (Respondent State), it had an obligation to prevent ‘Genocide’ by all reasonable means.¹³

¹¹ *Ibid.*

¹² Case Concerning Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (Bosnia And Herzegovina v. Yugoslavia (Serbia And Montenegro) Request For The Indication Of Provisional Measures Order Of 8 April 1993, Available at <https://www.icj-cij.org/sites/default/files/case-related/91/091-19930408-ORD-01-00-EN.pdf> at p.15.

¹³ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, <https://www.icj-cij.org/en/case/91>

The NATO States' intervention and bombing of Yugoslavia during the Kosovo War under the operation of the 'allied forces' in 1999 destroyed major cultural monuments, schools, and hospitals, allegedly killing more than 1000 forces of the Yugoslav security forces and 500 civilians (Radio Free Europe, 2019). The intervention was justified under the pretext of 'humanitarian intervention' after the Chinese and the Russian Veto (Kounalakis, 2016). It was the first time the NATO States intervened without explicit UNSC authorisation. The NATO bombings forced Yugoslavia to approach the ICJ in a series of proceedings, wherein the ICJ had the opportunity to interpret the Genocide Convention in the context of provisional measures vis-à-vis the legality of the *use of force*.¹⁴ The ICJ, in these proceedings, at the provisional measures stage, provided a narrow interpretation of the Genocide Convention by delving into the substantive contents of the Genocide Convention like 'intention' under Article II of the Genocide Convention.¹⁵ As previously discussed, the threshold for 'specific intent' is high in terms of the crime of Genocide, which at the provisional measure stage should not have been deliberated by the ICJ. Moreover, the ICJ agreed with the contention that the *use of force* is not capable of falling within the purview of Article III of the Genocide Convention¹⁶, thereby lacking jurisdiction under Art. IX of the Genocide Convention. What can also be seen is the ICJ's reluctance to render monetary compensation for the breaches of the obligations set out in Art I of the Genocide Convention. As Professor Christian Tomuschat aptly puts it, "...the ICJ could have ordered symbolic monetary damages by taking into account international practice and the request by the Applicant (Tomuschat, 2007)." The court required a direct causal link between the violation and the injury for the granting of material and moral damages (Zyberi, 2011).

In the case against one of the NATO States, Spain, the ICJ accepted the reservation made by Spain to Article IX of the Genocide Convention precluding the jurisdiction of the court (instrument of accession, deposited with the United Nations Secretary-General on 13 September 1968). Here, the ICJ focused on the consensual nature of international law rather than a specific act that violates international law. As the ICJ observes, "...there is a fundamental distinction between the question of the acceptance by a State of the Court's jurisdiction and the compatibility of particular acts with international law."¹⁷ However, the attitude of the ICJ appears to follow a liberal trajectory in the subsequent cases.

The case of *Gambia v Myanmar*¹⁸ marks the first time a non-injured State appearing before the court invoking the Genocide Convention (Becker, 2020). With the backing of

¹⁴ *Legality of Use of Force*, <https://www.icj-cij.org/en/case/112>

¹⁵ *Legality of Use of Force (Yugoslavia V. Spain) Request for the Indication of Provisional Measures*, Order (June 2, 1999), <https://www.icj-cij.org/public/files/case-related/112/112-19990602-ORD-01-00-EN.pdf>.

¹⁶ The provision lays down the list of acts that constitute 'Genocide'. These are - a) Killing members of the group; b) Causing serious bodily or mental harm to members of the group; c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group.

¹⁷ *Ibid* at 773.

¹⁸ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, <https://www.icj-cij.org/en/case/178>

the fifty-seven-member State of the Organization of Islamic Cooperation (OIC), a tiny West African State, Gambia instituted a proceeding against Myanmar. On 23rd January 2020, the ICJ indicated provisional measures, laying down three core criteria for indicating the same. These are – a) prima facie jurisdiction (the ICJ examines the existence of a dispute), b) plausibility, and c) risk of irreparable loss and urgency.¹⁹ Regarding the first criterion, in terms of ‘dispute’, the ICJ went by the definition, i.e., “a dispute between States exists where they hold opposite views concerning the question of the performance or non-performance of certain international obligations.”²⁰ The claim of one party must be positively opposed by the other. To determine the existence of the dispute, the ICJ interestingly referred to the statement made by the parties in the UNGA to decipher that the parties held divergent views concerning the event in the Rakhine State.²¹

Concerning the plausibility criteria, i.e., “a link must exist between the rights whose protection is sought and the provisional measures being requested.”²² The ICJ, relying on the UN fact-finding report and the report of UNGA report, added that “Given the function of provisional measures, which is to protect the respective rights of either party pending its final decision, the Court does not consider that the exceptional gravity of the allegations is a decisive factor warranting, as argued by Myanmar, the determination, at the present stage of the proceedings, of the existence of genocidal intent”²³. In short, the ICJ considered that at the provisional measure stage, it is not imperative to discuss an issue of ‘genocidal intent’, which is a matter reserved purely for the merits, thereby accepting the contention of Gambia.

The third criterion is the risk of irreparable loss and urgency. Here, the ICJ relied on the Preamble of the Genocide Convention to indicate the humanitarian dimension of the Genocide Convention,²⁴ a vivid reference to the same was made in para 73 of the opinion wherein it is pointed out that, “Myanmar has not taken adequate steps to recognise and ensure that the rights of the Rohingya exist as a protected group under the

¹⁹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

²⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.10.

²¹ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.27.

²² Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.18.

²³ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.23.

²⁴ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.24.

Genocide Convention, moreover the ICJ travelled an additional mile to state unanimously that, ‘Myanmar (take) all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention’, also went on to add that, ‘Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months until the Court renders a final decision on the case.’²⁵

The opinion was met with certain reservations from Judge Xue. Accordingly, even though the ICJ is not required to make an ascertainment of ‘genocidal intent’ at the present stage, the acts alleged should display *prima facie* raising the level of ‘genocidal intent.’²⁶ Judge Xue further emphasised that ‘State parties making reservation to Article IX of the Genocide Convention are equally committed to the *raison d’être* of the Genocide Convention.’²⁷

The separate opinion of the Judge also points towards the shifting nature of provisional measures in the context of the Genocide Convention. As the Judge observes in the separate opinion, ‘provisional measures are intended to bring the necessary protection to human beings who have been suffering for a long time in a situation of extreme vulnerability.’²⁸ Further, Trindade adds that provisions of the Genocide Convention confirm with the law of protection, ‘oriented towards the safeguard of the fundamental rights of those victimised in a continuing situation of extreme human vulnerability, so as also to secure the prevalence of the rule of law (*la prééminence du droit*).’²⁹ There is a further emphasis on the principle of ‘human vulnerability’ in the context of provisional measures, as it is opined, “the determination and ordering of provisional measures of protection under the Convention against Genocide, and under human rights Conventions, can only be properly undertaken from a humanist perspective, necessarily avoiding the pitfalls of an outdated and impertinent State voluntarist outlook.”³⁰ It is clear that the ICJ, in interpreting the Genocide Convention, did not enter into the ‘intent’ element under

²⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf> at p.31.

²⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), Separate Opinion of Vice- President Xue, available at <https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> at p.32.

²⁷ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar) Request for the Indication of Provisional Measures, Order, (January 23, 2020), Separate Opinion of Vice- President Xue, available at <https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-01-EN.pdf> at p.34.

²⁸ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Separate Opinion of Cançado Trindade, available at <https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-02-EN.pdf> at para 1.

²⁹ *Ibid* at para 89.

³⁰ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Separate Opinion of Cançado Trindade, available at <https://www.icj-cij.org/sites/default/files/case-related/178/178-20200123-ORD-01-02-EN.pdf> at para 94.

the Genocide Convention, which marks a visible shift from its earlier jurisprudence. As Angelique Rael opines, “The court’s decision to issue provisional measures is significant because it is the first binding decision to hold Myanmar accountable for its genocidal acts committed against the Rohingya group (Rael, 2021).”

5. RUSSIA-UKRAINE PROVISIONAL MEASURES

On 26 February 2022, Ukraine filed an application against Russia regarding ‘a dispute . . . relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.’³¹

5.1 Ukraine’s Contentions

The fundamental argument of Ukraine was premised on the interpretation of the Genocide Convention, to which both Ukraine and the Russian Federation are signatories.³² Ukraine disagrees with the argument of Russia that the special military operation is carried out to prevent the commission of Genocide in the regions of Luhansk and Donetsk oblast of Eastern Ukraine.³³ Therefore, according to Ukraine, it is a straightforward case of differences arising from interpretation pertaining to the Genocide Convention. Hence, the request for the provisional measure was essential to halt the special military mission. As Ukraine put forth in its claims, the request for the provisional measures has fulfilled the criteria of – a) prima facie jurisdiction, b) preservation of Rights, and c) The risk of irreparable prejudice and urgency.³⁴ On prima facie jurisdiction, Ukraine contended that Russia and Ukraine are parties to the Genocide Convention. Article IX of the said Convention reads as: “Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute.”³⁵

The ‘dispute’ requirement in Article IX is a disagreement on a point of law or fact, a conflict of legal views, or of interests between parties. This definition of ‘disagreement’ on

³¹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf>

³² Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation), Order, (March 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf>.

³³ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation), Order, (March 16, 2022), at p.8.

³⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine V. Russian Federation), Order, (March 16, 2022), at p.14.

³⁵ *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

the point of law or fact is that Ukraine has “emphatically denied that any act of Genocide has occurred in the Luhansk and Donetsk oblasts or elsewhere in Ukraine and that Russia has any lawful basis whatsoever to take action in and against Ukraine for the purpose of preventing and punishing genocide.”³⁶ In response to Russia’s claim, the Ministry of Foreign Affairs of Ukraine issued a statement that Ukraine “strongly denies Russia’s allegations of genocide and denies any attempt to use such manipulative allegations as an excuse for Russia’s unlawful aggression.”³⁷

Further, Ukraine intended to preserve, in good faith, Article I of the Genocide Convention, i.e., the obligation to prevent genocide. As Genocide was not committed in the first place by the incorrect claim of Russia, the purpose and object of the Convention are undermined.³⁸ Although the obligation to prevent Genocide is a key feature of the Genocide Convention, it has to be undertaken in good faith in accordance with the norm of international law. Therefore, as Ukraine points out, “The Russian Federation’s invasion of Ukraine based on a false claim of genocide is thus incompatible with the Genocide Convention and violates Ukraine’s rights.”³⁹

The third requirement is the risk of irreparable prejudice and urgency. According to Ukraine, the invasion of Russia is ongoing and has resulted in widespread loss of life, property and humanitarian crisis. Hence, Ukraine requests the ICJ to render the following provisional measures in terms of the Genocide Convention: “The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine.”⁴⁰

5.2 Russia’s Contention

Russia regrets the short notice in which it had to properly assess the case brought against it before the ICJ; therefore, it decided not to participate in the oral proceedings. However, out of deference to the court, Russia had decided its position regarding the lack

³⁶ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.8.

³⁷ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.10.

³⁸ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at 14.

³⁹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.12.

⁴⁰ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.3.

of competence of the Court in this case.⁴¹ The primary contention of Russia was that the ICJ does not possess prima facie jurisdiction as the subject matter of the dispute does not relate to the interpretation, application, and fulfilment of the Genocide Convention. This was in line with the ICJ's previously held view in the *Legality of Use of Force case*, wherein it was observed that “the Court must ascertain whether the breaches of the Convention alleged are capable of falling within the provisions of that instrument and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain pursuant to Article IX.”⁴²

Moreover, Russia contended that the Genocide Convention did not regulate matters relating to the use of force or the question of recognition of States. Although, as Ukraine argues, the obligation to prevent Genocide is enshrined in Article I of the Genocide Convention is to be compiled in good faith in sync with the UN Charter.⁴³ According to Russia, this does not imply that the Genocide Convention regulates matters pertaining to the use of force or Article 51. As Russia asserts, “To read them into the Convention by implication would be to substantially amend and distort the object and purpose of the Convention.”⁴⁴

The special military operation, according to Russia, was justified through Article 51 of the UN Charter and customary international law; this was communicated to the UNSG. Interestingly, the Russian justification for using force was to preserve the *right of self-determination* of the people of Donetsk and Lugansk People's Republics by relying on the 1970 Friendly Declarations, “as stipulated in [the] 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, must be strictly observed with regard to States that are conducting themselves in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.”⁴⁵ Russia's standpoint, in essence, is taken from the televised statement of Vladimir Putin.⁴⁶ Alongside the legal articulation in the televised speech, the views of the Russian president were political, as there was an unceasing reference to the West's double standards in intervening in Libya, Syria and Iraq and, thereby, distortion of all the UNSC resolutions.

⁴¹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.6.

⁴² *Legality of Use of Force (Serbia and Montenegro v. Italy)*, Preliminary Objections, 2004 I.C.J at 481.

⁴³ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.13.

⁴⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.8.

⁴⁵ *Declaration On Principles of International Law Friendly Relations and Co-Operation Among States in Accordance with The Charter of The United Nations, 1970*, <https://www.un.org/ruleoflaw/files/3dda1f104.pdf>

⁴⁶ *The Kremlin, Moscow, Address by the President of the Russian Federation*, <http://en.kremlin.ru/events/president/news/67828>

5.3 ICJ's View

The ICJ views the crisis unfolding in Ukraine as unfortunate and deplores the violations of international law.⁴⁷ Moreover, the ICJ acknowledged that several forums have taken up issues involving both parties. However, the ICJ points out that the present case is specific to the Genocide Convention. As was interpreted in its earlier jurisprudence of *Gambia v. Myanmar*, the ICJ tested the three criteria necessary for indicating provisional measures and, as contended by Ukraine, i.e., a) prima facie jurisdiction, b) plausibility, c) risk of irreparable loss and urgency. To determine the prima facie jurisdiction, the ICJ had to gauge the existence of a 'dispute' between the parties.⁴⁸ In pursuant to this, the ICJ looked into the statements made by senior officials representing the State organs, in particular, looked into the statement of the Russian President, Mr. Vladimir Putin, wherein reference was made to the situation in Donbas as a "horror and genocide, which almost 4 million people are facing (BBC, 2022)." It was specifically mentioned that the purpose of the special operation was "to protect people who have been subjected to abuse and genocide by the Kyiv regime for eight years (Lopez, Worthington, 2022)."

In response to the statement of the Russian president, Ukrainian authorities disagreed with the same in a statement issued on 26th February 2022, accordingly, "Ukraine strongly denies Russia's allegations of genocide and disputes any attempt to use such manipulative allegations as an excuse for Russia's unlawful aggression."⁴⁹ Therefore, the ICJ, by reference to the contrary views of Russia and Ukraine and without delving into the substantive requirements, considered that there is an existence of a 'dispute' in terms of disagreement of fact and law. Regarding the second limb of the argument, i.e., 'plausibility', Ukraine contended that it was falsely implicated for 'Genocide' and therefore, not to be subject to another State (Russia) in its territory, as it is a brazen violation of Art. I and IV of the Genocide Convention, i.e., obligation in good faith to take measures to prevent and punish the act of Genocide. Here the primary argument by Ukraine was that Russia's means of enforcing the Genocide Convention in terms of the *use of force* is not bona fide. The ICJ explicated that the means to act in good faith to prevent genocide is codified in the Convention, i.e., Art. VIII, IX, and the Preamble.⁵⁰

Article VIII of the Genocide Convention requires the calling upon other organs of the UN to take action to suppress the acts of Genocide or other acts enumerated in Art. III

⁴⁷ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.5.

⁴⁸ Application Of The Convention On The Prevention And Punishment Of The Crime Of Genocide (The Gambia V. Myanmar), (2020), <https://www.icj-cij.org/public/files/case-related/178/178-20200123-ORD-01-00-EN.pdf>.

⁴⁹ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.10.

⁵⁰ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.13.

of the Genocide Convention.⁵¹ Art. IX requires the States to submit the dispute to the ICJ relating to the Convention's interpretation, application, or fulfilment.⁵² The ICJ also noted that the States could undertake other means to prevent Genocide. However, it should fall within the contours of international law. Interestingly, the ICJ did not respond to whether a State could use force to prevent Genocide, as it is a matter that was required to be clarified on the merits, and hence, did not harp on the question as to whether Genocide was committed. A preliminary glance at the position adopted by the ICJ would reveal that 'use of force' is certainly not within the rubric of international law as it was outlawed as early as the 1920s.

The ICJ, taking into cognisance the first two requests of Ukraine aimed at preserving its rights, agreed that it fell within the ambit of the 'plausibility test', as the third and the fourth request of Ukraine were directed at preventing any action which would aggravate the existing dispute is not the subject of the 'plausibility test'. Concerning the third contention of risk of irreparable prejudice and urgency, the ICJ had to satisfy the condition of 'urgency', which according to the ICJ, can arise at any moment before the ICJ could make the final decision in the case. In light of the humanitarian situation in and around Ukraine, the ICJ regards that the situation caused irreparable prejudice to this right and that there is urgency in the sense that there is a real and imminent risk. The declaration of Judge Bennouna highlights the significance of the Genocide Convention as, ...'one of the major conventions of the United Nations, a monument of human civilisation.'⁵³

5.4 Third-Party Intervention in Russia-Ukraine: Aftermath

Article 63 of the ICJ Statute codifies third-party intervention, and the provision reads as: "...construction of a convention to which States other than those concerned in the case are parties in question."⁵⁴ Additionally, Article 82(1) Rules of the Court (1978) requires a State intervening to file a declaration before the court.⁵⁵ Moreover, the intervention should relate to the substantive question of interpretation and application of the Conventions. In the case of *Nicaragua v United States of America*, El Salvador sought to intervene to prove that the ICJ lacked jurisdiction; thereby, it made procedural and substantive claims under Article 36(2) of the ICJ Statute and Article 51 of the UN Charter. The ICJ rejected the intervention as it was unrelated to the substantive question relating to the Convention, as it "...relate[d] to the proceedings' current phase between Nicaragua and the United States (Alexander, 2022)."

⁵¹ *Convention on the Prevention and Punishment of the Crime of Genocide, 1948*, https://www.un.org/en/genocideprevention/documents/atrocities-crimes/Doc.1_Convention%20on%20the%20Prevention%20and%20Punishment%20of%20the%20Crime%20of%20Genocide.pdf

⁵² *Ibid.*

⁵³ Declaration Of Judge Bennouna, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-ORD-01-02-EN.pdf> at para 3.

⁵⁴ Statute Of The International Court Of Justice, available at https://legal.un.org/avl/pdf/ha/sicj/icj_statute_e.pdf

⁵⁵ Rules Of Court (1978) Adopted On 14 April 1978 and Entered into Force On 1 July 1978, available at <https://www.icj-cij.org/rules>

The intervention by States in advisory opinions is a common practice in the ICJ, but seldom is there mass intervention in contentious cases (Alexander, 2022; McGarry, 2022). In the aftermath of the provisional measures in Ukraine-Russia, several States filed applications for intervention.⁵⁶ These interventions covered both the questions of merits and jurisdiction⁵⁷, for instance, Latvia's declaration was related to "[t]he jurisdiction granted to the Court by Article IX includes disputes in which a State alleges that another State has committed genocide."⁵⁸ Further, on Article I of the Genocide Convention, Latvia contends that it has to be interpreted in good faith in line with the provisions of the Genocide Convention. The views of Latvia were echoed in the declaration of the U.K and Germany whereby it argued for the broad interpretation of Article IX of the Genocide Convention.

In these interventions, States have also emphasised the humanitarian nature of the Genocide Convention. For instance, Liechtenstein contends, "Convention's object and purpose also include a common interest for all Contracting Parties to find out whether specific acts indeed qualify as genocide as defined in Article II of the Convention to be in a position at all to accomplish the 'humanitarian and civilising purpose' to prevent and punish this crime."⁵⁹ Slovenia's declaration highlights that the convention's object is to protect the most elementary 'principles of morality', thus proscribes any State from abusing the provisions of the Convention. It states, "...it (abuse) would undermine the Convention's credibility as a universal instrument to outlaw the most abhorrent crime of genocide if its authority could be abused by any State Party without a possibility of the victim of such abuse to turn to the Court."⁶⁰ Moreover, States have also argued that the rights and obligations enshrined under the Genocide Convention reflect *erga omnes partes* and *jus cogens*.⁶¹ As Norway rightly puts it, "The prevention of genocide is a worldwide task for the benefit of humankind, not a matter for the protection of national interests."⁶²

⁵⁶ As of date, thirty-two States have filed declarations for intervention, See <https://www.icj-cij.org/case/182/intervention>

⁵⁷ See the declaration of Liechtenstein, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221215-WRI-01-00-EN.pdf>

⁵⁸ Declaration Of Intervention of The Republic of Latvia, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220719-WRI-01-00-EN.pdf>

⁵⁹ Declaration Of Intervention Under Article 63 of The Principality of Liechtenstein, Available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221215-WRI-01-00-EN.pdf>

⁶⁰ Declaration Of Intervention of The Republic of Slovenia, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-02-00-EN.pdf> para 29.

⁶¹ Declaration Of Intervention Of The Slovak Republic, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221208-WRI-01-00-EN.pdf> para 16; Joint Declaration of Intervention Pursuant to Article 63 of the Statute of the Court By the Governments of Canada and the Kingdom of the Netherlands, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221207-WRI-02-00-EN.pdf> para 11; Declaration of Intervention submitted by Malta, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221124-WRI-01-00-EN.pdf> para 11.

⁶² Declaration Of Intervention Under Article 63 Of Norway, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221124-WRI-02-00-EN.pdf> para 29; DECLARATION OF Intervention Of The Republic Of Bulgaria, Czech Republic available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221118-WRI-01-00-EN.pdf> para 11; DECLARATION OF Intervention Of The Republic Of Croatia, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20221019-WRI-01-00-EN.pdf> para 10.

6. ANALYSIS

In the cases brought against NATO States by Serbia and Montenegro, and Yugoslavia, the ICJ rendered a strict interpretation of the Genocide Convention in the provisional measures stage. The ICJ penetrated the question of the ‘merit’ in terms of fulfilling the ‘intention’ requirement. Regardless of the prima facie requirement, the ICJ could have indicated provisional measures based on urgency not to aggravate the dispute, in contrast to its earlier opinion in light of the *LaGrand case* (Germany v. the United States of America).⁶³ The ICJ should have intervened and expressed concern over profound human suffering and misery rather than relying excessively on formalistic requirements.

The recent decisions of the ICJ on provisional measures pertaining to the Genocide Convention is flexible. The popular test employed is, a) prima facie jurisdiction, b) plausibility, and c) risk of irreparable prejudice and urgency. However, the ICJ rejected the contention of Ukraine requesting Russia to provide “a report to the Court on measures taken to implement the Court’s Order on Provisional Measures one week after such order and then on a regular basis to be fixed by the Court”,⁶⁴ unlike the case of Myanmar wherein it was held that the “Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order and thereafter every six months until the Court renders a final decision on the case.”⁶⁵

In the case of *Bosnia v. Serbia*,⁶⁶ the ICJ stated that the obligation to prevent Genocide beyond the State border entails the capacity to influence the Genocidal actor and employ ‘all reasonable means’ available. Therefore, Russia’s justification for intervening in eastern Ukraine aligns with the ICJ dicta in *Bosnia v Serbia*. However, all reasonable means, whether it encompasses the use of force, was not answered in the case nor the subsequent cases. This is akin to Article 4 of the Draft Articles on Prevention and Punishment of Crimes against Humanity, which clarifies the scope of the obligation to prevent to mean, viz. “each State undertakes to prevent crimes against humanity, in conformity with international law, through ... (b) cooperation with other States, relevant intergovernmental organisations, and, as appropriate, other organisations (Glanville, 2021)”. The progress in the jurisprudence of the ICJ in the

⁶³ Declaration of Judge Shi, 775, <https://www.icj-cij.org/public/files/case-related/112/112-19990602-ORD-01-01-EN.pdf>

⁶⁴ Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the indication of provisional measures, available at <https://www.icj-cij.org/sites/default/files/case-related/182/182-20220316-SUM-01-00-EN.pdf> at p.18. Interestingly the ICJ did not provide the rationale behind not demanding the report from the Russian Federation.

⁶⁵ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, 2020 I.C.J 31.

⁶⁶ Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina V. Serbia and Montenegro), 2007 I.C.J, 220.

case Russia-Ukraine also sets out a limit on the obligation to prevent Genocide in the sense that States cannot go all out in breach of international law to safeguard against the act of Genocide extraterritorially.

7. CONCLUSION

The ICJ has provided a flexible interpretation of the Genocide Convention, reiterating its importance in safeguarding the common interest of States. In the case of Russia-Ukraine, the ICJ confirmed that the obligation to prevent Genocide should be within the confines of international law. Thus, ensuring that the provision of the Genocide is not abused in the context of the obligation to prevent Genocide. The ICJ rightly did not clarify whether States could use force to prevent Genocide, which it reserved for the merits. Further, the States intervening in the ICJ have asserted the humanitarian nature of the Genocide Convention, and States have also confirmed its *erga omnes partes* and *jus cogens* status. This position was reflected in the *Genocide Reservations case* (advisory opinion); this is notwithstanding a brief departure from ICJ's narrow interpretation of the Genocide Convention in the provisional measures on the NATO bombings of Yugoslavia. However, in recent opinions involving the Genocide Convention, the ICJ has shifted its narrative to a liberal approach in recognising the victims' fundamental rights in conflicts. It is recommended that the ICJ follow the same template in its prospective provisional measures involving Genocide Convention, thereby ensuring legal certainty.

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