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PUTIN'S RUSSIA BEFORE THE INTERNATIONAL COURT OF JUSTICE

Abstract: *In the past 15 years, Georgia and Ukraine have both brought cases against Russia before the International Court of Justice (ICJ). Georgia's 2008 application addressed the separatist movements in South Ossetia and Abkhazia. Ukraine's 2017 case (Ukraine v. Russian Federation I) accuses Russia of discriminating against Crimean Tatars, supporting terrorism in Eastern Ukraine and downing Malaysia Airlines flight MH-17. The 2022 case (Allegations of Genocide) claims that Russia's war against Ukraine violates the Genocide Convention. This article examines Russia's role in these disputes, comparing outcomes in Georgia v. Russian Federation and Ukraine v. Russian Federation I, both alleging breaches of the Convention on the Elimination of All Forms of Racial Discrimination. Only the latter reached the merits phase. The article also analyses the controversial judgment on preliminary objections in Allegations of Genocide. It argues that the ICJ's consensual jurisdiction limits its effectiveness, restricting its ability to rule on Russia's actions against Ukraine. Additionally, it assesses Russia's strategies in these proceedings, focussing on the "rhetorical adaptation" of international norms.*

Keywords: admissibility, ICJ, jurisdiction, Russia, Ukraine, war

INTRODUCTION

On 5 July 2023 Poland submitted written observations to the International Court of Justice (ICJ) in a pending case, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide, Ukraine v. Russian Federation* (hereinafter *Allegations of Genocide*). Like the other 32 State interven-

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ers – an unprecedented number in the ICJ's history¹ – Poland asserted that the Court should accept its jurisdiction in this case,² in which Ukraine claims that Russia has abused and violated Art. 1 of the Genocide Convention³ by alleging genocide against ethnic Russians in the eastern part of Ukraine and using this accusation as a pretext for invading its neighbour. As a “part of Poland's consistent policy of firmly condemning all unlawful actions by Russia”, the intervention before the ICJ is presented as complementing other legal actions, such as referring the Russian invasion of Ukraine to the International Criminal Court (ICC) and intervening in inter-state proceedings before the European Court of Human Rights (ECtHR).⁴ This activism positions Poland as “Ukraine's most loyal ally”⁵ since the onset of the Russian–Ukrainian War in February 2022. Accordingly, Poland's submission to the ICJ concludes by stating that the Court has “a positive obligation” to offer “a judicial framework for the resolution of legal conflicts, especially one which not only threatens international peace and security but also has escalated to a full-scale military invasion involving enormous human suffering and continuing loss of life.”⁶

Allegations of Genocide is only the most recent of several applications launched by Ukraine, and previously by Georgia, against Russia before the ICJ. Whilst it is likely the highest profile case,⁷ it can be regarded as part of a wider campaign of strategic litigation against Russian military assertiveness.⁸ This article seeks to provide a contextual assessment that describes, links and contrasts the three cases against Russia before the ICJ. Building on our previous work, in which we more generally discussed international courts and their potential to contribute to resolving the Ukrainian–Russian conflicts,⁹ here we specifically focus on the ICJ. In concrete

¹ B. Bonafe, *The Collective Dimension of Bilateral Litigation: The Ukraine v Russia Case Before the ICJ*, 96 Questions of International Law 27 (2022), p. 27.

² ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written observations of Poland on the subject-matter of its intervention, 5 July 2023, ICJ Rep. 2023.

³ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277.

⁴ *Poland filed a declaration of intervention to the International Court of Justice in Ukraine's case against Russia*, Ministry of Foreign Affairs, Republic of Poland, 16 September 2022, available at: <https://tinyurl.com/4am3pxaz> (accessed 30 August 2024).

⁵ W. Konończuk, *The Polish–Ukrainian Bond Is Here to Stay*, Strategic Europe, 3 October 2023, available at: <https://carnegieeurope.eu/strategiceurope/90686> (accessed 30 August 2024).

⁶ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written observations of Poland on the subject-matter of its intervention, ICJ Rep. 2023, para. 50.

⁷ The 32 submitted interventions by other States are strongest indicator in this regard.

⁸ M. Ramsden, *Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention*, 56(1) Vanderbilt Journal of Transnational Law 181 (2023), pp. 181–210.

⁹ N. Marin, B. Manova, *The Constraints of International Courts as a Tool for Resolving the Ukrainian–Russian Conflicts*, 62 German Yearbook of International Law 371 (2019).

terms, we look at the previously adjudicated cases of *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation)¹⁰ and *Application of 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* (Ukraine v. Russian Federation I),¹¹ in which the ICJ recently delivered a judgment on the merits, as well as the pending proceedings in *Allegations of Genocide*. Our analysis shows that although one should not expect the Court to act as a significant constraint on Russia's military actions, the cases nonetheless present some opportunities to adjudicate on the (il)legality of Russia's conduct. We examine Russia's involvement in the three cases before the ICJ in the light of the concepts of "bad-faith compliance"¹² and "rhetorical adaptation"¹³ of international norms that have recently been introduced in the literature to capture such strategic positioning. Furthermore, Russia's repeated effort to avoid the Court's jurisdiction and its extremely sceptical approach to such proceedings somewhat contradict its continued involvement with the Court – for instance when it comes to the nomination of judges.

The argument that follows is divided into three parts. The first section offers a short summary, in chronological order, of the three ICJ cases that Russia has recently faced. We look closely at the two judgments delivered by the ICJ at the beginning of 2024: the judgment on the merits in *Ukraine v. Russian Federation I* and the judgment on the preliminary objections in *Allegations of Genocide*. With the latter proceedings still pending, we also outline our predictions as to their likely outcome at the merits stage. We then move to the second section, where we evaluate Russia's current and potential compliance with the judgments, drawing particularly on the theory of rhetorical adaptation to explain Russia's conduct and litigation strategy. The concluding section builds on the foregoing discussion to offer some reflections on the future of the ICJ, and specifically on Russia's relation to the Court as the principal court of the United Nations.

¹⁰ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination* (Georgia v. Russian Federation), Judgment, 1 April 2011, ICJ Rep 2011, p. 70.

¹¹ This case has gone through the preliminary objections phase. See ICJ, *Application of 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* (Ukraine v. Russian Federation), Judgment, 8 November 2019, ICJ Rep 2019, p. 558. On 31 January 2024, a judgment on the merits was also delivered. See ICJ, *Application of 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* (Ukraine v. Russian Federation), Judgment, 31 January 2024, ICJ Rep 2024.

¹² Z.I. Búzás, *Evading International Law: How Agents Comply with the Letter of the Law but Violate its Purpose*, 23(4) European Journal of International Relations 857 (2017), pp. 857, 858.

¹³ J.M. Dixon, *Rhetorical Adaptation and Resistance to International Norms*, 15(1) Perspectives on Politics 83 (2017).

1. THREE PROCEEDINGS AGAINST RUSSIA BEFORE THE ICJ

This section provides an overview of the three proceedings in question, beginning with the 2008 application by Georgia. Since we extensively discussed the first two cases in a previous article,¹⁴ this text limits the factual and legal summaries to those aspects which are the most pertinent to the subsequent analysis. The third case, *Allegations of Genocide*, which was not covered in our earlier work, is given more comprehensive attention here, and the controversial recent judgment on the preliminary objections in these proceedings is critically assessed. Finally, this section offers some thoughts on what the main issues at stake would be at the merits stage of *Allegations of Genocide*, what strategies the parties are likely to employ and what outcomes could be expected.

1.1. *Georgia v. Russian Federation*

The case of *Georgia v. Russian Federation*, initiated by Georgia in 2008, dealt with the issue of the separatist movements in South Ossetia and Abkhazia. These regions had sought unilateral secession from Georgia, leading to a short military conflict that involved Russia as the backer of these breakaway regions. The central allegation in this case pertained to Russia's actions within and around Georgian territory, which Georgia claimed violated the International Convention on the Elimination of All Forms of Racial Discrimination (CERD).¹⁵ That said, the core issues at stake extended beyond the question of racial discrimination, which turned out to play a marginal role in this dispute.¹⁶ Instead, the conflict predominantly featured more classic international law questions surrounding the use of force, state recognition and the application of self-determination principles within the context of secession.

The Court concluded the case in 2011 in its judgment on the preliminary objections. It rejected Russia's first objection, which argued that no dispute existed between the parties concerning the CERD at the time of Georgia's application.¹⁷ However, Russia's second preliminary objection, citing the procedural requirements of Art. 22 CERD, was upheld.¹⁸ This provision holds that only disputes regarding the interpretation or application of the CERD which remain unresolved after negotiation or specified procedures may be referred to the ICJ. In this case, the Court

¹⁴ Marin, Manova, *supra* note 9, pp. 382–387.

¹⁵ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Application Instituting Proceedings, 12 August 2008, ICJ Rep 2008, p. 4.

¹⁶ P. Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11 Human Rights Law Review 739 (2011), p. 740.

¹⁷ ICJ, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Judgment, 1 April 2011, ICJ Rep 2011, paras. 113–114.

¹⁸ *Ibidem*, paras. 182–184.

found that Georgia had not made use of the dispute resolution mechanisms under the CERD before approaching the ICJ. It took into consideration some prior negotiations between the parties, which dealt with issues such as the status of South Ossetia and Abkhazia and the role of Russian peacekeepers, but determined that these did not address “CERD-related matters”.¹⁹ Consequently, the Court concluded that the parties had not sought a negotiated resolution under the terms of Art. 22 CERD, leading to the acceptance of Russia’s second preliminary objection.

Our previous article emphasised that this judgment was relevant for the understanding of the subsequent Ukrainian case, not only due to the strong factual similarities but also given Russia’s challenge of the jurisdictional basis of the Court.²⁰ This Russian strategy also clearly continued in *Allegations of Genocide*, and proved to be rather efficient, as the recent judgment on the preliminary objections in that case shows. The judgment in *Georgia v. Russian Federation* serves as a reminder that the ICJ may sometimes be inclined to sidestep the question of merits by adopting a reasoning that has been described as jurisdictionally formalist.²¹ However, even though the ICJ did not find jurisdictional basis to rule on the merits of the conflict between Georgia and Russia, the Georgian application has paved the way for more persistent “lawfare” by neighbouring States against Russia before the ICJ and other international courts.²²

1.2. *Ukraine v. Russian Federation I*

In 2017, Ukraine initiated a case against Russia at the ICJ, grounding its jurisdictional basis in violations of the CERD and the International Convention for the Suppression of the Financing of Terrorism (ICSFT).²³ Since Russia’s non-acceptance of the compulsory jurisdiction prevented Ukraine from raising the underlying legal issues at stake, which include the right to self-determination, unilateral secession and the use of force,²⁴ the claim that was filed focussed instead on discrimination against Crimean Tatars, support of terrorist activities in Eastern Ukraine and the

¹⁹ *Ibidem*, paras. 180–182.

²⁰ Marin, Manova, *supra* note 9, p. 383.

²¹ V.-J. Proulx, *The World Court’s Jurisdictional Formalism and its Lost Market Share: The Marshall Islands Decisions and the Quest for a Suitable Dispute Settlement Forum for Multilateral Disputes*, 30(4) *Leiden Journal of International Law* 925 (2017).

²² I. Marchuk, *Powerful States and International Law: Changing Narratives and Power Struggles in International Courts*, 26(1) *UC Davis Journal of International Law & Policy* 65 (2019), pp. 75–76.

²³ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 16 January 2017, ICJ Rep 2017, paras. 17–23.

²⁴ I. Marchuk, *Introductory Note to Application of 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 (Ukraine v. Russian Federation) (Preliminary Objections) (I.C.J.)*, 59(3) *International Legal Materials* 339 (2020), p. 339.

downing of Malaysia Airlines flight MH-17.²⁵ The claims under the CERD were specific to Crimea, whilst those under the ICSFT were related to the conflict in Eastern Ukraine, which had already ensued at the time.

In April 2017, the ICJ issued an order on provisional measures, acknowledging its *prima facie* jurisdiction under the CERD.²⁶ Though only some of Ukraine's requested provisional measures were granted, Russia was indeed instructed to preserve the rights of the Crimean Tatar community and to guarantee Ukrainian-language education.²⁷ Both parties were also encouraged to find a peaceful resolution to the conflict, particularly by contributing, individually and collectively, towards implementing the "Package of Measures for the Implementation of the Minsk Agreements",²⁸ a strategy endorsed by the UN Security Council.²⁹

The Court delivered a judgment on the preliminary objections in November 2019. In contrast to *Georgia v. Russia*, here it affirmed its jurisdiction under both the CERD and the ICSFT by finding that all necessary preconditions for referring disputes under these conventions had been satisfied.³⁰ To come to this conclusion, the ICJ specifically scrutinised whether the actions Ukraine contested fell within the ambit of the CERD and the ICSFT, and whether the procedural requirements for seizing the Court under these conventions had been fulfilled.³¹ Regarding the ICSFT-related claims, the central issue was whether there was jurisdiction to examine allegations of Russia's failure to cooperate in preventing the financing of terrorism. The Court considered this a factual question to be addressed at the merits phase,³² though predictions were made that proving the *mens rea* elements of terrorism financing would be "enormously challenging".³³

Concerning the CERD, the ICJ ruled that Russia's alleged acts fell within the purview of the Convention due to their impact on the rights protected by it.³⁴ The Court's finding that the actions challenged by Ukraine were "capable of having an

²⁵ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Application Instituting Proceedings, ICJ Rep 2017, paras. 4–15.

²⁶ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Order, 19 April 2017, ICJ Rep 2017, 104, para. 62.

²⁷ *Ibidem*, para. 102.

²⁸ *Ibidem*, para. 104.

²⁹ UN Security Council Resolution 2202/(2015), 17 February 2015, S/RES/2202 (2015).

³⁰ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 64, 77, 97, and 121.

³¹ *Ibidem*, paras. 76, 101, 120–121.

³² *Ibidem*, para. 63.

³³ Marchuk, *supra* note 24, p. 341.

³⁴ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 96–97.

adverse effect on the enjoyment of certain rights protected under CERD”³⁵ gave cause for optimism that the CERD claims stood a fair chance of success at the merits phase. Whilst this ICJ pronouncement ultimately did not determine the outcome on the merits, it can be situated within a broader context of the CERD being read in a more purposive and teleological manner, including by international bodies.³⁶

Another key aspect of the preliminary objections judgment was the Court’s interpretation of the procedural preconditions of Art. 22 CERD; it clarified that the requirements of negotiations and the CERD committee procedure were not cumulative but alternative, since the realisation of CERD’s objective and purpose – eliminating racial discrimination “without delay” – would otherwise be hindered.³⁷ In notable contrast to its finding in *Georgia v. Russian Federation*, the Court found that Ukraine had met the negotiation requirement through diplomatic efforts, including correspondence and attempted meetings with Russia concerning Crimea.³⁸ Finally, the ICJ also dismissed a preliminary objection based on the non-exhaustion of local remedies, which it deemed inapplicable given that Ukraine’s claim pertained to the overall legality of Russia’s conduct in Crimea rather than individual cases.³⁹

The public hearings in *Ukraine v. Russian Federation I*, expectedly heated given the ongoing war,⁴⁰ took place in June 2023, and an eagerly awaited judgment on the merits was delivered on 31 January 2024. The Court rejected all of Ukraine’s submissions apart from two, finding that Russia had violated the ICSFT, by failing to investigate the possible terrorism financing to which Ukraine had drawn its attention, and the CERD, by limiting access to Ukrainian-language education in Crimea after 2014.⁴¹ The judgment was a moderate success for Ukraine at best. Even so, it

³⁵ *Ibidem*, para. 96, as cited in Marchuk, *supra* note 24, p. 340.

³⁶ D. Keane, *Mapping the International Convention on the Elimination of All Forms of Racial Discrimination as a Living Instrument*, 20(2) 2020 Human Rights Law Review 236 (2020).

³⁷ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, paras. 110–111.

³⁸ *Ibidem*, para. 120. To be sure, this finding has not been without criticism, notably in A. Orakhelashvili, *Adjudicating Racial Discrimination Claims: Issues of Jurisdiction and Admissibility in Ukraine v. Russia*, 1(1) Moscow Journal of International Law 57 (2021), pp. 57–69. For a detailed account of the arguments presented by both parties and another critical assessment of the Court’s decision, see E. Decaux, *The Potential for Inter-State Conciliation within the Framework of the UN Treaties for the Protection of Human Rights*, in: C. Tomuschat, M. Kohen (eds.), *Flexibility in International Dispute Settlement*, Brill Nijhoff, Leiden: 2020, pp. 65–70.

³⁹ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2019, para. 130.

⁴⁰ M. Corder, *Ukraine Brands Russia “Terrorist State” in Opening Statement at International Court*, PBS News, 6 June 2023, available at: <https://www.pbs.org/newshour/world/ukraine-brands-russia-terrorist-state-in-opening-statement-at-international-court-case> (accessed 30 August 2024).

⁴¹ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 404.

was not easy for the ICJ judges to arrive at, as is evident from the large number of dissenting (1) and separate opinions (6) and declarations (5) annexed to it.⁴² The decision is interesting for several reasons, not least because it is the first in which the Court adjudicated on a State's compliance with the substantive provisions of both the CERD and the ICSFT.⁴³

The Court has been criticised for opting for a rather narrow understanding of Russia's obligations under the ICSFT.⁴⁴ Its interpretation of the meaning of the term "funds" gave rise to particular controversy. The ICJ held that "funds" within the meaning of the ICSFT only encompass resources of a financial or monetary character, and do "not extend to the means used to commit acts of terrorism", thereby excluding the provision of weapons to separatist movements in Ukraine from the scope of the potential terrorism financing activities covered by the ICSFT.⁴⁵ Three judges – Bhandari, Charlesworth and Pocar – expressed in separate opinions their opposing view that weapons were to be deemed "funds".⁴⁶

The Court found that the Russian Federation had breached its obligation under Art. 9(1) ICSFT to investigate terrorism financing, and that none of Ukraine's other claims had been sufficiently established. In reaching this conclusion, the ICJ applied stricter requirements when examining whether obligations – under Art. 8(1) (to freeze and seize funds used to finance terrorism), Art. 10(1) (to prosecute terrorism financing) or Art. 12(1) (to assist other States Parties in their investigations) – had arisen for Russia than in determining whether it was required to investigate possible terrorism financing offences. This approach is logical given that the latter obligation,

⁴² *Ibidem*, separate opinion of President Donoghue, Declaration of Judge Tomka, Declaration of Judge Abraham, Declaration of Judge Bennouna, Declaration of Judge Yusuf, Dissenting opinion of Judge Sebutinde, Separate opinion of Judge Bhandari, Separate opinion of Judge Iwasawa, Separate opinion of Judge Charlesworth, Declaration of Judge Brant, Separate opinion of Judge ad hoc Pocar, Separate opinion, partly concurring and partly dissenting of Judge ad hoc Tuzmukhamedov, available at: <https://www.icj-cij.org/case/166/judgments> (accessed 30 August 2024).

⁴³ I. Marchuk, *Unfulfilled Promises of the ICJ Litigation for Ukraine: Analysis of the ICJ Judgment in Ukraine v. Russia (CERD and ICSFT)*, EJIL: Talk!, 22 February 2024, available at: <https://tinyurl.com/2fvmunp7> (accessed 30 August 2024).

⁴⁴ *Ibidem*.

⁴⁵ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 49–53.

⁴⁶ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge ad hoc Pocar, ICJ Rep 2019, paras. 2–11; ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge Charlesworth, ICJ Rep 2024, paras. 2–12; ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Separate opinion of Judge Bhandari, ICJ Rep 2024, paras. 1–21.

by its very nature, implies a lack of certainty as to whether an offence has been committed.⁴⁷ The ICJ concluded that this threshold had been met, as the documents provided by Ukraine “contained sufficiently detailed allegations to give rise to an obligation (...) to undertake investigations”, and that Russia had not discharged this duty.⁴⁸

Moving on to Ukraine’s claims under the CERD, the Court dismissed the submissions related to alleged acts of racial discrimination consisting in disappearances, murders, abductions and torture of Crimean Tatars and ethnic Ukrainians,⁴⁹ discriminatory law enforcement measures, the ban on the Tatar representative institution Mejlis,⁵⁰ restrictions on culturally significant gatherings⁵¹ and media organisations⁵² and other forms of oppression.⁵³ The main reason these claims were considered unfounded lies in the Court’s rather restrictive interpretation of the term “racial discrimination” under Art. 1(1) CERD. Even though Ukraine argued that this provision prohibits both actions with a discriminatory purpose and effects-based (indirect) discrimination of seemingly neutral measures that have a disproportionate prejudicial effect on a protected group,⁵⁴ the ICJ took the stance that for a measure “which is neutral on its face” to constitute discrimination, its effects should demonstrate “that it is ‘based on’ a prohibited ground.”⁵⁵ As noted by Escobar, this notion departed from the interpretations adopted by the treaty monitoring body under the CERD: the CERD Committee.⁵⁶ The Court set a high and somewhat contradictory bar, as it required a subjective element, akin to an “*intent*” to discriminate on a prohibited ground, to be established even in cases of alleged effects-based discrimination. Moreover, it sufficed for the ICJ to find that the “disparate adverse effect” *could* “be explained in a way that does not relate to the prohibited grounds” to dismiss the claims altogether,⁵⁷ and the burden to

⁴⁷ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 103.

⁴⁸ *Ibidem*, paras. 107, 110–111.

⁴⁹ *Ibidem*, paras. 201–221.

⁵⁰ *Ibidem*, paras. 252–275.

⁵¹ *Ibidem*, paras. 289–306.

⁵² *Ibidem*, paras. 307–323.

⁵³ *Ibidem*, paras. 324–337, 364–368.

⁵⁴ *Ibidem*, para. 188, G.G. Escobar, *ICJ’s Judgment in Ukraine v. Russia regarding CERD’s Scope of Racial Discrimination: ICJ’s Approach to CERD Committee’s Views*, EJIL: Talk!, 29 February 2024, available at: <https://tinyurl.com/ykjd9m> (accessed 30 August 2024).

⁵⁵ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 196.

⁵⁶ Escobar, *supra* note 54.

⁵⁷ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 217, 238.

establish that the measures were based on ethnic origin was entirely on Ukraine.⁵⁸ For instance, the Court attributed the ban on the Mejlis to considerations related to the political activities of its leaders rather than their ethnicity⁵⁹ – an approach that was disputed by Judge Charlesworth.⁶⁰

The only submission upheld was that Russia, by the way in which it implemented its educational system in Crimea after 2014 with regard to school instruction in Ukrainian, violated its obligations under Art. 2(1)(a) CERD to ensure that all public authorities and institutions abstain from discriminatory practices and under Art. 5(e)(v) to guarantee the right of everyone, without distinction as to race, colour or national or ethnic origin, to equality before the law in the enjoyment of the right to education and training.⁶¹ The ICJ explained that the latter provision does not include a general right to school education in a minority language, but may “under certain circumstances, set limits to changes in the provision of school education in the language of a (...) minority.”⁶² Considering the steep decline in the number of students instructed in Ukrainian between 2014 and 2016, the Court found that this trend could not be solely attributed to the departure of many ethnic Ukrainians from Crimea following its annexation.⁶³ Ukraine asserted that parents and children had been subjected to harassment and manipulative conduct so they would opt to study in Russian.⁶⁴ The ICJ did not find these allegations sufficiently established, but nonetheless concluded that Russia had not demonstrated that it had complied with its duty to protect the rights of ethnic Ukrainians from a disparate adverse effect by taking measures to mitigate the pressure resulting from the exceptional “reorientation of the Crimean educational system towards Russia.”⁶⁵

Serious concern has been expressed in relation to the remedies determined by the ICJ for the ICSFT and CERD violations.⁶⁶ Under both conventions, Ukraine

⁵⁸ See e.g. *ibidem*, para. 241: “Ukraine has not presented convincing evidence to establish that persons of Crimean Tatar origin were subjected to such law enforcement measures based on their ethnic origin”; para. 267: “However, for the ban to amount to racial discrimination, Ukraine would also need to demonstrate that this exclusion was based on the ethnic origin of the Crimean Tatars as a group or of the members of the Mejlis, and that it had the purpose or effect of nullifying or impairing the enjoyment of their rights”; para. 272: “The Court thus concludes that Ukraine has not provided convincing evidence that the ban of the Mejlis was based on the ethnic origin of its members, rather than its political positions and activities.”

⁵⁹ *Ibidem*, paras. 270–271.

⁶⁰ *Ibidem*, para. 32.

⁶¹ *Ibidem*, para. 370.

⁶² *Ibidem*, para. 354.

⁶³ *Ibidem*, paras. 359–361.

⁶⁴ *Ibidem*, para. 362.

⁶⁵ *Ibidem*, para. 363.

⁶⁶ D. Desierto, *Human Rights Reparations and Fact-Finding Quandaries in the 2024 ICJ Judgments in Ukraine v. Russian Federation*, EJIL: Talk!, 11 March 2024, available at: <https://tinyurl.com/5ayd8kss> (accessed 30 August 2024).

had requested the Court to order not only cessation, but also full reparation.⁶⁷ These requests were not granted. The Court noted that Russia continues to be required “to undertake investigations into sufficiently substantiated allegations of (...) terrorism financing”⁶⁸ and to ensure that the system of instruction gives due regard to the needs of ethnic Ukrainians,⁶⁹ but that it is not “necessary or appropriate to order any other remedy.”⁷⁰ Nor did the Court provide any reasoning for these conclusions. We agree with Desierto that what she deems a “significant restraint and judicial parsimony when it comes to articulating the legal consequences of a State’s international responsibility for violations of international human rights treaty law” casts doubt upon the effectiveness of this adjudication for the victims.⁷¹

A final cause for disagreement amongst the judges was the question of whether Russia, by launching a war against Ukraine in February 2022, breached the requirement of the order on provisional measures to refrain from actions which might aggravate or extend the dispute before the Court or make it more difficult to resolve.⁷² The ICJ held that Russia’s actions amounted to a breach, as they “severely undermined the basis for mutual trust and co-operation and thus made the dispute more difficult to resolve.”⁷³ The Court’s reasoning on this point was succinct. It was elaborated on by Judge Charlesworth in a separate opinion and by Judge Sebutinde in a dissenting opinion, who explained that “conduct that is incompatible with the obligation to use peaceful means for the settlement of disputes is in principle likely to aggravate a dispute pending before the Court”⁷⁴ and that Russia’s conduct also impaired the gathering of evidence and the preparation by Ukraine of its case before the ICJ.⁷⁵

⁶⁷ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Application Instituting Proceedings, ICJ Rep 2017, paras. 136(f) and (l) and para. 138(h) in conjunction with para. 138(k).

⁶⁸ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 149.

⁶⁹ *Ibidem*, para. 373.

⁷⁰ *Ibidem*, paras. 150, 374.

⁷¹ Desierto, *supra* note 66.

⁷² ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Order, 19 April 2017, ICJ Rep 2017, para. 106(2).

⁷³ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 397–398.

⁷⁴ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Separate Opinion of Judge Charlesworth, ICJ Rep 2024, paras. 37, 39.

⁷⁵ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Dissenting Opinion of Judge Sebutinde, ICJ Rep 2024, para. 36.

However, five judges voted against this finding,⁷⁶ and three expressed their disagreement with it in two declarations and one separate opinion.⁷⁷ Their main argument is that the recognition of the Donetsk and the Luhansk People's Republics and the launching of military action in Eastern Ukraine are matters that fall outside the scope of the dispute before the ICJ, which concerns alleged violations of obligations under CERD in Crimea.⁷⁸

While we concur with Marchuk that the preliminary ruling decision in *Ukraine v. Russian Federation I* represented “the biggest defeat for Russia thus far”,⁷⁹ the Court fell short of delivering a consequential judgment on the merits, opting instead for a conservative approach to interpreting the two conventions. We can expect the practical implications of this judgment to be limited due to its narrow subject matter, the lack of reparations awarded, the absence of an effective enforcement mechanism and the ongoing war in Ukraine. Our assessment remains that the strict legal focus of Ukraine's application on the CERD and ICSFT, whilst necessary to establish *any* jurisdiction for the ICJ, significantly limited the potential of the merits judgment to provide a sufficient legal remedy for the underlying conflict.⁸⁰ It is in this context of the “disaggregation”⁸¹ of the legal action and the broader dispute that Ukraine's second case, *Allegations of Genocide*, assumes greater importance.

1.3. *Allegations of Genocide*

On 26 February 2022, Ukraine initiated a second set of legal proceedings against Russia in front of the ICJ, alleging a dispute concerning the interpretation and application of the 1948 Genocide Convention.⁸² This application specifically targets Russia's claims of genocide in Luhansk and Donetsk, arguing that these assertions underpinning Russia's recognition of the two breakaway republics and the subsequent military actions against Ukraine are not justified. Asserting that no such genocide occurred, Ukraine essentially seeks to prove that Russia lacked legal grounds for its invasion. Jurisdiction is sought under Art. IX of the Genocide Convention, which

⁷⁶ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 404(6).

⁷⁷ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, Separate Opinion, Partly Concurring and Partly Dissenting, of Judge Ad Hoc Tuzmukhamedov; Declaration of Judge Yusuf; Declaration of Judge Bennouna, ICJ Rep 2024.

⁷⁸ *Ibidem*, paras. 6, 11, 5.

⁷⁹ Marchuk, *supra* note 24, p. 340.

⁸⁰ Marin, Manova, *supra* note 9, p. 388.

⁸¹ A concept introduced in L. Hill-Cawthorne, *International Litigation and the Disaggregation of Disputes: Ukraine/Russia as a Case Study*, 68(4) International & Comparative Law Quarterly 779 (2019).

⁸² ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Application Instituting Proceedings, 27 February 2022, ICJ Rep 2022.

became the first point of contention during the preliminary proceedings and the public hearings in September 2023. The involvement of 32 State interveners, all submitting arguments in favour of Ukraine, likely reinforced the political and legal appeal of the Ukrainian side.⁸³ The Court adopted a careful approach in resolving the procedural complexities created by this unprecedented number of interveners, thus indicating that it is taking the case seriously.⁸⁴

Alongside its application, Ukraine sought provisional measures under Art. 41 of the ICJ Statute and relevant Rules of Court, aiming to prevent irreparable harm to its rights and to mitigate the escalation of the dispute, with such requests being prioritised in the Court's agenda.⁸⁵ Moreover, under Art. 74(4) of the Rules of Court, Ukraine requested the Court's intervention, urging Russia to immediately halt all military activities on its territory.⁸⁶ On 16 March 2023, the Court issued these provisional measures, affirming *prima facie* jurisdiction, and mandated Russia to suspend all military operations, including those involving military or irregular armed units under its direction or support.⁸⁷ The decision, taken by a vote of 13 to 2, received dissent only from Russian Judge Gevorgian, then Vice-President of the Court, and Chinese Judge Xue.⁸⁸ Despite Russia's ongoing "special military operation", the Court order has been perceived as a significant message, underscoring the gravity of the allegations and marking a notable victory for Ukraine.⁸⁹ The deliberate assertiveness of the measures has also been viewed as potentially encouraging similar future applications.⁹⁰

⁸³ Though it has also been argued that subtle nuances and differences in generally comparable interpretations could potentially also be detrimental to the applicant; see K. Wigard, O. Pomson, J. McIntyre, *Keeping Score: An Empirical Analysis of the Interventions in Ukraine v Russia*, 14(3) *Journal of International Dispute Settlement* 305 (2023), pp. 326–327.

⁸⁴ J. McIntyre, K. Wigard, O. Pomson, *Goliath v. David (and Friends): A Recap of the Preliminary Objections Hearings in Ukraine v. Russia*, EJIL: Talk!, 2 October 2023, available at: <https://tinyurl.com/3nszxrz6> (accessed 30 August 2024).

⁸⁵ ICJ, *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 submitted by Ukraine, 27 February 2022, ICJ Rep 2022.

⁸⁶ *Ibidem*, paras. 1, 4.

⁸⁷ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, 16 March 2022, ICJ Rep 2022, paras. 46–49, 81.

⁸⁸ *Ibidem*, para. 86.

⁸⁹ For commentaries arguing along those lines, see A. Sanger, *False Claims of Genocide Have Real Effects: ICJ Indicates Provisional Measures in Ukraine's Proceedings Against Russia*, 81(2) *The Cambridge Law Journal* 217 (2022), pp. 217–221; M. Milanovic, *Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, EJIL: Talk!, 16 March 2022, available at: <https://tinyurl.com/4vbwushy> (accessed 30 August 2024).

⁹⁰ A. Kulick, *Provisional Measures after Ukraine v Russia (2022)*, 13(2) *Journal of International Dispute Settlement* 323 (2022), pp. 336–337.

At the stage of preliminary objections, the case delved into complex legal territory, exploring the interplay between treaty obligations and overarching international law principles, such as good faith and the abuse of rights.⁹¹ Russia raised several such objections, notably disputing the existence of a legal dispute under the Genocide Convention and questioning the Court's jurisdiction under Art. IX thereof.⁹² According to the respondent, any dispute between the two parties "is either non-existent or does not concern the prevention and punishment of genocide."⁹³

On 2 February 2024, the ICJ ruled on the preliminary objections.⁹⁴ It dismissed Russia's first objection that no dispute existed between the parties regarding alleged violations of the Genocide Convention.⁹⁵ The Court adopted an unusual approach, taking upon itself to distinguish between two "distinct" aspects of Ukraine's position and examining them separately, even though the application made no such demarcation. The first aspect consisted in the assertion that Ukraine did not commit genocide; the second was the allegation that the Russian Federation itself breached the Genocide Convention by falsely accusing Ukraine of genocide and invading its territory on that basis.⁹⁶ This bifurcation of the applicant's submissions proved crucial for the outcome in the case. By 13 votes to 3, the Court deemed as admissible and falling within its jurisdiction on the basis of Art. IX of the Genocide Convention only submission (b) in para. 178 of the Memorial of Ukraine⁹⁷ – the "reverse compliance" claim,⁹⁸ by which it sought to establish the lack of any "credible evidence that Ukraine is responsible for committing genocide (...) in the Donetsk and Luhansk oblasts."⁹⁹ In doing so, the ICJ rejected the "more procedural" preliminary objections raised by Russia (alleged introduction of new claims, lack of practical effect of the judgment, inadmissibility of a reverse compliance request and abuse of process).¹⁰⁰ However, by 12 votes to 4, the Court concluded that Ukraine's more significant claims concerning the use of

⁹¹ McIntyre, Wigard, Pomson, *supra* note 84.

⁹² ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, 1 October 2022, ICJ Rep 2022.

⁹³ *Ibidem*, para. 138. The reasoning is outlined in section III of the memorial.

⁹⁴ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, 2 February 2024, ICJ Rep 2024.

⁹⁵ *Ibidem*, para. 51.

⁹⁶ *Ibidem*, paras. 53–57.

⁹⁷ *Ibidem*, para. 151.

⁹⁸ M. Milanovic, *ICJ Delivers Preliminary Objections Judgment in the Ukraine v. Russia Genocide Case, Ukraine Loses on the Most Important Aspects*, EJIL: Talk!, 2 February 2024, available at: <https://tinyurl.com/2r43se2a> (accessed 30 August 2024).

⁹⁹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Memorial Submitted by Ukraine, 1 July 2022, ICJ Rep 2022, para. 178(b).

¹⁰⁰ Milanovic, *supra* note 98; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 67–72, 77–80, 92–109, 113–118.

force and Russia's recognition of the independence of the Donetsk and Luhansk People's Republics fell outside the Genocide Convention's scope.¹⁰¹ Marchuk and Wanigasuriya were proven right in their predictions that "the ICJ is likely to limit itself to (...) ascertaining whether genocide has occurred in Donbas."¹⁰²

The judgment was met with disappointment and perceived as a loss for Ukraine, not least because it stands in sharp contrast to the order on the provisional measures.¹⁰³ Even the large number of state interventions in support of Ukraine's submissions did not persuade the ICJ that it was competent to adjudicate on the merits. Indeed, as Weller notes, this ruling provides Russia with the rhetorical means to argue that the provisional measures order which required the immediate suspension of its military operations¹⁰⁴ and initially looked like "a spectacular success of an innovative use of the Genocide Convention" was "not in fact based in a title to jurisdiction enjoyed by the Court."¹⁰⁵ Desierto emphasised the lack of legal reasoning provided in the judgment as to why Ukraine's interrelated claims should be entertained separately.¹⁰⁶ The Court was also criticised for reading the application in such a way as to *de facto* put Ukraine rather than Russia "in the dock".¹⁰⁷ If Ukraine further pursues the case, the merits phase will revolve around the question of whether *it* breached the Genocide Convention, thus turning it into a respondent. At best, Ukraine could obtain a negative declaratory judgment to the effect that it has not violated its obligations. Concern was also voiced that, by dramatically limiting the scope of the questions to be examined at the merits stage, the ICJ deprived Ukraine of the opportunity – even if it wins the case – to attempt to acquire as reparation a "confiscation and transfer of Russian state assets" currently frozen by third states.¹⁰⁸

Should the case proceed, the distribution of the burden of proof and the applicable evidentiary standard will affect the findings on the substance. The preliminary objections judgment places the parties in an interesting position, raising the question of whether it would be for the applicant, Ukraine, to establish the negative fact that it did not commit genocide, or rather for the respondent, Russia, to prove that the allegations it made outside of the context of the proceedings are well-founded. The Court would

¹⁰¹ *Ibidem*, para. 151.

¹⁰² I. Marchuk, A. Wanigasuriya, *Beyond the False Claim of Genocide: Preliminary Reflections on Ukraine's Prospects in Its Pursuit of Justice at the ICJ*, 25(3–4) Journal of Genocide Research 256 (2022), pp. 256–278.

¹⁰³ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, ICJ Rep 2022, paras. 46–49.

¹⁰⁴ *Ibidem*, para. 86(1).

¹⁰⁵ M. Weller, *Time for Another Ukrainian Genocide Case?*, EJIL: Talk!, 6 February 2024, available at: <https://www.ejiltalk.org/time-for-another-ukrainian-genocide-case/> (accessed 30 August 2024).

¹⁰⁶ Desierto, *supra* note 66.

¹⁰⁷ Weller, *supra* note 105.

¹⁰⁸ Milanovic, *supra* note 98.

have to navigate these issues in a manner that does not violate the general principle of *onus probandi incumbit actori*, that “it is for the party alleging a fact to demonstrate its existence”.¹⁰⁹ Judge Tomka drew attention to this question in his Declaration, stating that said principle “is not an absolute one applicable in all circumstances”, and that the Court has previously shown flexibility and at times even “reversed or partly reversed the burden of proof” “when faced with a submission or claim concerning a negative fact.”¹¹⁰ As for the standard of proof, given the gravity of the allegations, it is safe to assume that the ICJ would set the bar for finding a violation very high,¹¹¹ as in the *Bosnian genocide case (Bosnia and Herzegovina v. Serbia and Montenegro)*, where it required “evidence that is fully conclusive” with regards to both the existence and the attribution of the acts.¹¹² It is also improbable that Russia would be able to substantiate its allegations.

Despite the aforementioned legitimate concerns, our assessment of the judgment is nuanced. In dealing with the so-called “second aspect” of Ukraine’s submission, the Court laid out some persuasive judicial reasoning. The central point of contention was whether the ICJ had jurisdiction to entertain Ukraine’s allegations that Russia’s use of force and its recognition of the secession of Donetsk and Luhansk violated Arts I and IV of the Genocide Convention. These provisions create obligations for the States Parties to prevent and punish genocide (Art. I) and, specifically, to punish the perpetrators of the acts enumerated in Art. III (Art. IV).¹¹³ Ukraine’s submissions were designed to establish jurisdiction by fitting “a claim within a compromissory clause”,¹¹⁴ namely, Art. IX of the Genocide Convention in this case. This provision, broadly construed by Ukraine,¹¹⁵ allows the parties to the Genocide Convention to bring to the ICJ any dispute relating to its interpretation, application or fulfilment.¹¹⁶ The resourcefulness and originality of the application lay in the

¹⁰⁹ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 168. The same principle is also referred to in ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, 20 April 2010, ICJ Rep 2010 (I), p. 71, para. 163.

¹¹⁰ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, Declaration of Judge Tomka, ICJ Rep 2024, paras. 15–17.

¹¹¹ Weller, *supra* note 105.

¹¹² ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, 26 February 2007, ICJ Rep 2007, para. 209; *see also* ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 81.

¹¹³ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, Arts. I and IV.

¹¹⁴ Sanger, *supra* note 89, p. 219.

¹¹⁵ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Written statement of Ukraine on the preliminary objections raised by the Russian Federation, 3 February 2023, ICJ Rep 2023, paras. 91–95.

¹¹⁶ Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention) (adopted 9 December 1948, entered into force 12 January 1951), 78 UNTS 277, Art. IX.

fact that it aimed “to avoid the Court’s jurisdictional constraints” by affirming that Russia had violated the Convention *not* by committing genocide itself, but rather by waging war on Ukraine *based on unfounded charges of genocide*.¹¹⁷ Russia, for its part, argued that actions taken to prevent or punish genocide do not have to comply with other rules of international law.¹¹⁸ It stated that Ukraine purported to expand the subject matter of the Genocide Convention “by incorporating into its scope of application an unlimited number of international obligations arising under the UN Charter and customary international law”.¹¹⁹ In dissents to the order on provisional measures, Judge Gevorgian had also taken issue with the notion that “*any* purportedly illegal act (...) could be shoehorned into a random treaty”,¹²⁰ and Judge Bennouna likewise opposed this interpretation despite voting with the majority.¹²¹

The Court examined the question of whether Russia’s alleged actions and omissions, if established, would constitute violations of the provisions invoked by Ukraine.¹²² It recalled that the applicant does not assert that Russia “refrained from taking any measure to prevent a genocide or to punish persons who had committed such.”¹²³ Ukraine and some of the intervening States relied on the Court’s dictum in the *Bosnian genocide* case, where it had interpreted Art. I of the Genocide Convention.¹²⁴ In that case, the ICJ had clarified that the obligation to prevent genocide “is one of conduct and not one of result”, meaning that a State Party discharges the obligation if it employs all means of prevention reasonably available to it.¹²⁵ A State’s “capacity to influence effectively” the commission of genocide depends, *inter alia*, on legal criteria, since “every State may only act within the limits permitted by international law.”¹²⁶ According to the ICJ, rather than implying that a breach of the prohibition of the use of force based on false allegations of genocide would violate the duty to prevent genocide, the *Bosnian Genocide* dictum merely signifies that said

¹¹⁷ Milanovic, *supra* note 98.

¹¹⁸ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, ICJ Rep 2022, paras. 170–215.

¹¹⁹ *Ibidem*, para. 172.

¹²⁰ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, Declaration of Vice-President Gevorgian, ICJ Rep 2022, para. 7 (original emphasis).

¹²¹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Order, Declaration of Judge Bennouna, ICJ Rep 2022, paras. 5–6, 11.

¹²² ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, paras. 136, 139.

¹²³ *Ibidem*, para. 140.

¹²⁴ *Ibidem*, para. 145; ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Memorial Submitted by Ukraine, ICJ Rep 2022, paras. 94–96.

¹²⁵ ICJ, *Application of the International Convention for the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, ICJ Rep 2007, para. 430.

¹²⁶ *Ibidem*.

obligation neither requires a State “to act in disregard of other rules of international law”, nor could serve as a justification for such behaviour.¹²⁷ The Court maintained that, assuming Russia’s military campaign is illegal under international law, it would violate not the Genocide Convention but “the relevant rules of international law applicable to the recognition of States and the use of force.”¹²⁸ Accordingly, it ruled that Ukraine’s claims “fall outside the scope of the compromissory clause” and that it lacks the jurisdictional basis to examine them.¹²⁹

These findings crushed hopes that the ICJ would deliver a historic judgment on the merits condemning Russia’s invasion. Still, we have several reasons to believe that the prospects for Ukraine are not all that bleak, and that it is still worthwhile for it to continue the case. The Court’s granting of the provisional measures alone already counts as a strategic victory, having endowed Ukraine’s plea with the “rule of law imprimatur that an ICJ decision confers.”¹³⁰ Furthermore, by deeming its “reverse compliance claim” admissible, the Court granted the applicant with an important opportunity to establish once and for all the unfoundedness of Putin’s allegations of genocide. The symbolic value of such a finding should not be underestimated, since it would unequivocally deprive Russia, in the eyes of the international community, of the main justification for its invasion.¹³¹ As Weller puts it, this historic inference “will still be drawn”, albeit not by the ICJ.¹³²

It is also unclear whether it would have been preferable had the Court established its jurisdiction to entertain Ukraine’s submissions in their totality. The ICJ remains merely a *judicial* institution called upon to apply specific provisions of international law in a manner consistent with established principles of treaty interpretation, not to infinitely stretch them. The requirements of treaties should have the same meaning, whatever the factual background and the parties to a specific case, and no matter how high the political stakes may be. It is also pertinent to remember that the Genocide Convention has been rather popular lately, with three other high-profile genocide cases currently pending before the Court.¹³³ Ukraine’s interpretation that

¹²⁷ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 146.

¹²⁸ *Ibidem*.

¹²⁹ *Ibidem*, para. 147.

¹³⁰ Ramsden, *supra* note 8, p. 190.

¹³¹ For more on symbolism as a purpose of international litigation, see J. McIntyre, *Lyophilization and Lawfare in Ukraine v. Russia*, Australian and New Zealand Society of International Law, available at: <https://anzsilperspective.com/lyophilization-and-lawfare-in-ukraine-v-russia/> (accessed 30 August 2024).

¹³² Weller, *supra* note 105.

¹³³ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)*, Application instituting proceedings and Request for the indication of provisional measures, 29 December 2023, ICJ Rep 2023; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, Application instituting proceedings and Request for the indication of provisional measures, 11 November 2019, ICJ Rep 2019; ICJ, *Alleged Breaches*

the obligation to take the reasonably available steps to prevent genocide entails a prohibition of the use of force is indeed “creative”¹³⁴ – perhaps *too* creative. As Milanovic observed, the Ukrainian case was “non-obvious” as “there is no article in that treaty that clearly applies to false allegations of genocide or to uses of force based upon them.”¹³⁵ The Court’s strict reading of the provisions of the Genocide Convention and of its own previous case law seems logical even though it may also be deemed cautious, and caution is a sin that the Court is often criticised for.¹³⁶ By contrast, construing the Convention too broadly and without much apparent support in its wording, object and purpose so as to establish the jurisdiction to examine the Ukrainian case on the merits would have been risky. In the context of the ongoing war and the widespread denouncement of the Russian aggression, such a course of action could have threatened to undermine the long-term belief that international adjudication is unbiased and untainted by double standards.

In our view, rather than revealing an inaccuracy or a lack of courage from the ICJ in construing specific provisions of the Genocide Convention, the outcome in the case once again highlights a far more structural issue, namely that the Court’s capacity to provide judicial resolutions to international conflicts is gravely inhibited by its consensual jurisdiction – its “greatest weakness”.¹³⁷ Unlike national legal systems, where crimes are prosecuted regardless of the consent of the perpetrators, the international legal system does not currently feature any “jurisdictional equivalent” of substantive *jus cogens* norms and *erga omnes* obligations that do not need to be explicitly accepted by States to become binding on all of them. The judges themselves acknowledged the unfortunate discrepancy between the gravity of the dispute and the Court’s restricted capacity to intervene in it in the penultimate paragraph of the judgment, by underscoring the “fundamental distinction between the question of the acceptance by States of the Court’s jurisdiction and the conformity of their acts with international law.”¹³⁸ Regarding the application at hand, it appears that this is as close as Ukraine will ever get to obtaining a condemnation of Putin’s “special military operation” from the ICJ.

Nevertheless, other avenues are still available to it. To begin with, according to Bonafe, the remarkable third-party interventionism in the case demonstrates a way

of *Certain International Obligations in Respect of the Occupied Palestinian Territory (Nicaragua v. Germany)*, Application instituting proceedings and Request for the indication of provisional measures, 1 March 2024, ICJ Rep 2024.

¹³⁴ Milanovic, *supra* note 98.

¹³⁵ *Ibidem*.

¹³⁶ E.g. Marchuk, *supra* note 43.

¹³⁷ Marin, Manova, *supra* note 9, p. 387.

¹³⁸ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Judgment, ICJ Rep 2024, para. 150.

in which the international community could act united (albeit in a non-institutionalised form) in response to flagrant violations of *erga omnes* obligations,¹³⁹ thus compensating to a certain extent for the jurisdictional shortcomings of international courts. Secondly, as Weller argues, Ukraine may deem it worthwhile to bring a new application before the ICJ, alleging that genocide was committed *by Russia* – a plea that would be far more likely to make it to the merits phase.¹⁴⁰ Moreover, the ECtHR will also adjudicate on possible violations of the right to life under the European Convention on Human Rights (ECHR) allegedly committed by the Russian Federation in the joined case *Ukraine and the Netherlands v. Russia*, which features 31 interventions.¹⁴¹ These applications concern Russian actions committed both prior to and following the outbreak of the war, but before 16 September 2022, the date on which Russia ceased to be a party to the ECHR.

In the context of these several complex, protracted ICJ proceedings involving the Russian Federation in the last 15 years, Russia's conduct and stance towards the Court have been continuously changing. For this reason, we now turn to the question of compliance (or lack thereof) and the theory of rhetorical adaptation.

2. ICJ PROCEEDINGS IN THE CONTEXT OF RUSSIA'S STRATEGY OF "RHETORICAL ADAPTATION"

If we accept that Ukraine and Georgia, through their ICJ applications, are engaging in strategic litigation or even lawfare,¹⁴² it seems appropriate to adopt a strategic lens in assessing Russia's response to these proceedings. The concept of States participating in "sovereignty games" is well-established theoretically; more recent, however, is the idea that the body of international law itself evolves and adapts as States strive to regain sovereign manoeuvrability amidst the increasing legalisation of international relations.¹⁴³ In the section that follows, we will employ this framework to explore how the ICJ cases are shaping Russia's behaviour, and vice versa. This perspective allows us to transcend the somewhat stale binary of compliance

¹³⁹ Bonafe, *supra* note 1, pp. 27–29.

¹⁴⁰ Weller, *supra* note 105.

¹⁴¹ ECtHR, *Ukraine and the Netherlands v. Russia* (App. No. 8019/16, 43800/14, 28525/20 and 11055/22), 17 February 2023; ECtHR, *European Court joins inter-State case concerning Russian military operations in Ukraine to inter-State case concerning eastern Ukraine and downing of flight MH17*, Press release, 20 February 2023, available at: <https://hudoc.echr.coe.int/eng-press#%7B%22itemid%22:%5B%222003-7575325-10413252%22%5D%7D> (accessed 30 August 2024).

¹⁴² Marchuk, *supra* note 22; see also J.I. Goldenziel, *An Alternative to Zombicing: Lawfare Between Russia and Ukraine and the Future of International Law*, 108(1) Cornell Law Review 1 (2022).

¹⁴³ T. Aalberts, T. Gammeltoft-Hansen, *Sovereignty Games, International Law and Politics*, in: T. Aalberts, T. Gammeltoft-Hansen (eds.), *The Changing Practices of International Law*, Cambridge University Press, Cambridge: 2018, p. 28.

and non-compliance, delving into the more nuanced understanding of “*what* compliance means in the first place.”¹⁴⁴

The appropriate starting point for our assessment is the first Russian case before the ICJ, *Georgia v. Russian Federation*. During the 2008 conflict and prior to the proceedings, Russia notably invoked emerging legal concepts such as the Responsibility to Protect (R2P) and remedial secession to justify its military actions and recognition of the breakaway republics of South Ossetia and Abkhazia.¹⁴⁵ As Mälksoo suggests, the conflict and strategic deployment of legal arguments might be seen as a response to Kosovo, with Russia seeking to establish “symmetry with the West” in its approach to international law.¹⁴⁶ This perspective also informs Russia’s approach to the subsequent ICJ proceedings, where its robust, multi-layered challenge to the Court’s jurisdiction, whilst certainly a valid legal strategy, reflected a “deeply-rooted (...) unwillingness to sacrifice its sovereignty by submitting itself to judicial review”, as we have previously argued.¹⁴⁷ In its decision on the preliminary objections, the Court then surprisingly adopted a formalist interpretation, particularly concerning the requirement of pursuing dispute settlement under the CERD,¹⁴⁸ leading some to conclude that it was avoiding politically charged disputes.¹⁴⁹ Although *Ukraine v. Russian Federation I* demonstrated that this was not the case, the initial case set the tone for later disputes, with Okowa describing it as the “swift and dramatic end to one of the most bizarre disputes to have come before the International Court.”¹⁵⁰

Moving on to *Ukraine v. Russian Federation I*, Russia sought to replicate its previous success of removing the complaint through preliminary objections. In concrete terms, this meant that it submitted a memorial of ten chapters and almost 250 pages (excluding appendices).¹⁵¹ After the Court dismissed these objections to allow the case to proceed to the merits stage, Russia delivered two substantial counter-memorials, one for each of the instruments at stake, setting out legal arguments that encompassed 186 pages dealing with the ICSFT¹⁵² and another 157 pages for the

¹⁴⁴ *Ibidem*, p. 34 (original emphasis).

¹⁴⁵ Marchuk, *supra* note 22, p. 69. See also R. Allison, *The Russian Case for Military Intervention in Georgia: International Law, Norms and Political Calculation*, 18(2) European Security 173 (2009).

¹⁴⁶ L. Mälksoo, *Russian Approaches to International Law*, Oxford University Press, Oxford: 2015, p. 180.

¹⁴⁷ Marin, Manova, *supra* note 9, p. 382.

¹⁴⁸ Okowa, *supra* note 16, p. 749.

¹⁴⁹ Proulx, *supra* note 21, p. 938. See also B.I. Bonafé, *Establishing the Existence of a Dispute Before the International Court of Justice: Drawbacks and Implications*, 45 Questions of International Law 3 (2017), pp. 26–27.

¹⁵⁰ Okowa, *supra* note 16, p. 739.

¹⁵¹ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Preliminary objections submitted by the Russian Federation, 12 September 2018, ICJ Rep 2018.

¹⁵² ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Counter-Memorial of the Russian Federation on the case concerning the Application of the International Convention for the Suppression of the Financing of Terrorism, 9 April 2021, ICJ Rep 2021.

CERD (both excluding appendices).¹⁵³ It thus remained significantly invested in the proceedings, dispelling worries that its active involvement may come to an end at the merits phase. As others have noted, the Court may have opted to limit its provisional measures to the CERD and to avoid prematurely linking Russia to terrorist activities precisely “out of a concern to keep Russia engaged in the proceedings.”¹⁵⁴ Overall, it cannot be claimed that the case has had any significant impact on Russia’s conduct outside the proceedings: after all, only a few months passed between the submission of the counter-memorials and the start of overt, full-scale hostilities.

In *Allegations of Genocide*, finally, Russia initially declined to appear in the oral hearing related to the provisional measures in March 2022. If the initial strategy was therefore one of “partial engagement”,¹⁵⁵ Russia soon decided to change course, possibly due to the pressure created by the sheer number of States filing Art. 63 declarations with the intent to intervene.¹⁵⁶ Ramsden observes that at this point, Russia has not used the platform provided by the case to expand upon its narrative, for example with regards to the self-defence argument that it has officially marshalled to justify its military operation.¹⁵⁷ This, of course, could now change at the merits phase. Moreover, even if Russia has offered “the barest of justifications”¹⁵⁸ for the actual legal basis of its use of force, it once again delivered a thorough challenge to the Court’s jurisdiction, with the memorial including six objections that are set out over 123 pages.¹⁵⁹ With the case now partially proceeding to the merits stage, it will be intriguing to observe what course of action Russia will opt for. As stated, at this phase the roles of applicant and respondent will be somewhat reversed, and the Russian Federation will have to decide whether to provide evidence in support of its allegations of genocide committed by Ukraine.

How does Russia’s approach to these three cases align with its overall foreign policy? Whilst a detailed review of the extensive literature on Russia’s specific approach to international law is beyond the scope of this article, it is crucial to note that this approach is historically influenced by the legacy of empire and authoritarian rule, a complicated relationship with Europe and the West and the “civilizational idea” of

¹⁵³ ICJ, *Application of 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 (Ukraine v. Russian Federation)*, Counter-Memorial of the Russian Federation on the case concerning the Application of the International Convention on the Elimination of all Forms of Racial Discrimination, 9 August 2021, ICJ Rep 2021.

¹⁵⁴ Ramsden, *supra* note 8, p. 196.

¹⁵⁵ *Ibidem*, p. 194.

¹⁵⁶ Marchuk, Wanigasuriya, *supra* note 102, p. 4.

¹⁵⁷ Ramsden, *supra* note 8, p. 195.

¹⁵⁸ *Ibidem*.

¹⁵⁹ ICJ, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, Preliminary objections of the Russian Federation, ICJ Rep 2022.

a Russian world (*russkyi mir*).¹⁶⁰ Scholars often emphasise Russia's strategic and even instrumental use of international law, particularly regarding the Commonwealth of Independent States region.¹⁶¹ As Allison points out, this approach is less about attempting to modify international law, which would seem futile from a foreign policy perspective, and more about the selective (and often inconsistent) invocation of existing norms.¹⁶² Building on this, other commentators have argued – specifically with regard to the Russia/Ukraine conflict – that rather than making “a legal argument that would find widespread acceptance”, Russia uses international law “to articulate a position that [spells] out Russia's motives, [warn] Western states to respect Russia's expanded borders, and [clarify] conditions for a potential end to hostilities.”¹⁶³ The fact that these legal claims do not withstand rigorous legal scrutiny, as eminent scholars have argued,¹⁶⁴ is not particularly relevant in such a context.

Against this background, the concept we find most useful to describe Russia's handling of the three cases before the ICJ is Dixon's idea of “rhetorical adaptation”. Explicitly mentioning Russia's reliance on humanitarian intervention as a justification for its invasion of Georgia as one example, Dixon argues that States which adopt rhetorical adaptation “draw on a norm's content to resist pressures for compliance or minimize perceptions of violation.”¹⁶⁵ The same can also be said about the more recent allegations of genocide that were put forward as motivation for the Russian offensive in Ukraine. In the ICJ proceedings, we can identify two types of rhetorical adaptations as outlined by Dixon. Firstly, Russia has engaged in “norm avoidance” as it applies the various instruments, insisting that its “motivations or actions, or the outcomes of its actions, fall outside the parameters of a given norm.”¹⁶⁶ Russia argues that neither the CERD, nor the ICSFT, nor the Genocide Convention apply to the disputes at hand, which rather concern norms that Georgia or Ukraine cannot invoke before the ICJ, such as the right to self-defence, self-determination and remedial secession. Secondly, Russia has adopted a norm-signalling strategy, invoking, for instance, the prohibition of genocide as an explanation for its actions,

¹⁶⁰ Mälksoo, *supra* note 146, pp. 3, 182.

¹⁶¹ E.g. *ibidem*; Marchuk, *supra* note 22, p. 89; R. Allison, *Russia, the West, and Military Intervention*, Oxford University Press, Oxford: 2013, p. 166. Note that it has been argued that this instrumentalism can be seen a reaction to a similar approach taken by Western States – see C. Marxsen, *International Law in Crisis: Russia's Struggle for Recognition*, 58 German Yearbook of International Law 11 (2015).

¹⁶² R. Allison, *Russian Revisionism, Legal Discourse and the “Rules-Based” International Order*, 72(6) Europe-Asia Studies 976 (2020).

¹⁶³ F. dos Reis, J. Grzybowski, *Moving “Red Lines”: The Russian–Ukrainian War and the Pragmatic (Mis-)Use of International Law*, Cambridge University Press, Cambridge: 2023, p. 12.

¹⁶⁴ E.g. E. Wilmschurst, *Ukraine: Debunking Russia's Legal Justifications*, Chatham House, 24 February 2022, available at: <https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications> (accessed 30 August 2024).

¹⁶⁵ Dixon, *supra* note 13, p. 83.

¹⁶⁶ *Ibidem*, p. 86.

thus “expressing support for values or practices that are part of a norm, while not changing relevant behaviors.”¹⁶⁷ Importantly, however, Russia’s strategy is not one of “norm interpretation” in the sense that it would seek to change these norms themselves, which is in line with the literature cited above. The strongest (as obvious) indicator of the lack of such an ambition is that Russia remains the respondent in all cases and that it takes “every chance to dispute the jurisdiction of international courts”, as we have pointed out in our previous work.¹⁶⁸

3. THE UNCERTAIN FUTURE RELATIONS BETWEEN THE ICJ AND RUSSIA

Considering recent developments, Russia’s relationship with the ICJ is clearly undergoing a phase of change. This shift is not solely due to the three recent cases, one of which is still pending. Notably, in November 2023, Judge Gevorgian lost his bid for re-election to the bench of the ICJ, marking the first time that Russia (or its predecessor, the Soviet Union) has not been represented at the Court.¹⁶⁹ Though there have been other instances where Russia has recently failed to secure seats in international organisations, either as a State or for its individual candidates, the loss of the ICJ seat represents a striking departure from “the unwritten rule and tradition that the permanent members of the Security Council should always, and necessarily, be represented on the bench of the ICJ.”¹⁷⁰ Not having a Russian judge in general, and Judge Gevorgian in particular, will mean that Russia’s positions are less represented in the ICJ in future. However, this does not affect the pending *Allegations of Genocide* case, as according to Art. 13(3) of the ICJ Statute, discharged members “shall finish any cases which they may have begun.”

This being said, given the current volatility of Russia’s legal strategy and geopolitical position, predicting how its relationship with the ICJ will evolve is challenging. On the one hand, Russia routinely challenges the Court’s jurisdiction and has so far not complied with the provisional measures ordered by it – most blatantly in *Allegations of Genocide*, where the Court required no less than the immediate suspension of the military operations commenced on 24 February 2022 in Ukraine, yet the war is still ongoing over two and a half years after the delivery of the ICJ order.¹⁷¹ On

¹⁶⁷ *Ibidem*.

¹⁶⁸ Marin, Manova, *supra* note 9, p. 374.

¹⁶⁹ *In First, Russian Judge Loses UN World Court Seat*, The Moscow Times, 10 November 2023, available at: <https://tinyurl.com/3dt27v53> (accessed 30 August 2024).

¹⁷⁰ A. Zimmermann, *Five, Four, Three... and Counting Down? – The Outcome of the Recent Triennial Elections at the International Court of Justice*, EJIL: Talk!, 17 November 2023, available at: <https://tinyurl.com/msedv3xu> (accessed 30 August 2024).

¹⁷¹ Regarding the provisional measures of March 2022, Kremlin spokesperson Dmitry Peskov argued that Russia will not comply given that it has not consented to the proceedings – see S. Leeson, *Russia Rejects*

the other hand, Russia acknowledges the ICJ's institutional role as the world court and engages in legal proceedings, albeit reluctantly. This contrasts with its overtly hostile relationship with the ICC, evidenced by Russia issuing arrest warrants for ICC officials in retaliation for the arrest warrant issued by the Pre-Trial Chamber a few months earlier.¹⁷² In the case of the ECtHR, Russia ceased all collaboration with the Court following its decision in March 2022 to withdraw from the Council of Europe and to renounce the ECHR.¹⁷³ Whilst a pronouncement on the merits that is disadvantageous to Russia's cause in the *Allegations of Genocide* case could well lead to a similar disengagement with the ICJ, this is not an inevitable outcome. Russia's relationship with each of these international courts varies significantly, with the ICJ (and, by implication, the United Nations) being the hardest to abandon if, as we maintain, Russia intends to continue using international law language to justify its actions.

CONCLUSION

The three recent cases examined herein demonstrate that litigation before the ICJ, though frequently resorted to by States in relation to their conflicts with the Russian Federation, seems to be of limited practical impact and ineffective in restraining Russian aggression. At the merits phase of *Allegations of Genocide*, Ukraine would have to defend itself, rather than establish the violations perpetrated by Russia. If it brings a fresh case before the Court accusing Russia of genocide committed on its territory since the outbreak of the war, it would then be caught in another legalistic trap – having to meet an almost unattainably high evidentiary standard in order to prove that the Genocide Convention has been breached.¹⁷⁴ Meanwhile, other far more relevant violations – and easier ones to establish – such as the (il)legality of the use of force against Ukraine or large-scale human rights and humanitarian law breaches, will remain unaddressed for lack of jurisdictional basis. One nota-

International Court Ruling to Stop Invasion of Ukraine, EURActiv, 17 March 2022, available at: <https://www.euractiv.com/section/europe-s-east/news/russia-rejects-international-court-ruling-to-stop-invasion-of-ukraine> (accessed 30 August 2024).

¹⁷²C. Chiappa, *Russia Puts International Court's Top Leadership on Wanted List*, Politico Europe, 25 September 2023, available at: <https://tinyurl.com/utudn4b9> (accessed 30 August 2024).

¹⁷³For a timeline of the developments, see T. Lattmann, *From Partner to Pariah: The Changing Position of Russia in Terms of International Law*, in: B. Madlovics, B. Magyar (eds.), *Russia's Imperial Endeavor and its Geopolitical Consequences: The Russia–Ukraine War*, Central European University Press, Budapest: 2023, pp. 189–191.

¹⁷⁴B. Gehani, *Is the ICJ's Standard of Proof for Genocide Unattainable?*, Conflict Law Centre blog, 16 February 2024, available at: <https://rsilpak.org/2024/is-the-icjs-standard-of-proof-for-genocide-unattainable/> (accessed 30 August 2024).

ble exception is the pending ECtHR case *Ukraine and the Netherlands v. Russia*, though it only deals with facts and events occurring prior to 16 September 2022.

The most significant accomplishments of the Ukrainian litigation efforts before the ICJ so far seem to be the provisional measures ordered in both cases, and the two recent findings of violations of the CERD and the ICSFT – especially the one concerning access to Ukrainian-language education in Crimea. Nonetheless, Russia tends to disregard the Court's pronouncements, depriving them of practical impact. Thus, the importance of the legal proceedings manifests itself predominantly in the realm of the symbolic. Whilst this is not a negligible effect, it seems gravely disproportionate when juxtaposed with the scale of the ongoing human suffering. Even though it could be argued that nobody, least of all Ukraine, hoped that the ICJ cases would significantly influence the course of the conflict with Russia, the well-known structural deficiencies of the existing system of inter-state litigation that these proceedings have once again highlighted are still worth emphasising. They lie in the consensual jurisdiction of the Court and stem from a deeply rooted contradiction inherent to the system of public international law: its hybrid nature that, unlike national legal systems, does not clearly delineate between “private” law, where equal parties freely enter into mutual agreements, and “public” law that contains peremptory norms guaranteeing the very survival of the community and prosecutes and punishes breaches thereof regardless of individual consent. It is unsurprising that Russia makes strategic use of these shortcomings.