

## The Response of International Courts and Institutions to Russia's 2022 invasion of Ukraine

On 28<sup>th</sup> April 2022, the Centre for Law and Global Justice at Durham hosted a seminar which considered the response of international courts and institutions to Russia's 2022 invasion of Ukraine, including the International Court of Justice's March provisional measures order, the March and April interim measures issued by the European Court of Human Rights and recent action by the Council of Europe and UN General Assembly. Speakers focused on covering key points which opened up a discussion amongst attendees on this very challenging and difficult issue.

The session began with a presentation by Dr Matt Nicholson, who gave a comprehensive contextual background of the *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v Russian Federation)* case brought before the International Court of Justice (ICJ), followed by an analysis of the ICJ's provisional measures order issued on the 23 March 2022.<sup>1</sup> Dr Nicholson outlined the jurisdictional challenges faced by Ukraine in bringing a case against Russia; as Russia has not made a general declaration giving consent to the ICJ's jurisdiction, Ukraine's argument rested upon the Genocide Convention, which Russia is a party to.<sup>2</sup> Ukraine's application to the ICJ challenged President Putin's stated purpose of Russia's 'special military operation' against Ukraine – namely, to stop the genocide of individuals in the cities of Luhansk and Donetsk, undermining the legality of the invasion.<sup>3</sup> The curious way in which the case came before the Court, resting on assertions made by Putin, was highlighted as a distinguishing feature, as was the contents of the ICJ's provisional measures order in comparison to the requests made by Ukraine after concluding there was a dispute. Drawing on Milanovic's *EJIL: Talk!* blogpost, Dr Nicholson emphasised the ICJ's order was broader than the Ukraine's request, ordering Russia to, inter alia, immediately suspend the military operations it had commenced on the 24<sup>th</sup> February 2022 in Ukraine, omitting reference to the aspects of Ukraine's application which focused on the stated purpose and objective of the prevention and/or punishment of genocide.<sup>4</sup>

It was further noted that the ICJ, after proclaiming the absence of any evidence substantiating Russia's allegations, was 'doubtful that the Convention, in 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 or punishing an alleged genocide'.<sup>5</sup> The Court's surprising use of the word 'doubtful' in this context was highlighted, leaving questions unanswered regarding the scope of the treaty. It was concluded that ultimately, whilst the provisional measures order is limited to its three commands, it incites discussion on a wide range of matters including the politics, practice, attitudes of the ICJ and the use of force more generally.

Building on Dr Nicholson's opening remarks, Dr Petra Minnerop led the second presentation titled 'Legal dispute or non-violation complaint under the compromissory clause', which involved a closer examination of the declarations of each of the judges in the provisional

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<sup>1</sup> *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: Order) General List No 182 [2022] ICJ.

<sup>2</sup> *ibid* [1].

<sup>3</sup> *ibid* [32].

<sup>4</sup> Marko Milanovic, 'ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe' (*EJIL: Talk!*, 16 March 2022) <[www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/](http://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/)> accessed 20 May 2022.

<sup>5</sup> *Ukraine v Russian Federation (Request for the indication of provisional measures: Order)* (n 1) [59].

measures order, as well as the separate opinion of Judge Robinson.<sup>6</sup> Dr Minnerop noted the divergence of judicial views on various issues, including whether the dispute related to the use of force and/or the Geneva Convention and whether a fourth provisional measure should have been issued requiring Russia to periodically report on the implementation of steps taken pursuant to the ICJ's orders.<sup>7</sup> Of further contention was the Court's order 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*', instead of singling out Russia as the perpetrator, for as Judge ad hoc Daudet emphasised, it 'goes against all logic to enjoin the Ukrainians' in this order in light of the atrocities their country is currently experiencing.<sup>8</sup>

Taking a step back, Dr Henry Jones chose to discuss non-appearance at the ICJ, placing Russia's decision not to participate amongst the long history of states' refusal to participate in international courts and tribunals dating back to the early twentieth century.<sup>9</sup> Dr Jones' succinct, yet highly informative, presentation traced the patterns of non-appearance emerging in the peak of the Cold War through to the resumption of non-participation today, as evidenced through the cases of *The Gambia v Myanmar* and *Palestine v United States of America* to name just two examples.<sup>10</sup> Attendees of the seminar were reminded that where a state does not appear before the Court, the ICJ will endeavour to satisfy itself, putting its own legal arguments before the advocates, using its own experts and drawing on materials other than formal submissions such as political statements from state officials. A nuanced view of non-appearance was offered in Dr Jones' concluding comments which considered not only the reputational damage it may engender, but also the possible characterisation of non-participation as a strategy increasingly pursued by states.

The fourth and fifth presentations, delivered by Dr Claudia Candelmo and Professor Catherine O'Rourke respectively explored the relationship between the United Nations Security Council (UNSC) and General Assembly (UNGA), with both recognising the limited role of the former institution in handling the invasion of Ukraine due to Russia's permanent membership and subsequent veto power over resolutions. In considering potential solutions, Dr Candelmo listed the most commonly suggested reforms to the UNSC, including the expansion of permanent seats, or the establishment of 'semi-permanent members', however it was recognised that the need for unanimity across all current permanent members constitutes a barrier to any such proposal. Professor O'Rourke, contrastingly, drew attention to the UNGA's ability to take an active role on issues of international peace and security, thereby presenting an alternative suggestion as to how international law could respond to the current conflict in Ukraine and future disputes.<sup>11</sup>

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<sup>6</sup> *Ukraine v Russian Federation* (Separate Opinion of Judge Robinson) 2022 <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf)> accessed 19 May 2022.

<sup>7</sup> *Ukraine v Russian Federation* (Declaration of Vice-President Gevorgian) 2022 <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-EN.pdf)> accessed 19 May 2022 [5]; *Ukraine v Russian Federation* (Declaration of Judge Xue) 2022 <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf)> accessed 19 May 2022 [2]; *Ukraine v Russian Federation* (Declaration of Judge Bennouna) <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02-EN.pdf)> accessed 19 May 2022 [6]; *Ukraine v Russian Federation* (Separate Opinion of Judge Robinson) (n 6) [33].

<sup>8</sup> *Ukraine v Russian Federation* (Declaration of Judge Ad Hoc Daudet) 2022 <[www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-06-EN.pdf](http://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-06-EN.pdf)> accessed 19 May 2022 [6].

<sup>9</sup> eg *Costa Rica v Nicaragua* (1917) 11 Am J Int'l L 181.

<sup>10</sup> 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>> accessed 19 May 2022; *Relocation of the United States Embassy to Jerusalem (Palestine v. United States of America)* <[www.icj-cij.org/en/case/176](http://www.icj-cij.org/en/case/176)> accessed 19 May 2022.

<sup>11</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinions) 2004 <<https://www.icj-cij.org/public/files/case-related/131/131-20040709-ADV-01-00-EN.pdf>> accessed 19 May 2022 [28], [32].

Lastly, Dr Jane Rooney rounded off the presentations by summarising the European Court of Human Rights (ECtHR)'s response to Russia's invasion of Ukraine. After failing to comply with a series of interim measures granted by the Court, on 15<sup>th</sup> March 2022 Russia announced its withdrawal from the Council of Europe to take effect from the following day and was later expelled via Article 8, effective immediately. However, crucially, the jurisdiction of the ECtHR and Council of Europe is therefore limited to events up until the 16<sup>th</sup> March, including pending cases – of which there were approximately 18,000 against Russia at the end of February.<sup>12</sup> Dr Rooney stressed the extreme difficulty Ukraine or Ukrainian applicants would experience bringing a claim against Russia for events in the last two months due to the Court's curtailed extraterritorial jurisdiction following *Georgia v Russia (ii)*, which departs from the previous approach the Court had adopted in its jurisprudence.<sup>13</sup> Resultantly, an extreme amount of control over the territory and the replacement of the existing government will be required in order for jurisdiction to be established.<sup>14</sup> The presentation concluded by reflecting on the significance of the ECtHR declaring Russia's actions invalid in recent years, such as the poisoning of Alexander Litvinenko and the disappearance of 11 Chechnya residents, however the effectiveness of the Council of Europe in holding the state to account for the ongoing invasion of Ukraine is now severely weakened following the state's expulsion.<sup>15</sup>

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<sup>12</sup> Philip Leach, 'A Time of Reckoning? Russia and the Council of Europe' (*Strasbourg Observers*, 17 March 2022) <<https://strasbourgobservers.com/2022/03/17/a-time-of-reckoning-russia-and-the-council-of-europe/>> accessed 20 May 2022.

<sup>13</sup> *Georgia v Russia (ii)* App no 38263/08 (ECtHR, 21 January 2021).

<sup>14</sup> *ibid* [137] – [138].

<sup>15</sup> *Carter v Russia* App no 20914/07 (ECtHR, 21 September 2021); *Adzhigitova and Others v. Russia* [2021] ECHR 542.