



# BOFAXE

## OF LEGAL CREATIVITY AND PLAUSIBILITY OF RIGHTS (Part 1)

### The ICJ's Order on Provisional Measures in Ukraine v. Russia

On 16 March 2022, the International Court of Justice rendered its provisional measures order on the request by Ukraine in the case concerning *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*. The Court, by 13 votes to 2, ordered Russia to “immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine”. By the same margin, it ordered Russia to “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”. Unanimously, it requested both parties to “refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.”

In order to indicate these provisional measures, the Court at this stage had to find Ukraine's claims *prima facie* within its jurisdiction and the existence of the rights claimed at least plausible. These matters are, however, not as straightforward as the margin of votes might suggest.

#### Ukraine's Challenges in Bringing the Case

The order is truly exceptional in various ways, starting with the “creative” legal arguments brought forward by Ukraine to initiate the proceedings. While Russia maintains that Ukraine is committing genocide in the oblasts of Donetsk and Luhansk as a premise for its military aggression, these “demonstrably rubbish justifications” – as termed by Fuad Zarbiyev – essentially facilitated Ukraine's legal action. Invoking Article IX of the Genocide Convention as a jurisdictional basis, Ukraine argues that Russia's behavior is a blatant violation and abuse of Article I of the Genocide Convention obliging States to “prevent and punish genocide”. Conversely, Ukraine argues it has the right “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.” (*Ukraine's Request*, para. 12)

This is not Ukraine's first legal action in its almost decade-long conflict with Russia. Even though there is no general basis for jurisdiction between the two States, different subsets of the conflict have found their way to the ICJ already under the *International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination*, two UNCLOS arbitral tribunals (see [here](#) and [here](#)), the International Tribunal for the Law of the Sea also by way of a *provisional measures application* and the European Court of Human Rights by way of ten inter-State applications. The latest of these also resulted in the grant of urgent interim relief in relation to the present hostilities (on this decision, see [Risini](#)).

Ukraine's case is in part a negative declaratory action, aimed at determining that Russia must not use false claims of genocide as a means to justify its aggression. Furthermore, it is questionable whether Ukraine is additionally also entitled to demand from Russia the cessation of all its “special military operations” on the territory of Ukraine. A plain reading of Article I of the Genocide Convention suggests that no such “extended right” can be derived from the provision. However, and this will be the crucial question at a potential merits stage, such a right might be indirectly inferred from Article I, with significant consequences for future cases.

#### The Court's Position on *Prima Facie* Jurisdiction

In its “non-submission” to the Court, Russia emphatically denied the existence of a dispute between the two States regarding the interpretation, application or fulfillment of the Genocide Convention. Instead, Russia claimed that its “special military operation” was based on Article 51 of the UN-Charter and customary international law. Yet, beyond Russia's “non-submission”, the Court also took into consideration various other statements made by Russian officials, including President Putin's *declaration of war* of 24 March 2022. After carefully assessing the various statements, including Russia's wholly implausible invocation of Article 51 of the UN Charter, the Court concluded that *prima facie* a dispute under Article IX of the Genocide Convention existed.

But the Court's methodology did not find support by all judges. [Judge Gevorgian](#) succinctly declared not to believe in the Court's jurisdiction in the present case. To him, the conflict solely centers around Russia's use of force, which is neither “regulated by the Genocide Convention” nor does it “in itself constitute an act of genocide.” Referring to the Court's provisional measures decisions in the 1999 *Legality of Use of Force cases*, he suggested that the Court should similarly deny jurisdiction in the present case and remove it from the Court's docket. [Judge Nolte's declaration](#) put the matter into perspective, emphasizing that the applications initiated by Yugoslavia dealt with the question of whether the intervening States had committed genocide. By contrast, the present case “concerns the question whether the allegations of genocide and the military operations undertaken with the stated purpose of preventing and punishing genocide are in conformity with the Genocide Convention” (*para. 5*).

**VERANTWORTUNG** Die BOFAXE werden vom Institut für Friedenssicherungsrecht und Humanitäres Völkerrecht der Ruhr-Universität Bochum herausgegeben: IFHV, Massenbergrasse 9b, 44787 Bochum, Tel.: +49 (0)234/32-27366, Fax: +49 (0)234/32-14208, Web: <http://www.ruhr-uni-bochum.de/ifhv/>. Bei Interesse am Bezug der BOFAXE wenden Sie sich bitte an: [ifhv-publications@rub.de](mailto:ifhv-publications@rub.de). **FÜR DEN INHALT IST DER JEWEILIGE VERFASSER ALLEIN VERANTWORTLICH.** All content on this website provided by Völkerrechtsblog, and all posts by our authors, are subject to the license [Creative Commons BY SA 4.0](#).



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#### The – Plausible – Rights to be Protected

Judge Xue brought forward a more subtle line of reasoning. According to her, Ukraine's complaints are not directly related to the rights and obligations enshrined in Article I of the Genocide Convention. Judge Xue seems to imply that States do not have a justiciable legal entitlement under the Genocide Convention to request the cessation of a military aggression based on allegations of genocide – even where, as in this case, the allegations possibly constitute a (quite obvious) abuse of the law and a violation of good faith performance of the Genocide Convention by another State. Even though Judge Xue's declaration appears to also indicate doubts as to the Court's jurisdiction, this is where she really took issue with the majority's approach (para. 1).

Despite Judge Xue's expression of regret that the Court's order as rendered prejudged the jurisdiction and/or merits of the case, her declaration appears to do the same, just on the opposite side. Her concerns in substance were shared, however, by Judge Bennouna. Even though voting in favor of the provisional measures "compelled by this tragic situation", he stressed that the Court had failed in founding "Ukraine's alleged plausible right on one of the provisions of the Genocide Convention which the Russian Federation is said to have breached" (para. 6). For Judge Bennouna, implicitly, humanitarian considerations seem to have outweighed the rather superficial engagement of the Court with this aspect.

The majority, however, took the view that Ukraine's claims are at least plausible. While the use of this test at the provisional measures stage is not new to the Court's jurisprudence, it lacks in definition (Miles, BYIL 2018), which the present order also does not provide. Especially the dogmatically challenging questions posed by Ukraine's application may have caused reluctance on the Court's part to add precision to the concept at this point. What is more, it appears to have been precisely this ambiguity of what "plausibility" requires that enabled the Court to indicate provisional measures. In particular, the Court's reasoning on plausibility left Russia's counter-argument that the justifications for its "special military operation" fall outside the Genocide Convention's scope seemingly unaddressed for now. One may wonder, however, whether this really could have made a difference, in the sense that Ukraine's case would lack a reasonable (or – depending on the standard – any) chance of success.

#### Conclusions

Overall, the ICJ's order added an important voice – in a legally binding, even if not necessarily enforceable manner – to the plethora of legal and political statements calling for an end of Russia's aggression against Ukraine. The order showcases that "demonstrably rubbish justifications" also have the potential to backfire before the World Court.

Understandably, the Court was under political and temporal pressure. It had to find a swift but elegant response for the challenges it was presented with. The Court's use of its concept of "plausibility of rights" at the provisional measures stage seems to have been its "rhetorical device" to strike a balance between strict legal reasoning and the urgency of the highly sensitive and tragic situation. However, the more States use subject-matter specific conventions before the ICJ to bring claims not obviously or solely falling within such instruments' scope, which the present order may encourage, the more the plausibility test at the provisional measures stage needs further clarification (generally already Miles, BYIL 2018, pp. 44 et seq.).

Equally, further clarity is needed in relation to the potential justiciability of abuse of rights or law and good faith performance, which the ICJ might now provide as the case develops. Whether the Court will accept Ukraine's claim of a right under the Genocide Convention not to be subjected to the use of force by another State allegedly justified by claims of genocide at the merits stage, is an entirely different question. It will likely trigger more discussion on the bench than evidenced now by only two dissents.