

Provisional Measures at the International Court of Justice and International Criminal Law

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By: Dr. Joseph Rikhof

On March 16, 2022, the International Court of Justice (ICJ) issued provisional measures against Russia for its aggression against and subsequent conduct in Ukraine (see here for the decision and here, here, here and here for commentaries). The order stated the following:

1. "the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; and
2. the Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its

control or direction, take no steps in furtherance of the military operations referred to above." (see here at para 86)

The application was brought before the ICJ by Ukraine with the following requests:

"(a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.

(b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.

(c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.

(e) Require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.

(f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide." (idem at para 2)

The jurisdiction for this request for the order by Ukraine was based on the Genocide Convention see here), even though the real underlying reason, as can be seen from the order, was to prevent Russia to commit more crimes prohibited by international criminal law (ICL), specifically in this case war crimes. This order was issued in parallel with the investigation by the Prosecutor of the International Criminal Court (ICC), which was announced on February 28 and March 11, 2022 (for the latter, see here and while the Prosecutor indicated that the time of aggression was beyond his power to investigate due to jurisdictional hurdles, it has been suggested that this crime can be investigated indirectly). This article will explore how the ICJ has approached the issue of provisional measures when the main underlying situation involved the commission of the international crimes of aggression, war crimes, crimes against humanity and genocide.

Jurisdiction - General

The jurisdiction of the ICJ to issue provisional measures is based on article 41 of its statute, which says:

“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.”

Who can ask for such measures is regulated in article 36 of its statute, which provides for two principle ways a country can bring a dispute before the ICJ, namely either by accepting the court’s broad compulsory jurisdiction in article 36(2), which states:

“The states parties to the present Statute may at any time declare that they recognize as compulsory ipso facto and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:

1. the interpretation of a treaty;
2. any question of international law;
3. the existence of any fact which, if established, would constitute a breach of an international obligation;
4. the nature or extent of the reparation to be made for the breach of an international obligation.”

The second jurisdictional basis is set out in article 36(1), which states that:

“the jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.”

At the moment, 73 states have accepted the compulsory jurisdiction of the court (see here) but countries such as Armenia, China, France, Russia, Rwanda, the United States and Ukraine are not among them. In two cases involving international crimes, the question of whether a country had accepted such jurisdiction was litigated before the ICJ, namely in the case of Nicaragua versus the US (see here) and the case of the Democratic Republic of the Congo (DRC) versus Uganda (see here). The first situation pertained to forms of aggression by the US against Nicaragua (see here at para 1) while the second related to forms of aggression as well as “violations of international humanitarian law and massive human rights violations" (see here at para 4); in both cases provisional measures were granted by the court while the final judgments found in favor of Nicaragua (see here) and the DRC (see here and here). There has been one case under this category with a more tangential connection to international crimes, namely the case of Belgium versus the DRC where the question was whether Belgium could issue arrest for extradition purposes for a senior official of the DRC government; no provisional measure were issued (for an overview of the case see here).

Actions by or against states, which have not accepted the court’s compulsory jurisdiction will have to be brought through article 36(1) and will have to rely on the so-called compromissory clause in a treaty, which allows a dispute about the subject matter of that treaty to be adjudicated by the ICJ; an example of such a clause of interest to ICL is article IX of the *Genocide Convention*, which states:

“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." (see here)

Jurisdiction – international crimes

The problem with the reliance on treaties for international crimes is the fact that only the Genocide Convention has such a compromissory clause. The *1949 Geneva Conventions and their 1977 Additional Protocols* with respect to war crimes do not have such an article (see here at paras 33 and 35 for a confirmation of this approach) while at the moment there are no international treaties regulating the crimes of humanity or aggression when committed by states (the *Rome Statute for the International Criminal Court* can only hold individuals responsible for those crimes, here, articles 5-8 and the effort by the international community to create a treaty for crimes against humanity, which contains a compromissory clause in article 15(2) is only at the draft stage at the moment, see here). As a result, states have had to invoke international treaties, which only indirectly addressed the issue of international crimes (for an early discussion of this approach, see Shabtai Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, 2012, chapters 8.4, "Provisional Measures, Human Rights, and Humanitarian Law" and 8.9 "Provisional Measures and International Crisis Management" while for a more recent general discussion, see Péter Kovács, "Interim Measures in the Practice of the International Court of Justice and the International Criminal Court", in Fulvio Maria Palombino, Roberto Virzo, and Giovanni Zarra, *Provisional Measures Issued by International Courts and Tribunals*, 2021, pages 147-170).

To be sure, there have been five cases where genocide was alleged during the provisional measures stage, namely the case between Bosnia and Serbia in 1993 (see here and here); the case between Yugoslavia and 10 NATO countries in 1999 (there were individual decisions rendered on the same day for each country, namely for Belgium, Canada, France, Germany, Italy, the Netherlands, Portugal, Spain, the UK and the US); the case of the Democratic Republic of the Congo (DRC) and Rwanda in 2002 (see here); the case between Gambia and Myanmar in 2020 (see here); and now the case of Ukraine against Russia. There had been one other case where genocide was used as a basis for proceedings, namely Serbia versus Croatia but no provisional measures had been requested by Croatia while the eventual outcome of the case was that the court decided that no genocide had been committed by Croatia (see here at paras 500-515).

In the first of these five cases the ICJ did eventually find that genocide had been committed in Srebrenica, which Serbia had failed to prevent although it had an obligation under international law to do so (see here at paras 431-438 while it also breached its international obligation to punish the perpetrators (idem at paras 448-449). With respect to the NATO case, in eight of the decisions the court decided that regarding the assertion of genocide by Yugoslavia for acts by those NATO members (which had been more akin to forms of aggression) the intent by these countries to destroy a specific group in Yugoslavia was not made out even on the low evidentiary standard used during provisional measure while with respect to Spain and the US those countries had made a reservation regarding article IX of the *Genocide Convention*. Eventually all claims by Yugoslavia were rejected for various reasons (see here, under "Overview of the Case"). In the DRC v Rwanda case the provisional

measures were rejected because Rwanda had made a reservation to article IX of the *Genocide Convention* (see here at paras 69-72) while the case never proceeded to a judgment on the merits because the court declined jurisdiction to hear arguments for the same reasons as set out in the judgment re provisional measures (see here). The last two cases, the Gambia versus Myanmar and Ukraine versus Russia are still in progress.

Another treaty, which has been used four times to bring an international crime within the jurisdiction of the ICJ is the *International Convention on the Elimination of All Forms of Racial Discrimination* (see here with a reference to the ICJ in article 22), which has been used in the cases of the Democratic Republic of the Congo versus Rwanda in 2002 (see here, the final result was discussed above); Georgia versus Russia in 2008 (see here while for the final result, the dismissal of the case in 2011 as a result of preliminary objections by Russia, see here); Ukraine versus Russia in 2017 (see here); and Azerbaijan v. Armenia in 2021 (see here). The last two cases are still in process. The underlying facts alleged by the DRC in its case against Rwanda were “flagrant and serious violations of human rights and of international humanitarian law”, which has been the result of armed aggression by Rwanda (see here at para 1) while in the Georgia versus Russia case it was alleged that Russia invaded Georgia followed by armed attacks on civilians after which it embarked on a policy of ethnic cleansing of the Georgian population in the South Ossetian and Abkhazian regions of the country (see here at paras 17-21). The case between Ukraine and Russia involved the invasion and occupation of Crimea and the resulting mistreatment of the Tatar and ethnic Ukrainian communities in Crimea (see here at para 3; for a recent update on this situation, see here). The situation in the Azerbaijan versus Armenia case was the result of an armed conflict between the two countries also resulting in allegations of ethnic cleansing of Azerbaijanis in Armenia (see here at paras 13 and 21-22). Provisional measures were granted in the last three cases but not the first. The request was rejected in the DRC versus Rwanda case because Rwanda, as with the *Genocide Convention*, had made a reservation regarding the compromissory clause (see here at para 67).

A number of other treaties were invoked in the Democratic Republic of the Congo versus Rwanda in 2002, such as the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (see here with article 30 for the relevant provision), the Convention on the Elimination of All Forms of Discrimination against Women (see here with article 29) and the *Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation* (see here with article 14) but these arguments were rejected because Rwanda was not a party to the first treaty mentioned (see here at para 61) and because it did not adhere to the requirement to seek arbitration first before going to the ICJ for the last two treaties (idem at paras 76-79 and 86-88). Lastly, the Ukraine used the *International Convention for the Suppression of the Financing of Terrorism* (see here) in its first case against Russia in 2017 (see here at para 2) for providing financial assistance to a number of “illegal armed groups that engage in acts of terrorism in Ukraine”, including bombing and shelling of civilians, which are also war crimes. Provisional measures were granted by the court in this case. The *Torture Convention* was also used in a peripheral issue regarding international crimes, namely the parameters of its extradition or prosecution obligation in the case of Belgium versus Senegal but no provisional

measures were issued (for an overview of the case see here).

Other requirements for the granting of provisional measures

There are two other requirements before the ICJ can grant provisional measures, one procedural and one related to the standard of proof. The latter is expressed as follows in the recent Ukraine versus Russia case:

“At this stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights which Ukraine wishes to see protected exist; it need only decide whether the rights claimed by Ukraine on the merits, and for which it is seeking protection, are plausible. Moreover, a link must exist between the rights whose protection is sought and the provisional measures being requested.” (see here at para 51)

The same case describes the first requirement as:

“The power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision. 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.” (idem at para 66)

These requirements have been consistent with the previous jurisprudence of the ICJ although in one situation, namely Bosnia versus Serbia, the court issued two judgments with provisional measure as the urgency of the possibility of Serbia being involved in genocide had increased in the five months since issuing its first decision. Where the first judgment in April 1993 had stated that Serbia “should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take al1 measures within its power to prevent commission of the crime of genocide” (see here at para 52) in September 1993 the language had changed by seeking the implementation of the first order “immediately and effectively” (see here at para 61).

The contents of provisional measures

Of the 11 cases where international crimes allegations were made, 8 resulted in the issuing of provisional measures, two pursuant to the compulsory jurisdiction of the ICJ, three related to the Genocide Convention and three as a result of the *Convention on the Elimination of All Forms of Racial Discrimination*.

In the first case based on the compulsory jurisdiction, the Nicaragua case in 1984, the provisional measures were short and read as follows:

“The United States of America should irnmediately cease and refrain from any action restricting, blocking or endangering access to or from Nicaraguan ports, and, in particular, the laying of mines.” (see here, para 41)

In the Uganda case in 2000, these were the measures:

“Both Parties must, forthwith, prevent and refrain from any action, and in particular any armed action, which might prejudice the rights of the other Party in respect of whatever judgment the Court may render in the case, or which might aggravate or extend the dispute before the Court or make it more difficult to resolve;
Both Parties must, forthwith, take all measures necessary to comply with all of their obligations under international law, in particular those under the United Nations Charter and the Charter of the Organization of African Unity, and with United Nations Security Council resolution 1304 (2000) of 16 June 2000;
Both Parties must, forthwith, take al1 measures necessary to ensure full respect within the zone of conflict for fundamental human rights and for the applicable provisions of humanitarian law.” (see here , para 47)

Unlike the cases under the compulsory ICJ jurisdiction, in the cases decided pursuant to the *Genocide Convention* the measures are narrower, as can already be seen in the first case of this nature, namely the Bosnia case in 1993, which states that:

“Serbia should immediately and effectively, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take al1 measures within its power to prevent commission of the crime of genocide.” (see here at para 61)

The other two cases based on this treaty were very recent, namely the Myanmar case in 2020 and the Ukraine situation this year and the measures have become much more focused and precise than in 1993, with the Myanmar judgment saying:

“The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to the 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; and (d) imposing measures intended to prevent births within the group;
The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in

genocide;
The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide;
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 a final decision on the case is rendered by the Court." (see here, para 86)

Compared to the 1993 case, this judgment spells out in detail what the exact obligations are under the *Genocide Convention* by repeating all the categories of criminal conduct contained in that treaty as well as all the forms of indirect involvement in those crimes. Secondly, it makes clear that it is not only the military of Myanmar, which is primarily responsible but also any groups or persons it controls. Thirdly there is a measure to preserve evidence, which is clearly meant for possible later trials. Lastly, the ICJ directs Myanmar to submit reports regarding the measures imposed on a regular basis. (for the first report by Myanmar, see here while for the second, see here; for a commentary on the monitoring function of the ICJ, see here)

The recent case of Ukraine versus Russia is less encompassing and only makes mention of the first two measures used in the Myanmar case but with no reference to the Genocide Convention and thereby making the notions of the crimes and possible forms of liability a bit broader; the measures say:

"the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine; and
the Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to above." (see here at para 86)

The provisional measures issued under the *Convention on the Elimination of All Forms of Racial Discrimination* saw the opposite trajectory with a detailed approach in the beginning and then becoming broader with fewer specific orders as time went on. The first case based on this convention was the Georgia versus Russia case in 2008, where the provisional measures were set out as follows:

"Both Parties, within South Ossetia and Abkhazia and adjacent areas in Georgia, shall
(1) refrain from any act of racial discrimination against persons, groups of persons or institutions;
(2) abstain from sponsoring, defending or supporting racial discrimination by any persons or organizations;
(3) do all in their power, whenever and wherever possible, to ensure, without distinction as to national or ethnic origin, (i) security of persons; (ii) the right of persons to freedom of movement and residence within the border of the State; (iii) the protection of the property of displaced persons and of refugees;
(4) do all in their power to ensure that public authorities and public institutions under their control or

influence do not engage in acts of racial discrimination against persons, groups of persons or institutions;
Both Parties shall facilitate, and refrain from placing any impediment to, humanitarian assistance in support of the rights to which the local population are entitled under the International Convention on the Elimination of All Forms of Racial Discrimination." (see here, para 149)

Not only were the measures in subsequent cases shorter, they also reverted back to the language of all but two other measures by addressing only the defendant in the litigation while at the same time continuing to ensure that the measures were grounded in the language of the treaty that formed to basis of the complaint. The measures in the 2017 Ukraine versus Russia case only said: "Russia must refrain from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions." see here, para 106) while in the 2021 Armenia case the measure read:

"The Republic of Armenia shall, in accordance with its obligations under the International Convention on the Elimination of All Forms of Racial Discrimination, take all necessary measures to prevent the incitement and promotion of racial hatred, including by organizations and private persons in its territory, targeted at persons of Azerbaijani national or ethnic origin." (see here, para 76)

Conclusion

The evolution of the provisional measures issued by the ICJ for international crimes has been profound in a number of aspects. First of all, since the first such case in 1984, there had been only one case per decade with a sudden upswing of three cases in the last three years. This might be a reflection of the court becoming more engaged in these issues, but it is more likely that the global situation, which resulted in requests for ICJ intervention, has worsened. This appears to be the case even though the most recent situation of Ukraine versus Russia is unusual in that the complaint was not about the defendant engaging in the international crime of genocide as in the past but about the defendant using unwarranted use of the genocide terminology and then justifying this usage to engage in actual other international crimes.

With respect to the provisional measure themselves, the ICJ has the most discretion when it can act pursuant to its compulsory power as there is no limitation to the parameters of the provisional measures. When relying on the *Genocide Convention or the Convention on the Elimination of All Forms of Racial Discrimination*, which have been the most successful treaties in this context, the court's discretion is more circumscribed as it needs to tailor the measures to the confines of the subject matter of those two documents, which is especially limiting in the latter convention. However, there appears to be a willingness very recently to stretch the meaning of the words in the *Genocide Convention* in two important aspects. The first one is that the court used very broad language in 2022 Ukrainian case ("the Russian Federation shall immediately suspend military operations") without any reference to the underlying document. Secondly, in the 2021 Myanmar case (and to some extent the Ukrainian case) it was willing to go beyond the standard type of measures twofold by first broadening

them to a wider circle of perpetrators (by referring to “any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction”) and secondly by imposing a monitoring regime. The first expansion could very well be used in the future to address other international crimes beyond genocide while the second could improve the enforcement of provisional measures. Both are welcome additions to having another weapon against impunity for international crimes.

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