

# *Silent Leges Inter Arma?* Provisional Measures under the Convention on the Prevention and Punishment of the Crime of Genocide in the *Ukraine v. Russian Federation Case* at the International Court of Justice

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## 1. Introduction

The year 2022 will most likely be remembered as a time of serious test for the international community insofar as its commitments to the most basic values and norms of the UN Charter are concerned, including the prohibition of the use or threat of force.<sup>1</sup> The armed aggression of the Russian Federation on Ukraine, which started on 24 February 2022, triggered multifarious legal responses, both on the part of

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<sup>1</sup> Article 2(4) of the UN Charter: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations”.

international organizations<sup>2</sup> and individual states.<sup>3</sup> Understandably, Ukraine itself engaged in several legal avenues in order to challenge the aggressor state in international courts. The two principal proceedings initiated by Ukraine in that respect are those at the European Court of Human Rights (a request for provisional measures<sup>4</sup> with most probable follow-up, i.e. submission of an inter-state application under Article 33 of the ECHR), and at the International Court of Justice (ICJ), under Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter: the Convention or the Genocide Convention).<sup>5</sup>

In the paper, we examine and discuss the substance of the provisional measures adopted by the ICJ in the Order of 16 March 2022.<sup>6</sup> We also comment on the legal strategy adopted by Ukraine in asserting its rights before the ICJ under the Genocide Convention. In the aforementioned Order the Court declared by a vast majority (13 to 2) that:

the Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;  
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 in point (1) above;

<sup>2</sup> See: Resolution A/RES/ES-11/1 of the United Nations General Assembly (UNGA) adopted on 2 March 2022 at its 11<sup>th</sup> emergency special session: *Aggression against Ukraine*; resolutions of the Committee of Ministers of the Council of Europe: CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe, adopted on 16 March 2022 and CM/Res(2022)3 on legal and financial consequences of the cessation of membership of the Russian Federation in the Council of Europe, adopted on 23 March 2022.

<sup>3</sup> See e.g.: the State Party Referral under Article 14 of the Rome Statute, submitted by 39 States Parties to the Statute of the International Criminal Court to the Prosecutor of the ICC on 2 March 2022, <https://www.icc-cpi.int/itemsDocuments/ukraine/State-Party-Referral.pdf> [accessed on 30 April 2022].

<sup>4</sup> Request of 28 February 2022 filed by Ukraine to indicate urgent interim measures [case of Ukraine v. Russian Federation (X)] (application no. 11055/22); see the press release: *The ECHR grants urgent interim measures in application concerning Russian military operations on Ukrainian territory*, <https://tinyurl.com/3nadxhr7> [accessed on 30 April 2022].

<sup>5</sup> Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948, United Nations Treaty Series, Vol. 78, p. 277.

<sup>6</sup> Application instituting proceedings filed in the Registry of the Court on 26 February 2022. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, <https://www.icj-cij.org/en/case/182/institution-proceedings> [accessed on 30 April 2022].

and 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.

It was predictable that the indicated measures might not be respected by the aggressor state (and indeed, they were not). However, it can be argued that invoking Article IX of the Genocide Convention was a very reasonable legal strategy on the part of Ukraine. This strategy allowed the ICJ to take a stance on its *prima facie* jurisdiction and the very existence of a legal dispute between the Russian Federation and Ukraine as to the application of the Convention. On a more general plain, the provisional measures ordered by the Court also had the advantage of bringing back some hope into the values and norms of international law when faced with a blatant disregard thereof in times of active hostilities.

Having regard to the above, the principal research question of this paper is whether the institution of the proceedings by Ukraine, followed by the Order of the ICJ on provisional measures, can be considered a reasonable step of an attacked state confronted with *prima facie* unfounded charges of genocide, or rather: was the invocation of the Genocide Convention by Ukraine a misuse of the purpose of this treaty.

## 2. Provisional Measures at the International Court of Justice

Provisional (interim) measures are an essential instrument in the judicial settlement of international disputes. The power to indicate this kind of measure was already established in the Statute of the Permanent Court of International Justice (PCJI). Since then it has been followed – with some modalities – in the development of the international judiciary.<sup>7</sup> It is generally acknowledged that provisional measures bear a protective function insofar as the object of a litigation is concerned. As the ICJ explained, the provisional measures are supposed to preserve the respective rights of the parties pending the decision of the Court and to protect the latter against irreparable prejudice to the rights which are the subject of dispute in judicial proceedings.<sup>8</sup> The Court also stressed that its judgment on the merits “should not be anticipated by reason of any initiative regarding the measures which are in issue.”<sup>9</sup> The ICJ’s predecessor already insisted that provisional measures must not be considered an “interim judgment.”<sup>10</sup>

<sup>7</sup> R. Wolfrum, *Interim (Provisional) Measures of Protection* (August 2006), in: R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law* (online edn), para. 4 *et seq.*

<sup>8</sup> *Fisheries Jurisdiction Case (United Kingdom v. Iceland)*, Order of 17 August 1972, para. 21.

<sup>9</sup> *Ibidem.*

<sup>10</sup> R. Wolfrum, *op. cit.*, para. 38.

The states' obligation to comply with provisional measures delivered by the ICJ is based on Article 41 of the Statute of the Court.<sup>11</sup> Paragraph 1) of this provision stipulates that 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". According to a well-established test for indicating provisional measures, the Court may exercise the power under Article 41, provided that the following four requirements are met:

- a) the Court has *prima facie* jurisdiction over the merits of the case;
- b) there is a risk of irreparable prejudice to the rights of the applicant state;
- c) there is urgency in the circumstances; and
- d) there is a link between the provisional measures requested and the rights whose protection is sought.<sup>12</sup>

The ICJ also stressed that "the power [...] to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible."<sup>13</sup>

Since Article 41 of the ICJ Statute articulates an explicit obligation for state parties to comply with provisional measures delivered by the Court, a non-compliance constitutes an internationally wrongful act entailing international responsibility<sup>14</sup>. The question of responsibility is linked to the ongoing debate concerning the autonomy of the provisional measures regime. Both the supporters

<sup>11</sup> Statute of the International Court of Justice is an integral part of the UN Charter, signed on 26 June 1945, 1 UNTS XVI; text available at: <https://www.icj-cij.org/en/statute> [accessed on 30 April 2022].

<sup>12</sup> See *inter alia* the orders on provisional measures adopted by the ICJ in the following cases: *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Order of 13 July 2006, paras. 57 and 61–2; *Certain Criminal Proceedings in France (Republic of the Congo v. France)*, Order of 17 June 2003, paras. 20 and 22; *Avena and Other Mexican Nationals (United States of America v. Mexico)*, Order of 5 February 2003, at 87, paras. 38 and 49–50; *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Order of 8 December 2000, paras. 67 and 69; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria)*, Order of 15 March 1996, paras. 30 and 35; *Passage through the Great Belt (Finland v. Denmark)*, Order of 29 July 1991, paras. 14, 16 and 23; *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates)*, Order of 23 July 2018, paras. 14 and 60–61.

<sup>13</sup> *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, Order on Provisional Measures of 28 May 2009, para. 57.

<sup>14</sup> S. Rosenne, *Provisional Measures in International Law: The International Court of Justice and the International Tribunal for the Law of the Sea*, Oxford 2005, p. 11; See also: K. Oellers-Frahm, Article 41, in: A. Zimmermann and others (eds), *The Statute of the International Court of Justice – A Commentary*, Oxford 2012, pp. 1026 and 1068.

and the critics of the autonomous regime of responsibility recognize a separate obligation to comply with provisional measures.<sup>15</sup> The difference between their views concerns only the legal consequences of the breach of that obligation.<sup>16</sup>

### 3. Invoking of the Genocide Convention by Ukraine

On the third day of the Russian invasion, Ukraine filed with the Registry of the ICJ an application instituting proceedings against the Russian Federation, invoking Article IX of the Genocide Convention.<sup>17</sup> The next day, on 27 February 2022, the applicant state filed a request for the indication of provisional measures. The relevant paragraph of the request, which recapitulated the official position of the Russian Federation accusing Ukrainian authorities of genocide, reads as follows:

In the early morning hours of 24 February 2022, the Russian Federation declared what President Vladimir Putin called a “special military operation” against Ukraine. The stated purpose of the special military operation, according to President Putin, is “to stop” a “genocide of the millions of people who live” in the Luhansk and Donetsk oblasts of Ukraine (a region also referred to as the Donbas). Specifically, the President of the Russian Federation asserted that “[t]he purpose of this operation is to protect the people who, for eight years now, have been facing humiliation and genocide perpetrated by the [Kyiv] regime.” The Russian Federation asserts that it intends to “denazify Ukraine” and “bring to trial those who perpetrated numerous bloody crimes against civilians.” On the basis of these claims of genocide, the Russian Federation immediately commenced

<sup>15</sup> Article 94(1) UN Charter provides that “[e]ach Member of the United Nations undertakes to comply with any decision of the International Court of Justice in any case to which it is a party”.

<sup>16</sup> See: M. Lando, *Compliance with Provisional Measures by the International Court of Justice*, Journal of International Dispute Settlement 2017, Vol. 8, Issue 1, pp. 22–55. The author notes the difference between “compliance”, which is voluntary, and “enforcement”, which is a consequence of non-compliance (exercised by a distinct, superior third entity) of the state party to implement the provisional measures (and any other obligations that may stem from ICJ’s decisions). To ensure compliance states can take unilateral actions in the form of e.g. negotiations, recourse to the mechanisms envisaged under Article 94(2) UN Charter and Article 41(2) ICJ Statute (engaging the Security Council when circumstances arising in the aftermath of the order may constitute a threat to international peace and security), turn to the UN General Assembly and directly request it to make necessary recommendations, or refer to the ICJ as it “possesses enforcement powers with respect to its own decisions” – *ibidem*, p. 36.

<sup>17</sup> See *supra*, ft 6.

an unprovoked invasion throughout Ukrainian territory, which is already causing catastrophic harms to Ukraine and its people, both military and civilian.<sup>18</sup>

The statements referred to above were indeed made. As expressed by its President, the Russian Federation's position was that acts of genocide had taken place in the Luhansk and Donetsk oblasts of Ukraine. Russia was then expressly using the 'genocide argument' to justify its armed aggression and other actions taken against Ukraine, including the recognition of purportedly independent "pseudo-states" on Ukrainian territory. Thus, it can be assumed that the Russian Federation – in its own view – acted to prevent and punish such alleged acts of genocide (Article I of the Genocide Convention). Ukraine emphatically denied any such acts had ever occurred and insisted that the Russian Federation had no lawful basis to take military action against Ukraine (Article VIII of the Genocide Convention). Ukraine claimed that it, therefore, recognized three levels of the dispute: factual - as to the existence of acts of genocide; legal - the Russian Federation's claim to legal authority to take military action in and against Ukraine; and whether the Russian Federation may call upon „the competent UN organs to take such action under the UN Charter”.<sup>19</sup>

In its application and during the public hearing held on 7 March 2022, Ukraine invoked Article IX of the Genocide Convention emphasizing the ICJ's *prima facie* jurisdiction over the said dispute relating to the interpretation, application or fulfilment of the Convention.<sup>20</sup> When providing legal grounds for its claims, Ukraine invoked Articles I, II and III of the Genocide Convention<sup>21</sup> and made reference to the following findings of the ICJ in the earlier cases:

[Being] consistent with the object and purpose of the Genocide Convention to liberate mankind from the odious scourge of genocide, Article I includes both an obligation not to commit genocide, as well as a duty to act to prevent and punish genocide. With regard to the duty to act, where there is a serious risk of genocide, States should take preventative measures likely to have a deterrent effect.<sup>22</sup>

<sup>18</sup> Ukraine's request for the indication of provisional measures of 26 February 2022, para. 2.

<sup>19</sup> *Ibidem*.

<sup>20</sup> *Ibidem*, paras. 6-7; Ukraine reiterated the established case law of the Court, *inter alia*: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Provisional Measures, Order of 23 January 2020, para. 16.

<sup>21</sup> Ukraine's request for the indication of provisional measures of 26 February 2022, para. 26(a)-(c).

<sup>22</sup> See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 166.

[I]f one takes the view that the attacks were exclusively directed at military targets, and that the civilian casualties were not caused deliberately, one cannot consider those attacks, inasmuch as they caused civilian deaths, as falling within the scope of Article II (a) of the Genocide Convention.<sup>23</sup>

[The] Court recognized that the “misuse” of a right was an act “with the character of a breach of the Treaty”. Here, Russia is misusing its right – or, in this case, misusing its duty – to prevent and punish genocide. Russia’s abuse of its obligations under the Genocide Convention has the character of a breach of the Convention.<sup>24</sup>

Ukraine stated that the Russian Federation’s actions had eroded the core obligation, undermined its object and purpose, and diminished the solemn nature of the Contracting Parties’ pledge.<sup>25</sup> The Russian Federation’s declaration and implementation of measures in the form of a “special military operation” and acts of recognition under false grounds of genocide violate Ukraine’s rights and result in breaching the Genocide Convention.<sup>26</sup>

As regards the indication of provisional measures, Ukraine further elaborated that it sought to protect the right not to be subject to false claims of genocide and not to be subjected to any military operations based on a brazen abuse of Article I of the Genocide Convention<sup>27</sup>; to have it recognized that such military operations undertaken on the grounds of alleged and not proved acts of genocide (they manifestly do not exist) do not translate into the obligation of states parties to prevent and punish genocide enshrined in Article I of the Genocide Convention<sup>28</sup>; and to have it recognized that the Russian Federation’s taking military action against a sovereign states with the purported basis of preventing and punishing genocide could not do so in a manner that violates the UN Charter and thus it exceeds the limit permitted by international law.<sup>29</sup>

<sup>23</sup> See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia)*, Judgment of 3 February 2015, para. 474.

<sup>24</sup> See: *Certain German Interests in Polish Upper Silesia, Merits*, Judgment of 25 May 1926, p. 30.

<sup>25</sup> Ukraine’s request for the indication of provisional measures of 26 February 2022, para. 28.

<sup>26</sup> *Ibidem*, para. 29.

<sup>27</sup> *Ibidem*, paras. 12–13.

<sup>28</sup> The Court has indicated that: “[Article I of the Genocide Convention] does not *expressis verbis* require States to refrain from themselves committing genocide. However, in view of the Court, taking into account the established purpose of the Convention, the effect of Article I is to prohibit States from themselves committing genocide.” *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment of 26 February 2007, para. 166.

<sup>29</sup> The ICJ has previously underlined that “it is clear that every State may only act within the limits permitted by international law” – *ibidem*, para. 430.

J. Gimblett, one of the co-agents of the Government of Ukraine, directed attention to the urgency of the Order, by invoking the degrading situation of the people at war:

Thousands of people have already been killed in this conflict. Ukraine regrets the unnecessary loss of lives on both sides. While neither the Ukrainian military nor civilian population provoked this conflict, and while they will do everything in their power to repel the invasion now directed against them, it is equally true that many Russian soldiers had no idea what mission their deluded leadership was sending them into. The sad fact, however, is that with every day that passes, more lives will be lost and probably at an accelerating rate.<sup>30</sup>

#### 4. The Order of 16 March 2022

The ICJ delivered its Order on provisional measures following a public hearing held on 7 March 2022. The Russian Federation informed the Court that it had decided not to participate in the oral proceedings.<sup>31</sup> That of itself constituted a predicament but was in no way a factor that would prevent the Court from proceeding with the case.<sup>32</sup> Admittedly, non-appearance at international courts and tribunals – unwelcome as it may be – has not been unheard of and should not obstruct the proper conduct of proceedings.<sup>33</sup>

In its Order of 16 March 2022, the ICJ had to determine whether there was a *prima facie* jurisdiction without the need to decide on this issue in a definitive manner. It should be recalled that Ukraine invoked Article 36(1) of the Statute

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<sup>30</sup> See: Verbatim record of the public hearing before the ICJ held on 7 March 2022, para. 26, <https://www.icj-cij.org/public/files/case-related/182/182-20220307-ORA-01-00-BI.pdf> [accessed on 30 April 2022].

<sup>31</sup> See: F. Mégret, *Russia's Non-Appearance Before the ICJ Against Ukraine: Of Not So Vanishing Vanishing Acts and their Vanishingly Thin Justification*, 12 March 2022, <https://www.ejiltalk.org> [accessed on 30 April 2022].

<sup>32</sup> See: Order of 16 March 2022, para. 23.

<sup>33</sup> See *inter alia*: *Military and Paramilitary Activities against Nicaragua (Nicaragua v. United States of America)*, Order of 22 January 1985 and the letter of the respondent state dated 18 January 1985 informing that the US did not intend to participate in further proceedings; *United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, Order of 15 December 1979, p. 7; see also the arbitral proceedings in the *Arctic Sunrise Case (Kingdom of the Netherlands v. Russian Federation)*, where the respondent state refused to participate at all phases, <https://pca-cpa.org/en/cases/21> [accessed on 30 April 2022].



of the Court<sup>34</sup> and Article IX of the Genocide Convention.<sup>35</sup> A key question was whether there had been “a dispute” referred to in that provision. The ICJ recalled its case law on how to construct this notion, by reference to the definitive explanation in the *Mavromatis Palestine Concessions* case adjudicated by the PCIJ (“a disagreement on the point of law or fact, a conflict of legal views or interests”)<sup>36</sup>, as well as the more recent rulings.<sup>37</sup>

The Court also noted that:

(...) it takes into account in particular any statements or documents exchanged between the Parties, as well as any exchanges made in multilateral settings. In so doing, it pays special attention to the author of the statement or document, their intended or actual addressee, and their content. The existence of a dispute is a matter for objective determination by the Court; it is a matter of substance, and not a question of form or procedure.<sup>38</sup>

It could hardly be denied that the allegations of genocide have been made numerous times since 2014 at the highest levels on the Russia’s leadership. The Court noted that the statements of both parties did concern the subject matter of the Genocide Convention “in a sufficiently clear way to allow Ukraine to invoke the compromissory clause in this instrument as a basis for the Court’s jurisdiction”.<sup>39</sup> Therefore, the Court found that it has a *prima facie* jurisdiction to examine the case.

Adjudication of the provisional measures required to establish that the interpretation of the Genocide Convention suggested by Ukraine was plausible. The next step was to determine whether there had been a link between rights whose protection was sought and the measures requested by Ukraine. The latter argued the measures were demanded in order to exercise a right “not to be subject to a false claim of genocide” and “not to be subjected to another State’s military operations

<sup>34</sup> Article 36(1) of the Statute of the ICJ reads as follows: “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”.

<sup>35</sup> Article IX of the Genocide Convention stipulates: “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”.

<sup>36</sup> *Mavromatis Palestine Concessions*, Judgment of 30 August 1924, p. 11.

<sup>37</sup> Order of 16 March 2022, para. 28.

<sup>38</sup> *Ibidem*, para. 35.

<sup>39</sup> *Ibidem*, paras. 44-47. In para. 45 *in fine* the ICJ noted: „In the Court’s view, the acts complained of the Applicant appear to be capable of falling within the provisions of the Genocide Convention”.

on its territory based on a brazen abuse of Article I of the Genocide Convention”<sup>40</sup>. The Court was not required to address the question of whether or not “a right not be subject to a false claim of genocide” can be inferred from that treaty or whether the Genocide Convention as such may imply that there is a “right not to be subjected to another State’s military operations”. There are valid reasons to claim – as did the advocates and counsels for Ukraine during the public oral hearing on 7 March 2022 – that the Genocide Convention does not authorize a state party to invade the territory of another in order to implement its Article I (obligation to prevent and punish the crime of genocide). Nevertheless, these issues are to be determined at a later stage of the proceedings.

According to the Court, no evidence indicated that the Russian Federation’s allegations of genocide committed by Ukraine were substantiated. The ICJ highlighted that “it is doubtful that the Convention, in the light of its object and purpose, authorizes a Contracting Party’s unilateral use of force in the territory of another State for the purpose of preventing and punishing an alleged genocide”<sup>41</sup>.

The condition of irreparable prejudice and urgency was also found to be met. According to the Court, “the right of Ukraine that it has found to be plausible (...) is of such a nature that prejudice to it is capable of causing irreparable harm”<sup>42</sup>. The ICJ further noted the extreme vulnerability of the civilian population affected by the military conflict, the numerous civilian deaths and injuries, material damage caused, and increasingly difficult living conditions. In these circumstances, the conclusion that the case is urgent and that irreparable prejudice could be caused to the rights claimed by Ukraine (and considered plausible by the Court) was not a particularly challenging one.

These considerations led the Court to find that all conditions required to indicate provisional measures were satisfied. The measures ordered were not identical to those requested, however, they covered the essence of Ukrainian submission to the Court. In its Order, the Court indicated that the Russian Federation must suspend its military operations that it started on 24 February 2022 in the territory of Ukraine. Further, the aggressor state was obliged that any military or irregular armed units, which may be directed or supported by the Russian Federation, as well

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<sup>40</sup> *Ibidem*, para. 52.

<sup>41</sup> *Ibidem*, para. 59. See a comment on the issue by W. A. Schabas, *Preventing Genocide and the Ukraine/Russia case*, 10 March 2022, <https://www.ejiltalk.org/preventing-genocide-and-the-ukraine-russia-case> [accessed on 30 April 2022]. More by the same author on the application of Article IX of the Genocide Convention at the ICJ: W.A. Schabas, *Genocide in International Law. Crime of Crimes*, Cambridge 2009, 2nd edition, pp. 491–519.

<sup>42</sup> Order of 16 March 2022, para. 74.

as any organizations and persons, which may be subject to its control or direction, take no steps in furtherance of the military operations against Ukraine. Finally, the Court has also obliged both Ukraine and Russia to refrain from any actions which might aggravate or extend the dispute submitted to the Court or make that dispute more difficult to resolve.<sup>43</sup>

Deliberations of the Court resulted in an apparent victory for Ukraine, yet two judges decided to append declarations and separate opinions. Vice-President Gevorgian, former Russia's ambassador to the Netherlands and a judge at the ICJ since 2015, contested the jurisdiction of the Court over the said case, stressing that the case, in reality, concerned the use of force by the Russian Federation on Ukrainian territory and not – as the applicant state alleged – genocide.<sup>44</sup> He argued that the Court should have followed its reasoning from the *Legality of the Use of Force* case, where no jurisdiction based on Article IX of the Genocide Convention was found and the ICJ held that “the threat or use of force against a State cannot in itself constitute an act of genocide in the meaning of Article II of the Convention.”<sup>45</sup>

Some judges of the majority also provided additional reasons for their positions. Judge Bennouna declared that he voted in favour of the Order because he felt “compelled by this tragic situation, in which terrible suffering is being inflicted on the Ukrainian people”. However, he suggested he was not convinced that the ICJ had jurisdiction in this case, and he might not follow the majority on that point at the stage of merits.<sup>46</sup> Judge Robinson expressed regret that the Court did not grant Ukraine's request for the Russian Federation to provide a periodic report on the implementation of the Court's Order given the grave situation caused by the “military operation”.<sup>47</sup> Judge Nolte essentially focused on distinguishing the *Legality of the Use of Force* cases from the considered case, stressing that earlier (when the use of force by certain member states of NATO against Yugoslavia was concerned), neither the applicant nor the respondent state raised the prevention of alleged genocide.<sup>48</sup> Finally, Judge *ad hoc* Daudet expressed an opinion that the Court should have ordered “non-aggravation measures” only in respect of the aggressor state and not Ukraine.<sup>49</sup>

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<sup>43</sup> *Ibidem*, paras. 1-3 of the operative part.

<sup>44</sup> Declaration of Vice-President Gevorgian appended to the Order of 16 March 2022, paras. 1–10.

<sup>45</sup> *Ibidem*, para. 5.

<sup>46</sup> See: Declaration of Judge Bennouna appended to the Order of 16 March 2022, paras. 1–2.

<sup>47</sup> Separate Opinion of Judge Robinson appended to the Order of 16 March 2022, para. 6.

<sup>48</sup> Declaration of Judge Nolte appended to the Order of 16 March 2022, paras. 2–3.

<sup>49</sup> Declaration of Judge *ad hoc* Daudet appended to the Order of 16 March 2022, paras. 1–10.

## 5. Conclusions

A question arises whether the ICJ's Order of 16 March 2022 can be called a "Pyrrhic victory" for Ukraine, given that the Russian Federation did not comply with any of the ordered measures. It is common knowledge that in the following weeks the hostilities continued, bringing enormous loss of life among civilian population, blatant violations of international humanitarian law and horrific acts of destruction. The aggressor state failed to comply with the ICJ's binding Order, thus adding another violation of international law to a considerably long list of those committed from the earliest moments of the armed conflict it waged against Ukraine on 24 February 2022.

It could be argued that Ukraine's invocation of Article IX of the Genocide Convention in order to defend itself from armed aggression was a legal action using of "what was available" in the absence of a more straightforward legal basis allowing to raise a violation by Russia of Article 2(4) of the UN Charter, as well as abundant norms of international humanitarian law and human rights law. Nevertheless, it would be unbecoming or simply wrong to assume that Ukraine abused the purpose of the Genocide Convention or acted *praeter legem*, as far as international litigation is concerned. It should be stressed that allegations of genocide made by the Russian Federation were not just allusions but rather official and explicit statements utilized as a pretext for war. In these circumstances, it cannot be surprising at all that the slandered and attacked state would reach out to all legal means available to defend itself.

Hopefully, the ICJ will examine the merits of the Ukrainian claims and answer the questions concerning the rights invoked by the applicant, as inferred from the Genocide Convention. These proceedings would most likely need to establish facts both before and after 24 February 2022. One should note that investigating these events will consume time and resources of many more international courts and mechanisms. Apart from the proceedings launched by the Prosecutor at the International Criminal Court, one should mention several pending inter-state proceedings against the Russian Federation at the European Court of Human Rights, as well as the non-judicial mechanisms appointed in order to establish facts and examine violations of international law committed by Russia during the war against Ukraine. These mechanisms include the Commission of Inquiry on Ukraine set up by the UN Human Rights Council<sup>50</sup> and the mission of the so-called OSCE

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<sup>50</sup> Resolution of the UN Human Rights Council no. A/HRC/49/L.1 adopted on 4 March 2022.

Moscow Mechanism.<sup>51</sup> One may also reach out to the findings made by the OSCE Special Monitoring Mission to Ukraine.<sup>52</sup> While for the purposes of the proceedings at the ICJ the vital issue is whether there emerges any evidence pointing to the possibility of acts of genocide, the scope of fact-finding and examination of other courts and mechanisms will be much broader, including the violations of international humanitarian law and human rights. In adjudicating the case, the ICJ may also refer to external sources, such as reports of inquiry commission, although it remains fully competent to make its own findings.

It was difficult to expect that the Order of 16 March 2022 would immediately stop the hostilities of the war waged by Russia against Ukraine. However, the Ukrainian request to the ICJ provided the principal judicial organ of the United Nations with an opportunity to apply the Geneva Convention as a “practical and effective” and not just “theoretical and illusory” instrument which does not allow for unsubstantiated allegations of genocide to serve as a pretext for an armed aggression. The disregard for the ICJ’s Order by the respondent state speaks volumes about its attitude to international law as of 2022.

## Abstract

On 24 February 2022 the armed forces of the Russian Federation attacked Ukraine, allegedly with the aim of reacting to the acts of genocide and punishing the perpetrators. In the above context, the International Court of Justice (ICJ) is currently facing the challenge of examining an inter-state case submitted by Ukraine under the Convention on the Prevention and Punishment of the Crime of Genocide. The ICJ’s Order of 16 March 2022 to indicate provisional measures demonstrates the complexity of the dispute. The present paper aims to discuss the provisional measures adopted by the ICJ and to examine their substance based on the Court’s previous jurisprudence in similar cases. The authors also

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<sup>51</sup> The mission was established following invocation by 45 states of the OSCE’s Moscow Mechanism on 3 March 2022 in order to “address the human rights and humanitarian impacts of the Russian Federation’s invasion and acts of war, supported by Belarus, on the people of Ukraine, within Ukraine’s internationally recognized borders and territorial waters”, <https://www.osce.org/odihr/513973> [accessed on 30 April 2022].

<sup>52</sup> OSCE Special Monitoring Mission to Ukraine was deployed upon Decision No. 1117 by OSCE Permanent Council during its 9991st Special Plenary Meeting on 21 March 2014 (all 57 OSCE’s participating states agreed); and their mandate was extended upon Decision No. 1401 during its 1408<sup>th</sup> Special Plenary Session on 31 March 2021. It aimed mainly to gather information and report on the security situation, establish facts on specific incidents on the ground (authorities, civil society, ethnic and religious groups and local communities), <https://www.osce.org/special-monitoring-mission-to-ukraine> [accessed on 30 April 2022].

comment on the legal strategy adopted by Ukraine in asserting its rights before the ICJ under the Genocide Convention.

**Key words:** Convention on the Prevention and Punishment of the Crime of Genocide, provisional measures, International Court of Justice, Russian aggression against Ukraine

***Silent Leges Inter Arma? Środki tymczasowe na podstawie Konwencji w sprawie zapobiegania i karania zbrodni ludobójstwa w sprawie Ukraina przeciwko Federacji Rosyjskiej przed Międzynarodowym Trybunałem Sprawiedliwości***  
**Streszczenie**

Dnia 24 lutego 2022 r. siły zbrojne Federacji Rosyjskiej zaatakowały Ukrainę, rzekomo reagując na akty ludobójstwa i mając na celu ukaranie sprawców. W tym kontekście Międzynarodowy Trybunał Sprawiedliwości (MTS) stoi obecnie przed wyzwaniem, jakim jest rozpatrzenie sprawy wniesionej przez Ukrainę na podstawie Konwencji w sprawie zapobiegania i karania zbrodni ludobójstwa. Postanowienie MTS z dnia 16 marca 2022 r. w sprawie środków tymczasowych pokazuje złożoność powyższego sporu. Celem niniejszego opracowania jest omówienie środków tymczasowych przyjętych przez MTS oraz zwrócenie uwagi na ich istotę, również w oparciu o wcześniejsze orzecznictwo. Autorzy komentują także strategię prawną przyjętą przez Ukrainę w dochodzeniu roszczeń przed MTS na podstawie Konwencji o zapobieganiu i karaniu zbrodni ludobójstwa.

**Słowa kluczowe:** Konwencja o zapobieganiu i karaniu zbrodni ludobójstwa, środki tymczasowe, Międzynarodowy Trybunał Sprawiedliwości, agresja Rosji na Ukrainę