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Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention

Michael Ramsden
The Chinese University of Hong Kong

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Strategic Litigation in Wartime: Judging the Russian Invasion of Ukraine through the Genocide Convention

Michael Ramsden*

ABSTRACT

Ukraine's recent initiation of legal proceedings against Russia under the Genocide Convention is a prominent example of what has been termed "strategic litigation," denoting the bringing of a case with a goal to produce a wider impact beyond the courtroom. In Allegations of Genocide (Ukraine v. Russia), Ukraine sought a series of declarations from the International Court of Justice (ICJ) that Russia's decision to use force in Ukraine, and its ongoing operation, was unlawful, insofar as such a decision rested on the prevention of genocide. Given that the ICJ does not have the jurisdiction to determine whether Russia has committed aggression, Ukraine creatively argued that Russia has abused its rights under the Genocide Convention as a pretext for its unlawful use of force. It also sought and obtained provisional measures obliging Russia to suspend its military operations. The purpose of this Article is to evaluate the efficacy of this strategic litigation through an examination of the participants' goals, the court's strategic choices, and the discernible impact of the provisional measures' decision so far. In turn, this Article contributes to the scholarly literature on strategic litigation impact, the role of judicial institutions in ongoing armed conflicts. It also provides a basic structure for future researchers to consider the longer-term impact of this case in the resolution of the Russia-Ukraine conflict.

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* Associate Professor, Faculty of Law, The Chinese University of Hong Kong; Barrister Door Tenant, 25 Bedford Row, London (Michael.ramsden@cuhk.edu.hk). The research underpinning this article was supported by a Direct Grant awarded by The Chinese University of Hong Kong in 2020/2021 (grant no. 4059047).

I. INTRODUCTION

On February 24, 2022, Russia invaded Ukraine. What followed was a widespread condemnation from states and a variety of responses from international institutions. These included the imposition of sanctions, the adoption of resolutions condemning the aggression and human rights abuses, the creation of a UN commission of inquiry, the opening of an investigation by the Prosecutor of the International Criminal Court (ICC), and exclusion/suspension of Russian membership in the Council of Europe and Human Rights Council (HRC).¹ Alongside these responses, Ukraine initiated proceedings against Russia before the International Court of Justice (ICJ).² Given Russia's limited acceptance of the ICJ's jurisdiction over the major allegations of wrongdoing (i.e., aggression), Ukraine's application was limited to the contention that a dispute existed between the two states as to the interpretation and application of the Convention on the Prevention and Punishment of the Crime of Genocide (Genocide Convention).³ Given that Russia partially justified its intervention on the ground of genocide prevention, Ukraine sought a declaration from the ICJ that no such genocide had occurred in its territory, thereby removing any justification for Russian action, at least insofar as it was based upon the Genocide Convention.⁴ Ukraine also requested a decision from the Court ordering provisional measures so as to preserve its rights under the Genocide Convention pending an outcome on the merits of the case.⁵

This case—*Allegations of Genocide*—represents the latest episode of states strategically using the ICJ to advance objectives that go beyond the confines of the litigated issues.⁶ Former ICJ judge, Bruno Simma, has described this phenomenon as “juridical Nebenkriegsschauplatz,” entailing collateral action within a wider political-military dispute and brought with the aim of changing the course of international relations on this wider dispute.⁷ This has

1. As to these various legal avenues, see, e.g., Michael Ramsden, *Uniting for Peace: The Emergency Special Session on Ukraine*, HARV. INT'L L.J. (2022), <https://harvardilj.org/2022/04/uniting-for-peace-the-emergency-special-session-on-ukraine/> [<https://perma.cc/9MR9-Z2J2>] (archived Sept. 30, 2022).

2. Dispute Relating to Allegations of Genocide (Ukr. v. Russ.), Application Instituting Proceedings, 2022 I.C.J. (Feb. 26) [hereinafter Ukraine's Application].

3. Russia does not have a declaration accepting the ICJ's compulsory jurisdiction, nor is there a treaty vesting the Court with jurisdiction over aggression. See Statute of the International Court of Justice art. 36, June 26, 1945, 33 U.N.T.S. 993.

4. See Ukraine's Application, 2022 I.C.J. at 17, ¶ 30.

5. See generally Dispute Relating to Allegations of Genocide (Ukr. v. Russ.), Request for the Indication of Provisional Measures Submitted by Ukraine, 2022 I.C.J. (Feb. 27) [hereinafter Ukraine's Provisional Measures Application].

6. For an overview of this practice, see Michael Ramsden, *Strategic Litigation Before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights*, 33(2) EUR. J. INT'L L. 441 (2022).

7. Bruno Simma, *Human Rights Before the International Court of Justice: Community Interest Coming to Life?*, in THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 301, 310 (Christian Tams & James Sloan eds., 2013); see also Iryna Marchuk, *From warfare to “lawfare”: Increased Litigation and Rise*

involved the applicant bundling various aspects of the wider dispute into the legal regime within the ICJ's jurisdiction, with the intention that the litigation be used as leverage to support the applicant's interests in international relations as well as to supply information to catalyse institutional responses on the wider dispute.⁸ This practice of "strategic litigation"—brought to augment wider claims beyond the pleaded issues with a view to achieve structural change on these claims—has a long lineage in ICJ jurisprudence, including in the particular context of ongoing hostilities.⁹ Of particular relevance here, Russia itself has been on the receiving end of strategic litigations in the past given its acceptance of the Court's jurisdiction over disputes under the International Convention for the Suppression of the Financing of Terrorism (CSFT) and the Convention on the Elimination of Racial Discrimination (CERD).¹⁰ Accordingly, both Georgia and Ukraine invoked CERD (with Ukraine additionally invoking the CSFT) as a basis to challenge Russia's conduct as an occupying power within their territories.¹¹ As Ukraine returns to the ICJ to challenge Russian actions once more, this time under the Genocide Convention, to what extent can this legal challenge have an impact on the ongoing wider dispute? Drawing upon insights from previous strategic litigation campaigns and an analysis of the opposing parties' goals in *Allegations of Genocide*, this Article considers the scope of, and potential for, such litigation to deliver an impact beyond the specific issues before the Court.

The analysis in this Article is underpinned by an understanding of the participants as strategic actors who come with an appreciation of the wider context in which the litigation is contested. But what constitutes "strategy" and who are the "participants"? At its most generic, a strategy denotes a plan developed consciously and purposefully to achieve a specific result.¹² Studies into strategy formation thus focus on identifying the intended goals of the strategists in formulating their plan.¹³ In this regard, the seeking of interim remedies in the ICJ in particular has long featured as a litigation

of *Parallel Proceedings in International Courts*, in *THE FUTURE OF INTERNATIONAL COURTS* 217, 228–29 (Kent Avidan et al. eds., 2019).

8. See Simma, *supra* note 7, at 310; Marchuk, *supra* note 7, at 228–29.

9. As to the definition of strategic litigation as having wider objectives beyond the case, see generally Michael Ramsden & Kris Gledhill, *Defining Strategic Litigation*, 4 CIV. JUST. Q. 407 (2019).

10. See generally Application of the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (*Geor. v. Russ.*), Preliminary Objections, 2011 I.C.J. Rep. 70 (Apr. 1); 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 (*Ukr. v. Russ.*), Application Instituting Proceedings, 2017 I.C.J. (Jan. 16).

11. See generally Georgia v Russia Preliminary Objections Decision, 2011 I.C.J. Rep. 70; 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, *supra* note 10.

12. See Henry Mintzberg, *The Strategy Concept I: Five Ps for Strategy*, 30(1) CAL. MGMT. REV. 11, 11–12 (1987).

13. See *id.* See generally Anthony D'Amato, *Legal and Political Strategies of the South West Africa Litigation*, 4 L. TRANSITION Q. 8 (1967).

strategy of states. Aside from the limited purpose of preserving existing rights, the ordering of provisional measures has also served to provide the applicant with a preliminary indication on the strength of its case, a lower evidentiary threshold in which to substantiate their claims (i.e., *prima facie*), and a means to advance the cause to the international public through the media and other public channels.¹⁴ However, it is also necessary to differentiate the pre-conceived (and possibly evolving) goals of litigation from the impact that such a case produces.¹⁵ The strategist is unlikely to intend every outcome of the strategic litigation, good or bad.¹⁶ Goals of the strategist can therefore be used as a baseline to evaluate litigation impact, but a wider set of unintended impacts (if arising) must also be investigated.¹⁷ This leads into the second point, as to identifying who the participants are in a strategic litigation. Most obviously, the party initiating a strategic litigation (applicant) will come with a strategy; it is their case after all. Yet, it is also instructive to consider the preferences of the respondent party and how these preferences develop over time as the case progresses and the wider dispute in which it is embedded changes; given that the case is brought to have a wider impact, the respondent will have its own strategic calculations in approaching the case, possibly with a view of influencing perceptions or outcomes on the wider dispute.¹⁸ It is also, finally, useful to enquire into the ICJ's own strategic choices in a case. The notion that the Court is a strategic actor in this manner is, of course, denied by the judges, who frequently profess their role to be strictly confined to questions of legality.¹⁹ Nonetheless, as will be shown in this Article, the Court has acted strategically to promote the acceptability of its decisions amongst the parties or to assume some relevance in relation to the wider dispute or conflict.²⁰

Through the lens of *Allegations of Genocide*, this Article adds new insights to the scholarly literature on ICJ decision-making and, more significantly, the extent to which the parties use the litigation to advance systemic change beyond the courtroom. While much of the scholarly literature has tended to focus on doctrinal issues of ICJ decision-making, the present Article is situated in the more fledgling

14. See Karin Oellers-Frahm, *Use and Abuse of Interim Protection before International Courts and Tribunals*, in COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMICORUM RUDIGER WOLFRUM 1685, 1686 (Holger Hestermeyer et al. eds., 2012); CAMERON MILES, PROVISIONAL MEASURES BEFORE INTERNATIONAL COURTS AND TRIBUNALS 461 (2017).

15. See HELEN DUFFY, STRATEGIC HUMAN RIGHTS LITIGATION: UNDERSTANDING AND MAXIMISING IMPACT 47 (2018).

16. See Douglas Nejaime, *Winning Through Losing*, 96 IOWA L. REV. 941, 969–71 (2011).

17. DUFFY, *supra* note 15, at 47.

18. See D'Amato, *supra* note 13, at 11.

19. See Songying Fang, *The Strategic Use of International Institutions in Dispute Settlement*, 5(2) Q.J. POL. SCI. 107, 109 (2010).

20. Comparatively, this strategic dimension has been noted to be present in other supranational courts. See James Cavallaro & Stephanie Brewer, *Reevaluating Regional Human Rights Litigation in the Twenty-First Century: The Case of the Inter-American Court*, 102(4) AM. J. INT'L L. 768, 770 (2008).

literature on supranational litigation impact, from the perspective of relevant actors both within the legal proceedings and outside of it.²¹ In this regard, while strategic litigation impact has been extensively studied at a domestic level (particularly in the context of human rights and social justice) and somewhat at the supranational level (particularly in the regional human rights courts), there has been less of an attempt to understand the wider impact of strategic litigations before the ICJ.²² Accordingly, this Article draws from prior ICJ strategic litigations as a context for understanding the case initiated by Ukraine, as well as to understand its scope to produce a wider impact beyond the litigation.

Having sketched the key elements of strategic litigation, and its participants, this Article contains five parts. Part II discusses the goals of Ukraine in initiating *Allegations of Genocide*, considering both the declarations that it seeks from the Court and its extra-legal goals, in aiming to influence a wider international response on Russian aggression. Part III then considers Russia's goals in engaging in the litigation, situating its particular response (i.e., selective engagement) in the context of prior litigations and its prior justifications for the use of force against Ukraine. Part IV then evaluates the ICJ's response so far as can be gleaned from the choices that it made in its provisional measures order. Part V identifies the wider impact that the case has had in the weeks from the initiation of proceedings to the ordering of provisional measures (on March 16, 2022) and its aftermath. It considers the possible future impact the case may have and the extent to which it is capable of advancing Ukraine's goals relating to the wider geopolitical conflict. Part VI concludes.

II. GOALS OF UKRAINE IN ALLEGATIONS OF GENOCIDE

Before examining Ukraine's particular goals in initiating and requesting provisional measures in *Allegations of Genocide*, it is beneficial to first note the variety of goals that can form part of an applicant's strategy in initiating litigation. A more specified and holistic understanding of these goals can be appreciated by focusing not merely on the declarations or remedies requested in the case (which although revealing as to the litigation goals, themselves often only provide a partial or even secondary motive in bringing the case) but also on how the litigation is being used as an opportunity to advance the applicant's preferences beyond the case.²³ These broader

21. Strategic litigation, in this sense, is strategic "on the part of the parties" and "sometimes even on the part of the courts." Christoph Engel, *Challenges in the Interdisciplinary Use of Comparative Law*, 69 AM. J. COMPAR. L. 777, 784 (2022).

22. Amongst the voluminous studies on domestic strategic litigation, see Ramsden & Gledhill, *supra* note 9, at 410 (and extensive referencing there); CAROL HARLOW & RICHARD RAWLINGS, *PRESSURE THROUGH LAW* 159-60 (1992); Upendra Baxi, *Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India*, 4 THIRD WORLD LEGAL STUD. 107, 108 (1985); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89(7) HARV. L. REV. 1281, 1284 (1976).

23. See, e.g., Ryan Irwin, *Apartheid on Trial: South West Africa and the International Court of Justice, 1960-66*, 32(4) INT'L HIST. REV. 619, 624 (2010).

goals, in this regard, vary considerably and include the use of the litigation to (1) advance the applicant's narrative on a situation to the international public; (2) assuage demands of domestic constituencies; (3) reframe a political dispute through the optic of international law; (4) obtain a favourable clarification of international norms that can be used to augment claims in the political arena; (5) impose reputational costs and raise the stakes on offending/recalcitrant states for their non-observance of international law, thereby incentivising negotiation; (6) catalyse action within, or exert pressure on, international institutions to act, including the Security Council permanent members; (7) obtain a favourable ruling that can be used to support ongoing parallel litigation; and (8) push disinterested or resistant third parties to support the litigated cause, thereby securing the widest possible coalition to support the applicant's interests.²⁴ It is also important to note that an applicant's goals are not necessarily fixed but change as the litigation progresses.²⁵ For instance, the applicant's primary goal while violations are ongoing will be cessation of the wrongful conduct; afterwards, it will be accountability.²⁶ Furthermore, the mere initiation of proceedings and requests for urgent injunctive relief does not necessarily mean that the applicant is intent upon litigating the cause to the end of the merits phase. Rather, applicants have also initiated proceedings with the main objective of obtaining publicity for their cause (knowing their arguments are unlikely to succeed at the merits phase) or only with an intention to obtain provisional measures (and then later withdraw the application), knowing that the act of commencing proceedings or obtaining an interim decision will still serve to advance some of their objectives beyond the case.²⁷

Ukraine's goals in initiating the proceedings can be gleaned from the nature of the legal requests to the Court and also from its statements outside the courtroom. These statements make clear that Ukraine hopes to use the litigation to advance a variety of broader purposes in the sphere of international relations. Dealing firstly with

24. See Dana Fischer, *Decisions to Use the International Court of Justice: Four Recent Cases*, 26(2) INT'L STUD. Q. 251, 258 (1982); Marie Lemey, *Incidental Proceedings before the International Court of Justice: The Fine Line between "Litigation Strategy" and "Abuse of Process"*, 20 L. & PRAC. INT'L CTS. & TRIBUNALS 5, 20 (2021); Teresa Barnes, *"The Best Defense is to Attack": African Agency in the South West Africa Case at the International Court of Justice, 1960–66*, 69(2) S. AFR. HIST. J. 162, 168–69 (2017); Timothy Meyer, *How Compliance Understates Effectiveness*, 108 AJIL UNBOUND 93, 95 (2014); Markus Gehring, *Litigating the way out of deadlock: the WTO, the EU and the UN*, in DEADLOCKS IN MULTILATERAL NEGOTIATIONS 96, 101–02 (Amrita Narlikar ed., 2010); Cindy Wittke, *The Politics of International Law in the Post-Soviet Space: Do Georgia, Ukraine, and Russia "Speak" International Law in International Politics Differently?*, 72(2) EUR.-ASIA STUD. 180, 196 (2020).

25. See DUFFY, *supra* note 15, at 48.

26. *Id.*

27. See, e.g., Vienna Convention on Consular Relations (Para. v. U.S.), Order, 1998 I.C.J. 426 (Nov. 10) (after provisional measures were ordered, Paraguay applied for discontinuance, with the United States concurring in this discontinuance); Rebecca Jacobs, *Treading Deep Waters: Substantive Law Issues in Tuvalu's Threat to Sue the United States in the International Court of Justice*, 14 PAC. RIM L. & POL'Y J. 103, 105 (2005) (where Tuvalu threatened to commence proceedings against the United States for its failure to ratify the Kyoto Protocol, which generated substantial publicity).

its formal legal requests, Ukraine sought a number of orders from the Court in relation to its dispute with Russia, both in the form of provisional measures and relief in the event that they succeed on the merits. In relation to the latter, Ukraine requested a variety of orders connected to what it conceived as Russia's misuse of the Genocide Convention in premising its use of military force upon a false claim of genocide. It is worthwhile, in this respect, setting out the relief sought from the Court in full:

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

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

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

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

E. Require that the Russian Federation provide assurances and guarantees nonrepetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.

F. Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide.²⁸

As this relief shows, Ukraine seeks to litigate Russia's use of force, and the consequences flowing therefrom, through the lens of the Genocide Convention. Request A (above) involves something rather unprecedented in ICJ litigation: an applicant state requesting a declaration that it *has not* violated international law. Usually, an applicant's submissions will be focused on establishing affirmative violations of international law. Still, this is a logical and necessary step in the argument to establish Russia's violation of the Genocide Convention on the basis of a false claim and also to obviate any legal basis for it to take measures with the purpose of preventing genocide. Flowing from this, Request B removes any asserted legal basis that might be grounded in a doctrine of humanitarian intervention (even accepting the legal validity of this doctrine) to prevent genocide.²⁹ On this basis, any duty to prevent genocide only arises where there is an

28. Ukraine's Application, 2022 I.C.J. at 17, ¶ 30.

29. The doctrine of humanitarian intervention in customary international law is controversial. See Michael Ramsden, *Uniting for Peace and Humanitarian Intervention: The Authorising Function of the UN General Assembly*, 25(2) WASH. INT'L L.J. 267, 275-76 (2016).

actual genocide or a serious risk of it, a factual predicate manifestly lacking in Ukraine.³⁰ A corollary of this finding is that the measures taken by Russia, namely to recognise the independence of the “Donetsk People’s Republic” and “Luhansk People’s Republic” (Request C) and to use military force against Ukraine (Request D) have no basis in the Genocide Convention. Although being confined to the legality of Russia’s conduct under the Genocide Convention, Ukraine clearly envisaged the Court’s determination to have broader significance to the legality of Russian conduct more generally. In other words, removing genocide prevention as a legal basis places Russia in a legal check mate; although the ICJ would not be able to declare the military operation to be generally unlawful as a matter of international law, removing its only conceivable legal basis (i.e., genocide prevention) will indirectly produce that outcome. This is apparent in Requests E and F. These requests demanded the non-repetition of and reparations for “unlawful measures” “including the use of force.”³¹ As is apparent from these requests, they turn upon considerations of legal issues broader than those found in the Genocide Convention, including the scope for the use of force to be justified as self-defence under Article 51 of the UN Charter (a point returned to in Part III below).

All of these requests are premised upon a notion that Russia’s false claim of genocide violates the Genocide Convention. This is not an argument derived from a textual prohibition on state parties making false genocide claims, but rather one that flows from a duty to act in good faith under the Genocide Convention.³² Asserting a “right to commit aggression under the guise of a duty to prevent and punish a non-existent genocide is not good faith performance” of the convention.³³ A corollary of the good faith principle is that states do not abuse their rights under a treaty.³⁴ While, therefore, Russia as a party to the Genocide Convention is entitled to denounce the occurrence of genocide, it cannot abuse this right by making false genocide claims.³⁵ To do so “degrades and defiles the object and purpose of the Genocide Convention, and undermines the solemn commitments made by all Contracting Parties to prevent and punish actual cases of genocide.”³⁶ Ukraine thus argued that it has a right not to suffer detriments as a result of Russia’s bad faith implementation of the Genocide Convention, with such detriment justifying reparations.³⁷ Accordingly, Ukraine referred to numerous false claims by Russian officials (from 2014-2022), together with the reports of independent factfinders noting

30. See *Dispute Relating to Allegations of Genocide (Ukr. v. Russ.)*, Record, 2022 I.C.J. 39–40, ¶¶ 8–9 (Mar. 7) [hereinafter *Ukraine Oral Argument*].

31. *Ukraine’s Application*, 2022 I.C.J. at 17, ¶ 30.

32. See *Ukraine Oral Argument 2022 I.C.J.* at 65, ¶ 29.

33. *Id.* at 42, ¶ 17.

34. See *id.* at 65, ¶ 29.

35. See *id.*

36. *Ukraine’s Provisional Measures Application*, 2022 I.C.J. at 1, ¶ 3.

37. See *Ukraine’s Application*, 2022 I.C.J. at 17, ¶ 30; *Ukraine Oral Argument*, 2022 I.C.J. at 49, ¶ 5.

there was no such occurrence of genocide, to support its contention that Russia abused its rights under the Genocide Convention.³⁸

Still, Ukraine's legal requests pose difficult questions of international law that the ICJ has yet to resolve in its prior jurisprudence on the Genocide Convention.³⁹ Even assuming there is a duty in the Genocide Convention not to subject another state to "genocide defamation," is the Court entitled to fully consider the underlying conduct and consequences arising from such claim (i.e., an unlawful use of force leading to violations of international human rights law and international humanitarian law)? Similarly, to what extent is the Court able to evaluate the significance of a state's alleged misuse of the Genocide Convention without drifting into issues over which it does not have jurisdiction, including Russia's other legal bases for intervention (self-defence and customary international law)?⁴⁰ Is there a legal basis in the Genocide Convention for a state to recognise a breakaway region of alleged victims of genocidal policies of the territorial state concerned? Similarly, is there a legal basis in the Genocide Convention to justify unilateral humanitarian intervention as a facet of the duty to prevent genocide? It is likely that the ICJ is able to avoid resolving some of these issues: it could avoid pronouncing on the legal nature of the doctrine of humanitarian intervention given the clear absence of evidence of genocide in Ukraine. At the same time, it is open to doubt whether the Genocide Convention was intended by the drafters to be used to regulate questions of interstate uses of force.⁴¹

Although difficult, these issues will turn out to be moot if Ukraine ultimately withdraws the claim. Rather than thinking so far ahead, it is possible that Ukraine's dominant purpose in bringing the case was to obtain provisional measures on issues around Russia's aggression rather than to litigate this dispute to the end.⁴² It is possible—as with other cases initiated in the past to score a provisional measures

38. See Ukraine Oral Argument, 2022 I.C.J. at 31–32, ¶¶ 7–11.

39. See generally, e.g., Claus Krieb, *The International Court of Justice and the Elements of the Crime of Genocide*, 18(4) EUR. J. INT'L L. 619 (2007); Ademola Abass, *Proving State Responsibility for Genocide: The ICJ in Bosnia v Serbia and the International Commission of Inquiry for Darfur*, 31 FORDHAM INT'L L.J. 871 (2008).

40. See *infra* Part III.

41. Indeed, such reservations were expressed by Judge Bennouna in the case *Dispute Relating to Allegations of Genocide (Ukr. v. Russ.)*, Provisional Measures Declaration of Judge Bennouna, 2022 I.C.J. 1, ¶ 2 (Mar. 16) ("I am not convinced that the [Genocide Convention] was conceived, and subsequently adopted, in 1948, to enable a State, such as Ukraine, to seize the Court of a dispute concerning allegations of genocide made against it by another State, such as the Russian Federation, even if those allegations were to serve as a pretext for an unlawful use of force. We know, since the adoption of the Charter of the United Nations, that the only exceptions to the prohibition of the use of force in international relations are individual or collective self-defence, under Article 51 of the Charter (which has also been invoked by the Russian Federation), and authorization by the Security Council, in accordance with Chapter VII of that text.")

42. See also the view of Marko Milanović, *ICJ Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelled from the Council of Europe*, EJIL: TALK! (Mar. 16, 2022), <https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia-in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/> [<https://perma.cc/SCA5-52D5>] (archived Sept. 30, 2022) ("Bottom line—Ukraine got what it wanted from the Court in this case, which is the indication of provisional measures asking Russia to stop its military operation.")

victory—that this case will not proceed to the merits.⁴³ Nor, for that matter, does it have to for Ukraine to impart onto its claims a rule of law imprimatur that an ICJ decision confers, given the availability of provisional measures.⁴⁴ In this respect, unlike the more stringent standard of proof applied at the merits stage, the ordering of provisional measures, designed to prevent irreparable prejudice to a party's rights on an emergency basis, applies a much lower *prima facie* threshold.⁴⁵ This threshold in turn applies to all aspects of the parties' dispute at the provisional measures stage, including the Court's jurisdiction, the existence of a dispute, the legal nature of the requesting party's rights under the applicable law, and the evidence that points to irreparable prejudice if provisional measures were not ordered.⁴⁶

If Ukraine's dominant purpose in initiating proceedings was obtaining provisional measures, it is instructive to consider precisely what these requested measures are. Ukraine sought from the Court declarations that Russia (a) "immediately suspend the military operations commenced on 24 February 2022"; (b) "immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations"; (c) "refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute subject to the application"; and (d) impose a reporting requirement on Russia one week after such order and on a "regular basis" thereafter.⁴⁷ In requesting these orders, Ukraine specifically connected them to any action taken by Russia that has, as its stated purpose, "the prevention and punishment of genocide."⁴⁸

43. See, e.g., Vienna Convention on Consular Relations, 1998 I.C.J. at 427 (Paraguay's discontinuance of action against the United States after obtaining provisional measures).

44. See Ramsden, *supra* note 6, at 454.

45. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. 9, ¶ 16 (Jan. 23) ("The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded, but need not satisfy itself in a definitive manner that it has jurisdiction as regards the merits of the case.") [hereinafter *The Gambia v Myanmar Provisional Measures Decision*]. By comparison, at the merits phase, a much greater level of evidentiary certainty is required, ranging from "balance of probabilities" to the need, in cases involving grave allegations, for the allegations to be conclusively proven. See *Corfu Channel (U.K. v. Alb.)*, Judgment, 1949 I.C.J. 4, 17 (Apr. 9) ("conclusive evidence"); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, ¶ 237 (Dec. 19) ("convincing evidence"); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶ 210 (Feb. 26) ("[T]he Court requires proof at a high level of certainty appropriate to the seriousness of the allegation.").

46. See *The Gambia v Myanmar Provisional Measures Decision*, 2020 I.C.J. at 9, ¶ 16; *Corfu Channel*, 1949 I.C.J. at 17; *Armed Activities on the Territory of the Congo*, 2005 I.C.J. at 168, ¶ 237; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, 2007 I.C.J. at 43, ¶ 210.

47. Ukraine's Application, 2022 I.C.J. at 17, ¶ 30.

48. Ukraine's Provisional Measures Application, 2022 I.C.J. at 7, ¶ 20.

What, though, of Ukraine's extra-legal goals in bringing the case? Professor Harold Koh, counsel for Ukraine, articulated these broader goals both in the course of the oral argument before the ICJ and in media comments after the provisional measures decision. Professor Koh thus noted that the Russian aggression was being addressed by numerous other international institutions: the UN General Assembly, HRC, European Court of Human Rights, national prosecutions, and states via sanctions.⁴⁹ A positive decision from the ICJ was envisaged to assist this broader movement:

Within its own legal mandate, each of these bodies must do its own job. So if you speak clearly and decisively now, you will not act alone. Other parts of the international legal system will act in concert with you, focusing on other aspects of Russia's aggression. But amid this broad network of legal activity, your order is the essential spark that will inspire other competent international organs and agencies to take the further steps necessary to protect peace, security, accountability and human rights in this rapidly deepening crisis.⁵⁰

A context of this international response has been the failure of the UN Security Council to adopt measures due to Russia's misuse of its veto power which has impeded the adoption of a Chapter VII resolution condemning the aggression and demanding suspension of the military operation.⁵¹ Professor Koh in this respect noted the unreasonableness of a permanent member paralysing the UN system and immunising its actions from international law.⁵² This observation reflects the central role that the Security Council plays in the international system, in adopting binding decisions and authorising coercive action against actors that breach or threaten international peace and security.⁵³ In this respect, the Security Council has historically adopted a wide variety of measures to maintain or restore international peace and security, including to authorise states to use force, impose economic sanctions, and to establish ad hoc tribunals to try individuals suspected of committing international crimes.⁵⁴ Ukraine's referencing of the veto context as a motivation for bringing the case thus suggests that an ICJ decision, and the response it can stimulate in the international system, is capable of making up in some way for Security Council deadlock. In addition to the ICJ case complementing action by other international actors, Professor Koh also envisaged the provisional measures decision to serve other purposes, including challenging Russian narratives on the necessity for its military

49. See Ukraine Oral Argument, 2022 I.C.J. at 60–61, ¶ 15.

50. *Id.* at 61, ¶ 16.

51. Russia's reasons for its veto of the proposed resolution were to protect civilians from neo-Nazis and militia. See *Security Council Fails to Adopt Draft Resolution on Ending Ukraine Crisis, as Russian Federation Wields Veto*, UNITED NATIONS (Feb. 25, 2022), <https://www.un.org/press/en/2022/sc14808.doc.htm> [<https://perma.cc/F8XK-644J>] (archived Sept. 30, 2022).

52. See Ukraine Oral Argument, 2022 I.C.J. at 59, ¶ 11.

53. See U.N. Charter, ch. VII.

54. Amongst the many excellent studies on Security Council powers and practice, see Devon Whittle, *The Limits of Legality and the United Nations Security Council: Applying the Extra-Legal Measures Model to Chapter VII Action*, 26(2) EUR. J. INT'L L. 671 (2015).

intervention and imposing reputational costs for its continued aggressive acts. Speaking after the order, Koh thus noted that the decision has served to dispel any veneer of legality around Russia's actions, serving to isolate Vladimir Putin and strengthen "the case for further sanctions and accountability measures if he persists."⁵⁵ In this regard, as Part IV suggests, provisional measures can serve legitimising and legalising functions in augmenting responses of international actors to such recalcitrance.

Finally, scholars have deduced a public relations goal in both initiating proceedings and seeking provisional measures, as a means to draw attention to the plight of a state/population and to advance a narrative on a situation to an international public.⁵⁶ This will typically be evident in the broadening of a factual presentation to include legal violations ostensibly beyond the scope of the Court's jurisdiction.⁵⁷ In this regard, it is noteworthy that the word "aggression" was used by Ukraine a combined forty-five times in its oral and written submissions, despite this being something that the ICJ is unable to rule upon.⁵⁸ Ukraine also drew attention to the humanitarian situation caused by this aggression, including the occurrence of war crimes and "grave" human rights violations, the severe degradation of the environment, the arming of "illegal armed groups" since 2014 and, connected to this, the unlawful attempts to annex territory and overthrow the Ukrainian government.⁵⁹ Ukraine's request for provisional measures also forced Russia into making a choice of whether to participate in the proceedings (it chose to not appear and only file brief, written submissions).⁶⁰ Russia's failure to do so further supports Ukraine's narrative that Russia has no respect for international law: "The fact that Russia's seats are empty speaks loudly. They are not here in this court of law. They are on a battlefield, waging aggressive war against my country."⁶¹

III. GOALS OF RUSSIA

Evaluating the efficacy of a strategic litigation also requires consideration of the respondent's goals in participating in the pro-

55. *Professor Koh Helps Win World Court Ruling Ordering Russia to Halt Ukraine Invasion*, YALE L. SCH. (Mar. 16, 2022), <https://law.yale.edu/yls-today/news/professor-koh-helps-win-world-court-ruling-ordering-russia-halt-ukraine-invasion> [<https://perma.cc/39SH-VF8M>] (archived Sept. 30, 2022). For further discussion on Professor Koh's statement, see *infra* Part V.

56. See Phoebe Okowa, *The International Court of Justice and the Georgia/Russia Dispute*, 11(4) HUM. RTS L. REV. 739, 740 (2011) and accompanying citations.

57. See Wittke, *supra* note 24, at 202.

58. See generally Ukraine Oral Argument, 2022 I.C.J.; Ukraine's Application, 2022 I.C.J.

59. Ukraine Oral Argument, 2022 I.C.J. at 13, 32–34, 36, 49–55 ("Russia has the gall to massacre Ukrainians and call it 'protection.' Russia has the gall to attempt to overthrow a democratically elected government and call it punishment of Nazis."); see also Ukraine's Application, 2022 I.C.J. at 14, ¶ 24.

60. See *infra* Part III.

61. Ukraine Oral Argument, 2022 I.C.J. at 14, ¶ 6.

ceedings, including how their preferences might change as the case progresses.⁶² At the most generic level, a respondent's goal will be to successfully fend off the applicant's challenge. As the applicant's challenge in a strategic litigation will implicate an important sovereign interest of the respondent, and seek to impose reputational costs upon them, such respondent will almost invariably want to avoid the case progressing to the merits. In prior strategic litigations, respondents have thus objected to the Court's exercise of jurisdiction or otherwise brought some other preliminary challenge, such as to challenge the use of the litigation for an extraneous purpose as an abuse of process.⁶³ In an attempt to deprive the proceedings of legitimacy, respondents have also refused to appear, or only engage selectively in the proceedings.⁶⁴ Such tactics enable the respondent to portray the proceedings as illegitimate to the international public and their political bases of support in the event that the Court makes an adverse finding against them.⁶⁵ On the other hand, some respondents have chosen to engage more fully on the basis that they have nothing to lose (given that they have already been widely politically condemned), with the hope that victory (even for jurisdictional reasons) would allow it to impart a veneer of legality on the conduct challenged by the applicant.⁶⁶ In this respect, some respondents in strategic litigations before the ICJ have gone beyond merely jurisdictional/procedural challenges to engage with the substantive merits of the dispute.⁶⁷ The respondent's engagement with the substantive legal issues itself serves to demonstrate the value it places on receiving a judicial vindication of its conduct in accordance with international law. Finally, in rare instances, respondents have also made tactical concessions to render the proceedings moot, so as to avoid the reputational harm that will arise in having the Court find against them on the same or a broader basis.⁶⁸ Even if no concessions are forthcoming, the respondent might seek to bring new information to light so as to provide more specified justifications for its action.⁶⁹

Russia's goals behind its "special military operation" are documented in several official speeches given prior to the military campaign. All such goals are packaged as vindicating legal interests, be that of the civilian population in Ukraine, the rights of a people to self-determination, or the preservation of Russia's territorial integrity. On February 23, 2022, Russia's representative to the UN Security Council,

62. See Tom Ginsburg, *The Institutional Context of the International Court of Justice*, in CAMBRIDGE COMPANION TO THE INTERNATIONAL COURT OF JUSTICE (forthcoming 2023) (manuscript at 8) (on file with University of Chicago Law School).

63. See, e.g., Henry Burmester, *Australia's Experience in International Litigation*, in LITIGATING INTERNATIONAL LAW DISPUTES 305, 326 (Natalie Klein ed., 2014).

64. See Stanimir A. Alexandrov, *Non-Appearance before the International Court of Justice*, 33 COLUM. J. TRANSNAT'L L. 41, 54 (1995).

65. See *id.*

66. See Keith Highet, *Litigation Implications of the U.S. Withdrawal from the Nicaragua Case*, 79(4) AM. J. INT'L L. 992, 998 (1985).

67. See, e.g., Irwin, *supra* note 23, at 634–35.

68. See Leslie Johns, *Courts as Coordinators: Endogenous Enforcement and Jurisdiction in International Adjudication*, 56(2) J. CONFLICT RES. 257, 273 (2012).

69. See Ramsden, *supra* note 6, at 452–55.

Vassily Nebenzia, thus noted the goal of the military operation to be the “protection of people who have been victimized and exposed to genocide by the Kiev regime.”⁷⁰ To achieve this putative objective, Russia sought the “demilitarization and denazification of Ukraine, and criminal prosecution for those who committed numerous heinous crimes against civilians.”⁷¹ The express legal basis for this action was noted to be Article 51 of the UN Charter, enshrining a state’s inherent right to self-defence.⁷² An additional legal basis appeared to be provided in the right of self-determination, on the basis that the people of Donbas were being denied such a right and were being met with violence by the Ukrainian authorities.⁷³ This rationale for war was reiterated by President Vladimir Putin a day later. In underlining the operation’s purpose of protecting people who “for eight years now have been facing humiliation and genocide perpetrated by the Kiev regime,” he stated, “[t]o this end, we will seek to demilitarise and denazify Ukraine.”⁷⁴

Russia’s approach to *Allegations of Genocide* itself has been one of partial engagement. Russia declined to appear at the provisional measures oral hearing before the Court on March 7, 2022, thereby seeking to undermine the legitimacy of the litigation.⁷⁵ At the same time, it challenged via written submissions the Court’s jurisdiction on the basis that the Genocide Convention has no applicability to its “special military operation”; on this view, the plain language of the Genocide Convention did not regulate either the use of force between states or the recognition of states.⁷⁶ Rather, Ukraine was abusively using the Genocide Convention as a “vehicle” to bring before the Court the legality of Russia’s military operation.⁷⁷ Russia then explained that the legal basis for action existed under Article 51 of the UN Charter (the right to self-defence) and the right to self-determination.⁷⁸ It is apparent that Ukraine’s initiation of proceedings did not lead to any alteration in Russia’s formulation of its legal position but rather served to reinforce it. According to Russia, both legal bases were

70. Permanent Mission of the Russian Federation to the United Nations, *Statement and reply by Permanent Representative Vassily Nebenzia at UNSC briefing on Ukraine*, RUSSIAN PERMANENT MISSION TO UNITED NATIONS (Feb. 23, 2022), <https://russiaun.ru/en/news/230222un> [<https://perma.cc/VR2B-45MG>] (archived Sep. 29, 2022).

71. *Id.*

72. *See id.*

73. *See id.* (citing 1970 Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States, on the need for states to conduct themselves “in compliance with the principle of equal rights and self-determination of peoples and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour”).

74. President of Russia, *Address by the President of the Russian Federation*, THE KREMLIN (Feb. 24, 2022), <http://en.kremlin.ru/events/president/transcripts/statements/67843> [<https://perma.cc/G45Q-J4EQ>] (archived Sept. 29, 2022).

75. As to the delegitimizing tactics, see Alexandrov, *supra* note 64, at 54.

76. Dispute Relating to Allegations of Genocide (Ukr. v. Russ.), Russia Response, 2022 I.C.J. 1, ¶ 4 (Mar. 7) [hereinafter Russia Response].

77. *Id.* ¶ 4.

78. *See id.* ¶ 15.

outside of the Court's jurisdiction in relation to the present dispute.⁷⁹ Furthermore, Russia challenged Ukraine's singular focus on the Genocide Convention as the putative basis for the military operation. Quite aside from the fact that President Putin did not justify Russia's conduct within the framework of the Genocide Convention, references to genocide in Donbas were merely explanations of the "general humanitarian environment along with other factors and considerations."⁸⁰ In short, there was no causal link between Russia's allegation of genocide and the intervention, which itself was motivated by multiple considerations connected to Russia's national interests and was not only based on the alleged humanitarian situation in Ukraine.

In contrast to some of the prior responses from respondents to strategic litigations before the ICJ, Russia has not regarded it to be in their interest to use the proceedings to expand upon its narrative or legal basis for military action. It simply did the bare minimum to explain its legal bases in the context of denying the relevance of the Genocide Convention which, in its view, had no applicability to Russia's decision to resort to the use of force in Ukraine. Russia left unanswered, both in its diplomatic justifications and in the legal submissions before the Court, whether the conditions were met to use force under Article 51 (particularly whether an "armed attack" occurred) and whether the right to self-determination justified Russia's unilateral humanitarian intervention.⁸¹ Russia's goal in the litigation, in this respect, was merely to challenge jurisdiction based on the barest of justifications rather than to seek broader judicial validation for its legal claims.

IV. THE ICJ'S PROVISIONAL MEASURES ORDER

Having outlined the preferences of Ukraine and Russia in *Allegations of Genocide*, the following Part will now consider the ICJ's engagement with the issues so far, in the context of its provisional measures decision. The premise of the analysis in this Part is that the ICJ itself is a strategic actor who will use its jurisdiction, within permissible bounds, in a manner that best promotes compliance with international law and, more generally, the observance of the principles and purposes set out in the UN Charter.⁸² The Court has historically employed different tactics to ensure its relevance to the wider set of

79. *See id.*

80. *Id.* ¶ 20

81. In any event, Russia's justifications are deeply problematic: Article 51 of the UN Charter only applies when an 'armed attack' has occurred or, at the very least, an imminent threat of attack, features that are manifestly lacking in this situation. *See* Elizabeth Wilmshurst, *Ukraine: Debunking Russia's legal justifications*, CHATHAM HOUSE (Feb. 24, 2022), <https://www.chathamhouse.org/2022/02/ukraine-debunking-russias-legal-justifications> [<https://perma.cc/S4X8-9ZPP>] (archived Sept. 29, 2022).

82. As to this strategic activity, see Yuval Shany, *Bosnia, Serbia and the Politics of International Adjudication*, 45 JUST. 21 (2008); Felix Fouchard, *Allowing leeway to expediency, without abandoning principle? The International Court of Justice's use of avoidance techniques*, 33 LEIDEN J. INT'L L. 767, 777-78 (2020).

issues that are presented in a strategic litigation. This has involved the Court using the opportunity that the case presents to advance an interpretive vision of international law that goes beyond what is necessary to resolve the dispute at hand.⁸³ It also includes the Court giving its view on the steps that the parties should take to resolve their broader dispute, with expressions on the parties' conduct ranging from disapprobation to encouragement.⁸⁴ For example, in ordering provisional measures in the dispute between Ukraine and Russia in relation to the CSFT and CERD, the Court went beyond protecting rights under CERD to encourage the parties to consider a broader settlement, with an expectation that the parties will work for the "full implementation" of the Minsk Agreements.⁸⁵ On the other hand, scholars have noted instances of the Court employing issue-avoidance and moderation tactics to avoid jurisprudential backlash and enhance the impact of its decisions.⁸⁶ Again, in *CSFT/CERD (Ukraine v. Russia)*, the Court only granted provisional measures in relation to CERD and not concerning the more contentious allegations under the CSFT that Russia has sponsored terrorism.⁸⁷ Although it is only possible to speculate on the Court's avoidance motivation here, it is likely borne out of a concern to keep Russia engaged in the proceedings; by contrast, a finding that Russia was involved in the sponsoring of acts of terrorism would be corrosive towards future efforts to influence Russia's conduct.⁸⁸ Set in light of these strategic considerations, what

83. See, e.g., Marko Milanović, *State Responsibility for Genocide: A Follow Up*, 18(4) EUR. J. INT'L L. 669, 687 (2007); Nienke Grossman, *The Normative Legitimacy of International Courts*, 86 TEMP. L. REV. 61, 70–71 (2013).

84. See, e.g., Irya Marchuk, *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. Russia)*, 18 MELB. J. INT'L L. 436, 443 (2017); Shai Dothan, *How International Courts Enhance Their Legitimacy*, 14 THEORETICAL INQUIRIES L. 455, 461 (2013).

85. 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 (Ukr. v. Russ.), Order, 2017 I.C.J. 104, 139–40 (Apr. 19) [hereinafter *CSFT/CERD Provisional Measures Decision*].

86. See, e.g., Fouchard, *supra* note 82, at 777–78.

87. See Marchuk, *supra* note 84, at 443.

88. See *id.* The Court explained its refusal due to there being a lack of evidence to support Russian intent or knowledge to breach provisions of the CSFT. *CSFT/CERD Provisional Measures Decision*, 2017 I.C.J. at 131, ¶ 75 (“[I]n order to determine whether the rights for which Ukraine seeks protection are at least plausible, it is necessary to ascertain whether there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1 [of the CSFT], such as the elements of intention or knowledge . . .”). However, the Court has also been more flexible subsequently when it came to contested issues around intention and knowledge, and the extent to which each element of a norm had to be prima facie established at the provisional measures stage, such as whether the Myanmar government had specific intent to commit genocide. See *The Gambia v Myanmar Provisional Measures Decision*, 2020 I.C.J. at 14, ¶ 30 (“For the purposes of the present proceedings, the Court is not required to ascertain whether any violations of Myanmar’s obligations under the Genocide Convention have occurred. Such a finding, which notably depends on the assessment of the existence of an intent to destroy, in whole or in part, the group of the Rohingya as such, could be made by the Court only at the stage of the examination of the merits of the present case . . . In the Court’s view, at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Convention.” (emphases added)).

choices did the ICJ make in the construction of its provisional measures decision in *Allegations of Genocide*?

In its provisional measures orders, the ICJ granted most of what Ukraine requested.⁸⁹ The Court ordered that Russia “shall immediately suspend the military operations” and ensure that any “military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps” in furtherance of such military operations.⁹⁰ It also included a very common order found in prior provisional measures decisions to request the parties (including, rather curiously, Ukraine) to refrain from any action which might aggravate or extend the dispute before the Court or otherwise make it more difficult to resolve.⁹¹ Most significantly, the text of the Court’s orders departed from those requested by Ukraine. Whereas Ukraine’s proposed orders (outlined in Part II above) requested the suspension of military operations “*that have as their stated purpose and objective the prevention*” of genocide, the ICJ did not tie its order to suspend military operations to any underlying genocide-prevention objective.⁹² Rather, to reiterate, the Court simply ordered the suspension of the military operation irrespective of the underlying objective behind it.⁹³

The Court did not explain the basis for this decoupling. On the one hand, the Court’s order is extraordinary in calling for the suspension of military operations that Russia might seek to justify on another legal basis (e.g., Article 51 of the UN Charter) that the ICJ lacks jurisdiction to determine. On the other hand, it seems reasonable to construe the Court’s order as a means to protect Ukraine’s espoused rights under the Genocide Convention by preventing Russia from changing the rationale for its military operation so as to defeat the provisional measures order. Still, Ukraine did not obtain absolutely everything that it sought from the Court. In particular, the Court did not grant Ukraine’s requested order that Russia provide a report to the Court on a “regular basis” on the steps taken to implement provisional measures.⁹⁴ The Court’s avoidance of a reporting requirement was,

89. See *Dispute Relating to Allegations of Genocide (Ukr. v. Russ.)*, Provisional Measures, 2022 I.C.J. 17–18, ¶¶ 78–85 (Mar. 16) [hereinafter *Ukraine v. Russia Provisional Measures Decision*]. However, the decision was not unanimous. Judges Gevorgian and Xue wrote separate dissenting opinions, essentially disputing the use of the Genocide Convention to bring a use of force claim through the back door. See *Dispute Relating to Allegations of Genocide (Ukr. v. Russ.)*, Provisional Measures Declaration of Judge Gevorgian, 2022 I.C.J. (Mar. 16); *Dispute Relating to Allegations of Genocide (Ukr. v. Russ.)*, Provisional Measures Declaration of Judge Xue, 2022 I.C.J. (Mar. 16). Interestingly, these voting divisions reflect wider geopolitical divisions, with the dissenting judges being Russian and Chinese nationals, with the 13 voting in support of provisional measures hailing from States (broadly speaking) politically aligned to Ukraine in this dispute (i.e., President Donoghue (United States), Judges Tomka (Slovakia), Abraham (France), Bennouna (Morocco), Yusuf (Somalia), Sebutinde (Uganda), Bhandari (India), Robinson (Jamaica), Salam (Lebanon), Iwasawa (Japan), Nolte (Germany), Charlesworth (Australia), and *Judge ad hoc Daudet* (France)).

90. *Ukraine v. Russia Provisional Measures Decision*, 2022 I.C.J. at 18–19, ¶ 86.

91. See *id.*

92. *Id.*

93. See *id.*

94. *Ukraine’s Provisional Measures Application*, 2022 I.C.J. at 7, ¶ 20.

unfortunately, not explained. However, such avoidance is arguably a retrograde step in light of the Court's decision in another case in 2020 to impose a reporting requirement on Myanmar to show how it had implemented provisional measures in application of the Genocide Convention.⁹⁵ It is likely that the Court did not regard there to be much utility in imposing a reporting requirement given the low likelihood of Russia's future cooperation, although the Court's lack of reasons and consistency of approach means that this is only speculation.

At a more abstract level, it is apparent that the ICJ regarded itself as balancing two aspects of its role: bilateral dispute resolution and supporting the attainment of collective goods. On the one hand, the ICJ is a bilateral dispute resolution service that is respectful of the extent of participating states' consent to jurisdiction and is attuned to their needs in resolving the legal disagreement between them.⁹⁶ On the other hand, the ICJ is the UN's principal judicial organ, operating within an international organization established to advance a number of lofty objectives, including to maintain international peace and security.⁹⁷ This dualistic tension is played out in the introductory paragraphs of the provisional measures decision, where the Court prefaced its reasoning by being "mindful of the purposes and principles" of the UN Charter and its "own responsibilities in the maintenance of international peace and security."⁹⁸ Accordingly, it "deemed it necessary to emphasize that all states must act in conformity with their obligations under the United Nations Charter and other rules of international law, including international humanitarian law."⁹⁹ Such language obviously goes beyond the narrow confines of a discrete bilateral dispute under the Genocide Convention to embrace a wider set of international obligations. At the same time, the ICJ also acknowledged that the case before it was "limited in scope," raising issues "only under the Genocide Convention," thereby appearing to place a limit on the extent to which it is able to adjudicate upon Russia's actions in Ukraine, even if those actions are contrary to the purposes and principles of the UN Charter.¹⁰⁰

Still, it is also apparent that the Court regarded (according to a *prima facie* standard, at least) the Genocide Convention as offering ample latitude for it to consider some of these wider issues as related

95. See, e.g., *The Gambia v Myanmar Provisional Measures Decision*, 2020 I.C.J. at 18–19, ¶ 86 (noting that Myanmar "shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court"). By contrast, in *CSFT/CERD Provisional Measures Decision*, 2017 I.C.J., the Court did not require Russia to periodically report on its implementation of provisional measures. Unfortunately, there is a lack of explanation as to why a choice is made in one case to impose a reporting requirement, but not in another.

96. As to this theory of the Court's role, see generally Eric Posner & John Yoo, *Judicial Independence in International Tribunals*, 93 CALIF. L. REV. 1 (2004).

97. See Rotem Giladi & Yuval Shany, *The International Court of Justice, in ASSESSING THE EFFECTIVENESS OF INTERNATIONAL COURTS* 161, 166 (Yuval Shany ed., 2014).

98. *Ukraine v Russia Provisional Measures Decision*, 2022 I.C.J. at 5, ¶ 18.

99. *Id.*

100. *Id.* at 5, ¶ 19.

to Ukraine's espoused rights not to be subject to a false genocide allegation. In turn, the ICJ noted the "extent of human tragedy that is taking place in Ukraine."¹⁰¹ The Court observed that Russia's "special military operation" has resulted in "numerous civilian deaths and injuries" and "caused significant material damage," with "attacks ongoing," and created "increasingly difficult living conditions for the civilian population."¹⁰² The Court also stated that Russia's actions led to a "very large number of people . . . attempting to flee from the most affected cities under extremely insecure conditions."¹⁰³ The Court avoided characterising the use of force as aggression although it did draw from General Assembly Resolution ES-11/1 (which itself condemned the aggression) as referring "to many aspects of the conflict."¹⁰⁴ The fact that Russia based the legality of its "special military operation" on Article 51 of the UN Charter and customary international law did not preclude, at the provisional measures stage, a *prima facie* finding by the Court that there existed a dispute relating to the interpretation, application, or fulfilment of the Genocide Convention.¹⁰⁵ Furthermore, in evaluating the legality of the use of force, the Court reiterated its prior view that the Genocide Convention duty of prevention is only permissible "within the limits permitted by international law," thereby providing a potential bridge for it to consider the rules on the use of force under the UN Charter in future proceedings beyond the provisional measures decision.¹⁰⁶

V. EVALUATING THE IMPACT OF THE INITIATION OF PROCEEDINGS AND THE PROVISIONAL MEASURES DECISION

Having outlined the goals of the litigants and the Court's choices, the final Part of this Article outlines a basic structure in which to appreciate the scope for this case to produce impact.

"Impact," in this respect, can come in many different forms. Given that strategic litigation concerns wider impacts beyond the case, it is unduly narrow to simply focus on the extent to which the respondent has complied with the Court's decision.¹⁰⁷ If compliance was the sole measure, then the impact of prior provisional measures decisions will similarly be limited, despite there being some high-profile examples where the respondent not only complied but also entered into a negotiated settlement with the applicant.¹⁰⁸ To be sure, the extent to

101. *Id.* at 5, ¶ 17.

102. *Id.* at 16, ¶ 75.

103. *Id.*

104. *Id.* at 5, ¶ 19.

105. *Id.* at 11, ¶ 46.

106. *Id.* at 13, ¶ 57. The Court also noted it to be "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." *Id.* at 13, ¶ 59.

107. Andrew T. Guzman, *International Tribunals: A Rational Choice Analysis*, 157 U. PA. L. REV. 171, 179 (2008).

108. See Michael Ramsden & Zixin Jiang, *The Dialogic Function of ICJ Provisional Measures Decisions in the UN Political Organs: Assessing the Evidence*, AM. U. INT'L L. REV. (forthcoming 2022).

which the respondent adapts its preferences and conduct in light of the litigation will be an important focus of enquiry into litigation impact (the litigation is aimed at the respondent's conduct, after all).¹⁰⁹ However, the litigation can have impacts on other actors, thereby strengthening the response of a campaign against an offending state. These other actors include states (reaffirming their opposition to the recalcitrant state/recruiting new states to the opposition coalition); political institutions (catalysing them into action); courts (supplying them with information and judicial findings that can be used to support their own determinations); media (in supporting narrative building and framing); and victims (providing symbolic judicial recognition of the harm they have suffered, including historical legacies of abuse).¹¹⁰ As already noted, the applicant's goals will provide a baseline to appreciate the efficacy of this litigation, but not exclusively so. Strategic litigation might have negative unintended impacts, particularly in causing backlash from and within the respondent state, as prior studies have noted.¹¹¹ On the other hand, the litigation can have positive unintended impacts, such as where the loss of a case serves to energise civil society and prompt political actors into finding solutions to overcome legal injustices.¹¹² It is also necessary, when evaluating litigation impact, to be wary of making definitive causative claims, particularly where the court case forms part of a wider campaign for action, involving cases and advocacy efforts in multiple legal and political fora.¹¹³ In this respect, it is important to situate the case within this wider effort, acknowledging that multiple factors could contribute to any identified impact.

The most immediate impact of the provisional measures decision itself flowed from the relative swiftness in which the decision was handed down, within a matter of three weeks from Ukraine's initiation of proceedings and request for interim relief. The resulting speed meant that the ICJ decision—issued on March 16, 2022—was the first international judicial decision to address (albeit to a *prima facie* standard) the legality of Russia's resort to armed force since the invasion of Ukraine began.¹¹⁴ Prior to this decision, the illegality of

109. See, e.g., DUFFY, *supra* note 15, at 50–80 (covering the respondent-sided impact of the litigation).

110. See *id.*; Gehring, *supra* note 24, at 96; Guzman, *supra* note 107, at 179–80.

111. See Mikael Rask Madsen, Pola Cebulak & Micha Wiebusch, *Backlash Against International Courts: Explaining Forms and Patterns of Resistance to International Courts*, 14 INT'L J.L. CONTEXT 197, 200–201 (2018).

112. See DUFFY, *supra* note 15, at 44, 77–80.

113. See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 7 (2d ed., 2008); Andreas Fischer-Lescano, *From Strategic Litigation to Juridical Action*, in TRANSNATIONAL LEGAL ACTIVISM IN GLOBAL VALUE CHAINS 299, 299–312 (Miriam Saage-Maaß et al. eds., 2021).

114. The European Court of Human Rights did grant urgent interim measures much sooner than the ICJ, on March 1, 2022, but this was narrower in scope, concerning the human rights of the civilian population in Ukraine. See Eliav Liebich, *Not Far Enough: The European Court of Human Rights' Interim Measures on Ukraine*, JUST SEC. (Mar. 7, 2022), <https://www.justsecurity.org/80482/not-far-enough-the-european-court-of-human-rights-interim-measures-on-ukraine/> [https:

Russia's use of force was only declared as such by political actors, in what can be described as "quasi-judicial" determinations but not, as such, judicial in character.¹¹⁵ While the quasi-judicial determinations of plenary bodies such as the UN General Assembly provide an important insight into the legality of state conduct, it is reasonable to say that this is not a complete substitute for a judicial determination by an international court where this is available.¹¹⁶ Indeed, a media content analysis on reporting of the General Assembly Resolution 11-1 (which condemned aggression and other violations of international law) and the ICJ provisional measures decision indicates as much: whereas the resolution was portrayed in the media as "non-binding" (albeit important symbolically in establishing a widespread state consensus), the ICJ's provisional measures order was understood to confirm the illegality of Russia's invasion.¹¹⁷

The parties themselves diverged on the legal significance of the provisional measures decision. For Ukraine, the decision was portrayed as an authoritative judicial ruling despite its provisional nature. Commenting on Twitter, President Zelensky thus hailed Ukraine's "complete victory in its case against Russia" at the ICJ.¹¹⁸

[/perma.cc/M7KD-5DC4](https://perma.cc/M7KD-5DC4)] (archived Sept. 24, 2022); EUR. CT. OF HUM. RTS., THE EUROPEAN COURT GRANTS URGENT INTERIM MEASURES IN APPLICATION CONCERNING RUSSIAN MILITARY OPERATIONS ON UKRAINIAN TERRITORY (Jan. 3, 2022), <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=003-7272764-9905947&filename=The%20Court%20grants%20urgent%20interim%20measures%20in%20application%20concerning%20Russian%20military%20operations%20on%20Ukrainian%20territory.pdf> [<https://perma.cc/Z8QJ-CYBA>] (archived Sept. 24, 2022).

115. See Mara Tignino, *Quasi-judicial bodies*, in RESEARCH HANDBOOK ON THE THEORY AND PRACTICE OF INTERNATIONAL LAWMAKING 242, 242–61 (Catherine Brölmann & Yannick Radi eds., 2016); Oscar Schachter, *The Quasi-Judicial Role of the Security Council and the General Assembly*, 58 AM. J. INT'L L. 960, 960 (1964).

116. See MICHAEL RAMSDEN, INTERNATIONAL JUSTICE IN THE UNITED NATIONS GENERAL ASSEMBLY 101 (2021).

117. *E.g.*, Stephanie van den Berg, *World Court orders Russia to halt military operations in Ukraine*, REUTERS (Mar. 17, 2022), <https://www.reuters.com/world/europe/world-court-rule-emergency-measures-ukraine-vs-russia-case-2022-03-16/> [<https://perma.cc/Y5CR-WZHH>] (archived Sept. 25, 2022) (noting that ICJ rulings are binding on their face but that there are no direct means of enforcement); Humeyra Pamuk & Jonathan Landay, *U.N. General Assembly in historic vote denounced Russia over Ukraine invasion*, REUTERS (Mar. 3, 2022), <https://www.reuters.com/world/un-general-assembly-set-censure-russia-over-ukraine-invasion-2022-03-02/> [<https://perma.cc/98B6-VS4Y>] (archived Sept. 25, 2022); Julian Borger, *UN international court of justice orders Russia to halt invasion of Ukraine*, GUARDIAN (Mar. 16, 2022), <https://www.theguardian.com/world/2022/mar/16/un-international-court-of-justice-orders-russia-to-halt-invasion-of-ukraine> [<https://perma.cc/P3MB-35FG>] (archived Sept. 27, 2022) (again stating that ICJ rulings are binding but unenforceable); Julian Borger, *UN votes to condemn Russia's invasion of Ukraine and calls for withdrawal*, GUARDIAN (Mar. 2, 2022), <https://www.theguardian.com/world/2022/mar/02/united-nations-russia-ukraine-vote> [<https://perma.cc/T8H4-J3N6>] (archived Sept. 25, 2022); Daniel Posthumus & Kelebogile Zvobgo, *The ICJ ordered Russia to halt military operations in Ukraine. What comes next?*, WASH. POST (Mar. 25, 2022), <https://www.washingtonpost.com/politics/2022/03/25/icj-russia-ukraine-international-law/> [<https://perma.cc/HE3S-B92U>] (archived Sept. 25, 2022).

118. Володимир Зеленський (@ZelenskyyUa), TWITTER (Mar. 16, 2022), <https://twitter.com/zelenskyyua/status/1504120775749550081?s=21> [<https://perma.cc/SMY7-RVKN>] (archived Sept. 25, 2022).

President Zelensky noted that the ICJ ordered Russia “to immediately stop the invasion,” which was “binding under international law.”¹¹⁹ In turn, “Russia must comply immediately” and “[i]gnoring the order will isolate Russia even further.”¹²⁰ The nuance of this being an interim order, and not a final determination, was omitted from this proclamation of victory. From a public relations perspective, the provisional measures decision thus served Ukraine’s interests in the same manner as if there had been a decision on the merits, in obtaining a binding decision to use against Russia.¹²¹ By contrast, Russia used the media to challenge the legal nature of the provisional measures decision. A spokesman for Russia, Dmitry Peskov, indicated to the media that Russia “cannot take this decision into account” given that there was “no consent” to the case from both sides, thereby rendering the ruling invalid.¹²² Although legally misconceived (the Court did say that it had jurisdiction), Russia was signalling its intention to not comply with the ruling and to file preliminary objections to jurisdiction.

Russia has a history of non-compliance with the Court’s orders. The ICJ’s ordering of provisional measures in 2017 for Russia to respect the Crimean Tartar’s rights under CERD ultimately did not stop further incursions into Ukrainian territory.¹²³ Going back further, Russia also resisted the provisional measures ordered in 2008 in *Georgia v. Russia*, instead publicly rejecting the order on the basis that the seven-judge dissenting opinion supported its position.¹²⁴ Similarly, the ICJ’s provisional measures of March 16, 2022, did not lead to Russian withdrawal from Ukraine; in fact, there was an intensification of hostilities, including the unearthing of heinous international crimes, including allegations of genocide and war crimes, that sparked international outrage.¹²⁵ It is also apparent that, so far, the litigation has not led to an appreciable change in the rationale offered by Russia for its intervention. To be sure, Russia’s written submissions to the Court downplayed a genocide-prevention imperative and instead

119. *Id.*

120. *Id.*

121. As of April 29, 2022, President Zelensky’s tweet has been retweeted nearly forty thousand times, with over two thousand quote tweets and over 205,000 likes. *Id.*

122. *Kremlin, As Expected, Rejects ICJ Ruling to Halt Ukraine Invasion*, RADIO FREE EUR. (Mar. 17, 2022), <https://www.rferl.org/a/russia-rejects-icj-war-ruling/31757644.html> [<https://perma.cc/3C69-ZSRC>] (archived Sept. 25, 2022).

123. See generally CSFT/CERD Provisional Measures Decision, 2017 I.C.J.

124. See U.N. GAOR, 64th Sess., 32nd plen. mtg. at 7, U.N. Doc. A/64/PV.32 (Oct. 30, 2009) (“The Court found that it had prima facie jurisdiction, with only eight judges voting in favour and seven against. A virtual 50-50 vote split has been quite a rare occurrence in the history of the Court. Furthermore, for the very first time in its judicial proceedings on provisional measures, seven judges formed a united front, signing an opinion dissenting from the position of the other eight. The conclusion of half of the judges that the Court’s provisional measures, as part of the recognition of prima facie jurisdiction, were based on shaky legal ground speaks for itself.”).

125. See, e.g., *Suspected Russian War Crimes in Ukraine’s Bucha Spark Global Outrage*, FRANCE 24 (Apr. 4, 2022), <https://www.france24.com/en/europe/20220404-russian-war-crimes-in-ukraine-spark-global-outrage> [<https://perma.cc/66PN-FYNA>] (archived Sept. 25, 2022).

emphasised a self-defence justification under Article 51.¹²⁶ At the same time, Russia has continued to maintain outside the legal proceedings the line that the main purpose of the military operation has been to protect the people of Donbas from genocide perpetrated by the “Kiev regime.”¹²⁷ Speaking to a domestic audience just two days after the ICJ decision was released, President Putin thus noted that the people of Donbas “were besieged and subjected to systemic shelling with artillery and bombing by aircraft – and this is actually what is called ‘genocide.’”¹²⁸ Accordingly, “the main goal and motive of the military operation that we launched in Donbass and Ukraine is to relieve these people of suffering, of this genocide.”¹²⁹ Instead of refining its justifications, Russia in fact has doubled down on its genocide-prevention narrative.

What, though, about the achievement of Ukraine’s goal in catalysing or supporting a response within the international system? There is mixed evidence in this respect. States, intergovernmental organizations, and international organizations have publicly endorsed the ICJ decision and called upon Russia to comply.¹³⁰ Statements adopted by the “G7” and North Atlantic Treaty Organisation have called for Russia to suspend military operations per the ICJ order, as a means to achieve a ceasefire and negotiated solution.¹³¹ Before the

126. See Russia Response, 2022 I.C.J. at 6, ¶ 20 (explaining the occurrence of genocide being part of the “general humanitarian environment along with other factors and considerations” to justify the military operation).

127. *Address by the President of the Russian Federation*, *supra* note 74.

128. President of Russia, *Concert marking the anniversary of Crimea’s reunification with Russia*, THE KREMLIN (Mar. 18, 2022), <http://en.kremlin.ru/events/president/news/68016> [<https://perma.cc/8MDB-UETE>] (archived Sept. 25, 2022); see also President of Russia, *Meeting with public representatives of Crimea and Sevastopol*, THE KREMLIN (Mar. 18, 2022), <http://en.kremlin.ru/events/president/news/65172> [<https://perma.cc/BGG2-587C>] (archived Sept. 25, 2022).

129. *Concert marking the anniversary of Crimea’s reunification with Russia*, *supra* note 128; see also *Meeting with public representatives of Crimea and Sevastopol*, *supra* note 128.

130. See, e.g., *Statement: International Court of Justice (ICJ) Ruling on the Request for Provisional Measures Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine vs. Russian Federation)*, REPUBLIC OF THE PHIL. DEP’T OF FOREIGN AFFS. (Mar. 23, 2022), <https://dfa.gov.ph/dfa-news/statements-and-advisories/update/30280-statement-international-court-of-justice-icj-ruling-on-the-request-for-provisional-measures-under-the-convention-on-the-prevention-and-punishment-of-the-crime-of-genocide-ukraine-vs-russian-federation>

[<https://perma.cc/7JQY-Z75U>] (archived Sept. 27, 2022); *Speakers Discuss Two Competing Draft Resolutions on Humanitarian Situation in Ukraine, as General Assembly Resumes Emergency Special Session*, UNITED NATIONS (Mar. 23, 2022), <https://www.un.org/press/en/2022/ga12410.doc.htm> [<https://perma.cc/2LA9-2RVT>] (archived Sept. 27, 2022) (showing that states also drew from the decision in General Assembly debates, including Lithuania, Croatia, Marshall Islands and Andorra) [hereinafter *U.N. Competing Drafts*].

131. See *G7 Foreign Ministers’ Statement on Russia’s War of Aggression Against Ukraine*, U.S. DEP’T OF STATE (Apr. 7, 2022), <https://www.state.gov/g7-foreign-ministers-statement-on-russias-war-of-aggression-against-ukraine/> [<https://perma.cc/28X4-4NTV>] (archived Sept. 27, 2022); see also *G7 Chair’s Statement on Today’s G7 Call*, G7 RSCH. GRP. (Mar. 17, 2022), <http://www.g7.utoronto.ca/foreign/220317-ukraine.html> [<https://perma.cc/S2WN-NFD7>] (archived Sept. 27, 2022); *Statement by NATO Heads of State and Government*, N. ATL. TREATY ORG. (Mar. 24,

ICJ released its provisional measures decision, the HRC, in a resolution creating a commission of inquiry, noted the role of the ICJ “in settling, in accordance with international law, legal disputes submitted to it by States.”¹³² The International Labour Organisation (ILO) went a step further in using the ruling to support its operational decision-making: it drew from the “legally binding” provisional measures decision “to suspend invitations” to Russia to attend ILO meetings.¹³³ Another noteworthy development has been a joint statement by some forty-three states and the European Union indicating their support of Ukraine’s case before the ICJ.¹³⁴ This statement stressed the importance of Russia observing provisional measures: “[F]ailure to comply with the Court’s 16 March 2022 Order constitutes a further breach, by Russia, of its international obligations.”¹³⁵ Most significantly, these forty-three states and the European Union indicated their intention to support Ukraine by joining the case as interveners.¹³⁶ Practically speaking, this would allow these states to make representations to the Court, including “their interpretation of some of the [Genocide Convention’s] essential provisions.”¹³⁷ In another sense, the intervener procedure has provided a further channel for states to organise multilaterally to hold Russia to account and exert pressure on it to comply with international law.

However, the provisional measures decision has not been incorporated into the reasoning or decision-making of all relevant international organs. The Security Council, as prior practice indicates, may adopt a resolution demanding Russia’s compliance with the provisional measures decision and to take Chapter VII action to secure compliance.¹³⁸ Yet, such action is impossible given Russia’s threatened or actual use of the veto. Some Security Council members in debates have instead reminded Russia of its obligations under the ICJ decision. However, such members have not used the decision to challenge the illegitimacy of the veto when exercised by a permanent member

2022), [https://www.nato.int/cps/en/natohq/official_texts_193719.htm?](https://www.nato.int/cps/en/natohq/official_texts_193719.htm?selectedLocale=en)
selectedLocale=en [https://perma.cc/3WGD-LLHY] (archived Sept. 27, 2022).

132. Human Rights Council Res. 49/1, U.N. Doc. A/49/1 (Mar. 4, 2022).

133. INT’L LABOUR ORG., RESOLUTION CONCERNING THE RUSSIAN FEDERATION’S AGGRESSION AGAINST UKRAINE FROM THE PERSPECTIVE OF THE MANDATE OF THE INTERNATIONAL LABOUR ORGANIZATION (Mar. 2022), https://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/documents/meeting_document/wcms_839998.pdf [https://perma.cc/U3QJ-7TKS] (archived Sept. 27, 2022) (also citing UN General Assembly and Human Rights Council resolutions to support this decision).

134. *Joint Statement of support for Ukraine’s application before the International Court of Justice against Russia*, FOREIGN, COMMONWEALTH & DEV. OFF. OF U.K. (July 13, 2022), <https://www.gov.uk/government/news/joint-statement-of-support-for-ukraines-application-before-the-international-court-of-justice-against-russia> [https://perma.cc/KF67-XXPM] (archived Sept. 27, 2022).

135. *Id.*

136. *See id.* (“It is in the interest of all States Parties to the Genocide Convention, and more broadly of the international community as a whole, that the Convention not be misused or abused. That is why the signatories of the present declaration which are Parties to the Genocide Convention intend to intervene in these proceedings.”).

137. *Id.*

138. *See generally* Ramsden & Jiang, *supra* note 108.

against its obligations, despite the Court decision constituting an obligation under the UN Charter.¹³⁹ Perhaps more surprisingly, the General Assembly, in its Emergency Special Session on Ukraine, has yet to explicitly endorse the decision or call upon Russia to comply, despite numerous members referencing the ICJ decision (and Russia's failure to implement it so far) in its explanations of vote in support of resolutions.¹⁴⁰ In contrast to the ILO suspension decision, the General Assembly suspended Russia's membership in the HRC without referencing the provisional measures decision; this decision was based on the evidence of human rights abuses contained in UN monitoring reports.¹⁴¹ This omission probably reflected the standard applicable to these suspension decisions, concerned with "gross and systematic violations of human rights" (with misuse of the Genocide Convention as a pretext for invasion perhaps not considered a gross and systematic human rights violation).¹⁴² Finally, there is no appreciable direct impact of the ICJ decision on the decision-making of regional organisations, including the Council of Europe and EU, that have suspended Russia's membership and imposed economic sanctions respectively.¹⁴³ The United States, amongst others, has similarly not invoked the provisional measures decision as a basis for the imposition or continuation of sanctions.¹⁴⁴ It is possible that the ICJ decision con-

139. See U.N. SCOR, 76th Sess., 9011th mtg. at 12, 17, 20, 24, 30, U.N. Doc. S/PV.9011 (Apr. 5, 2022); U.N. SCOR, 76th Sess., 9013th mtg. at 11, U.N. Doc. SC/14857 (Apr. 11, 2022).

140. See *U.N. Competing Drafts*, *supra* note 130 (containing statements by Lithuania (also speaking for Denmark, Estonia, Finland, Iceland, Latvia, Norway and Sweden), Croatia, and the Marshall Islands).

141. See G.A. Res. ES-11/3 (Apr. 7, 2022).

142. G.A. Res. 60/251, ¶ 8 (Mar. 15, 2006).

143. See Council of Europe Committee of Ministers, *2.3 Situation in Ukraine – Measures to be taken, including under Article 8 of the Statute of the Council of Europe*, COUNCIL OF EUR. (Feb. 25, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5a360 [<https://perma.cc/VB5Z-982M>] (archived Sept. 27, 2022) (showing that there have been several decisions, made before and after the ICJ decision); Council of Europe Committee of Ministers, *Resolution CM/Res(2022)2 on the cessation of the membership of the Russian Federation to the Council of Europe*, COUNCIL OF EUR. (Mar. 16, 2022), https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=0900001680a5da51 [<https://perma.cc/E7J8-TW75>] (archived Oct. 27, 2022); *Press statement by President von der Leyen on the fifth round of sanctions against Russia*, EUR. COMM'N (Apr. 5, 2022), https://ec.europa.eu/commission/presscorner/detail/en/statement_22_2281 [<https://perma.cc/WSH2-HFK9>] (archived Sept. 29, 2022); *Ukraine: Declaration by the High Representative on behalf of the EU on Russian atrocities committed in Bucha and other Ukrainian towns*, COUNCIL OF THE EUR. UNION (Apr. 4, 2022), <https://www.consilium.europa.eu/en/press/press-releases/2022/04/04/ukraine-declaration-by-the-high-representative-on-behalf-of-the-eu-on-russian-atrocities-committed-in-bucha-and-other-ukrainian-towns/> [<https://perma.cc/UJL4-35CQ>] (archived Sept. 29, 2022); see also Philip Leach, *A Time of Reckoning? Russia and the Council of Europe*, STRASBOURG OBSERVER (Mar. 17, 2022), <https://strasbourgobservers.com/2022/03/17/a-time-of-reckoning-russia-and-the-council-of-europe/> [<https://perma.cc/EZE9-RD8P>] (archived Sept. 29, 2022).

144. See *FACT SHEET: United States, G7 and EU Impose Severe and Immediate Costs on Russia*, THE WHITE HOUSE (Apr. 6, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/06/fact-sheet-united-states-g7-and-eu-impose-severe-and-immediate-costs-on-russia/> [<https://perma.cc/5843-3UCA>] (archived Sept. 27, 2022).

tributed towards a general ethos in which such decisions were viewed as justified, although this is difficult to prove without the direct incorporation of the ICJ decision into the institutional decision-making instrument.

One noteworthy finding that arose when reviewing international responses to the Ukrainian armed conflict since February 24, 2022, was the large number of references to the investigation ongoing at the ICC into the Ukraine situation. The activity before this international court has, in some respects, featured more prominently in discourse compared to the ICJ decision. In an address to the Security Council on April 5, 2022, President Zelensky did not refer to the ICJ decision or Russia's failure to comply thereto; he did, however, mention the need for ICC involvement to secure "full truth, full responsibility."¹⁴⁵ International organs and states have also emphasised the need for ICC action as a means to secure accountability for the international crimes that were documented as the war in Ukraine intensified.¹⁴⁶ This probably reflects shifting priorities as the full scale and extent of atrocities come to light. The ICC is the most appropriate judicial institution on which to pin hopes for accountability for such atrocities, given its jurisdiction over a wide range of international crimes. Therefore, while challenging the legality of the invasion was an immediate priority in February 2022, it has, to some extent, been overtaken by a new international priority to hold Russian suspects accountable for the international crimes of war crimes and, increasingly, genocide.¹⁴⁷ In this respect, one way in which the ICJ case would gain relevance to the growing anti-impunity agenda is if Ukraine was to widen its claims in *Allegations of Genocide* to include Russia's responsibility for genocide and not merely abuse of the Genocide Convention to justify its invasion.

145. Volodymyr Zelenskyy, *Speech by the President of Ukraine at a meeting of the UN Security Council*, PRESIDENT OF UKR. (Apr. 5, 2022), <https://www.president.gov.ua/en/news/vistup-prezidenta-ukrayyni-na-zasidanni-radi-bezpeki-oon-74121> [<https://perma.cc/U938-VDNU>] (archived Sept. 27, 2022).

146. See e.g., *Doorstep statement by NATO Secretary General Jens Stoltenberg at the start of the extraordinary Summit of NATO Heads of State and Government*, N. ATL. TREATY ORG. (Mar. 24, 2022), https://www.nato.int/cps/en/natohq/opinions_193611.htm?selectedLocale=en [<https://perma.cc/D3TK-9QG4>] (archived Sept. 27, 2022); *Press conference by NATO Secretary General Jens Stoltenberg following the Extraordinary meeting of NATO Ministers of Foreign Affairs*, N. ATL. TREATY ORG. (Mar. 4, 2022), https://www.nato.int/cps/en/natohq/opinions_192739.htm?selectedLocale=en [<https://perma.cc/HW2E-JX5S>] (archived Sept. 27, 2022); *U.N. Competing Drafts, supra* note 130 (see Japan's statement); *Mounting Reports of Crimes against Women, Children in Ukraine Raising 'Red Flags' over Potential Protection Crisis, Executive Director Tells Security Council*, UNITED NATIONS (Apr. 11, 2022), <https://www.un.org/press/en/2022/sc14857.doc.htm> [<https://perma.cc/KL F7-99VR>] (archived Sept. 28, 2022) (see the statements of Norway, the United Kingdom, and Germany).

147. See Kanishka Singh, *Canada lawmakers vote unanimously to label Russia's acts in Ukraine as 'genocide'*, REUTERS (Apr. 28, 2022), <https://www.reuters.com/world/canada-lawmakers-vote-unanimously-label-russias-acts-ukraine-genocide-2022-04-27/> [<https://perma.cc/SCC2-F35J>] (archived Sept. 28, 2022); George Wright, *Ukraine war: Is Russia committing genocide?*, BBC (Apr. 13, 2022), <https://www.bbc.com/news/world-europe-61017352> [<https://perma.cc/CAP3-UQ8H>] (archived Sept. 28, 2022).

Although the impact of the provisional measures decision appeared to be minimal in the month following its release, some commentators have nonetheless reported a symbolic effect. This impact has been noted in other strategic litigations, particularly those brought on behalf of a large group of victims, such as the Rohingya, with a judicial ruling providing some vindication for historical and ongoing wrongdoing.¹⁴⁸ In a similar manner, the ICJ decision itself (albeit to a *prima facie* standard) has provided recognition of Ukraine's right to territorial integrity and sovereignty, and the need for a vulnerable population to be protected during wartime.¹⁴⁹ This symbolic effect will be of little comfort for victims on the ground but represents an advancement in international judicial thinking both specifically on the Ukraine situation and generally on the readiness for the ICJ to intervene in ongoing conflicts. Specifically, recall that in its previous *Ukraine v. Russia* decision construing the CSFT and CERD, the ICJ avoided the issue whether there existed *prima facie* evidence of Russian support for terrorism in Ukraine.¹⁵⁰ In only ordering Russia to protect the rights of Crimeans under CERD, the ICJ thus avoided the thornier question as to the extent of Russian intervention into Ukraine's internal affairs under the CSFT.¹⁵¹ By contrast, the ICJ has now provided the first judicial ruling as to the apparent illegality of Russia's decision to invade Ukraine (at least insofar as that issue arises from a false genocide claim under the Genocide Convention). More generally, this reflects an expansion in judicial thinking on the Court's role in answering questions pertaining to the use of force in ongoing conflict situations. It contrasts sharply with the ICJ's approach adopted in *Georgia v. Russia*, where the Court in 2011 denied jurisdiction based on a claim under CERD for reasons that have fairly been described as overly formalistic.¹⁵² If the ICJ inadvertently sent a message in 2011 and 2017 that it will not scrutinise Russian use of force, the 2022 provisional measures decision has shown a decisive turn that paves the way for continued scrutiny of the ongoing conflict in the future.

Finally, it is worth considering precisely what legal impact the provisional measures decision may have. Recall that counsel for Ukraine, Professor Koh, alluded to the ICJ's important role in the international system, as the "essential spark that will inspire other

148. See Kelebogile Zvobgo & Nathaniel Liu, *Putin won't end up at The Hague — but war-crimes prosecutions of Russia still matter*, WASH. POST (Mar. 22, 2022), <https://www.washingtonpost.com/outlook/2022/03/15/international-law-tribunal-russia-ukraine/> [<https://perma.cc/2EXV-G6SA>] (archived Sept. 30, 2022); see also Ramsden, *supra* note 6, at 468 (explaining the symbolic impact of the ICJ's provisional measures ruling in *Gambia v. Myanmar*).

149. See Zvobgo & Liu, *supra* note 148; see also Ramsden, *supra* note 6, at 465 (on the ICJ's determination that the Rohingya are an "extremely vulnerable" population).

150. See generally *CSFT/CERD Provisional Measures Decision*, 2017 I.C.J.; Fouchard, *supra* note 82, at 777–78.

151. See *CSFT/CERD Provisional Measures Decision*, 2017 I.C.J. at 131–32, ¶¶ 75–76.

152. See *Georgia v Russia Preliminary Objections Decision*, 2011 I.C.J. at 139–40, ¶¶ 182–84; Okowa, *supra* note 56, at 749 (stating that the ICJ took "an excessively formalist view of its role").

competent international organs and agencies to take the further steps necessary.”¹⁵³ Could the provisional measures decision itself go beyond being a “spark” to actually providing a legal foundation for the taking of particular measures in the international system and, if so, in what form? The starting point is to recognise that the provisional measures decision entails binding obligations, not only flowing from the Genocide Convention but also in the UN Charter.¹⁵⁴ In the UN Charter, a decision of the ICJ is legally equivalent to one by the Security Council—both are binding decisions (albeit of different scope). Article 94(1) stipulates that each member undertakes “to comply with the decision of the International Court of Justice in any case to which it is a party.”¹⁵⁵ The ICJ has similarly noted provisional measures to be binding under its statute.¹⁵⁶ What constitutes an ICJ “decision” is open for a debate that cannot be considered at any length here. The best view is that a decision includes not only a “judgment” on the merits but also interlocutory orders, including provisional measures.¹⁵⁷ That being the case, the ICJ’s provisional measures order requiring that Russia observe its obligations under the Genocide Convention had the parallel effect of creating an obligation under Article 94 of the UN Charter. This provides an additional hook for members to assert that Russia has not acted in accordance with the expectations incumbent upon it as a UN member. In its resolution on Russian aggression, the General Assembly highlighted “the obligation under Article 2 (2) of the Charter, that all Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfil in good faith the obligations assumed by them in accordance with the Charter.”¹⁵⁸ Thereafter, the General Assembly suspended Russia from the HRC.¹⁵⁹ The assembly’s hint at membership being conditional (above) could also support a decision within this organ as to whether to accept the credentials of the Russian representative.¹⁶⁰ The acceptance of a governmental representative’s credentials before the assembly is, ordinarily, a formality.¹⁶¹ However, there is also precedent for the General Assembly to reject credentials where a regime has flagrantly

153. Ukraine Oral Argument, 2022 I.C.J. at 61, ¶ 16.

154. See *The Gambia v Myanmar Provisional Measures Decision*, 2020 I.C.J. at 29, ¶ 84; Statute of the International Court of Justice, *supra* note 3, art. 41; *LaGrand Case* (Ger. v. U.S.), Judgment, 2001 I.C.J. Rep. 506, ¶ 109 (June 27).

155. U.N. Charter art. 94(1).

156. See *LaGrand Case*, 2001 I.C.J. at 502, ¶ 102.

157. See Karin Oellers-Frahm, *The International Court of Justice, Article 94, in THE CHARTER OF THE UNITED NATIONS: A COMMENTARY 1957, 1960* (Bruno Simma et al. eds., 3d ed. 2012) (highlighting that art. 94(2) refers to ICJ “judgments;” given that it must be assumed that the drafters appreciated textual distinctions, the reference to ‘decision’ in art. 94(1) was intended to have a wider meaning).

158. G.A. Res. ES-11/1 (Mar. 1, 2022).

159. See G.A. Res. ES-11/3 (Apr. 7, 2022).

160. See, e.g., Farrokh Jhabvala, *The Credentials Approach to Representation Questions in the U.N. General Assembly*, 7 CAL. W. INT’L L.J. 615 (1977); Gerhard Erasmus, *Rejection of Credentials: A Proper Exercise of General Assembly Powers or Suspension by Stealth?*, 7 S. AFR. Y.B. INT’L L. 40 (1981).

161. See Jhabvala, *supra* note 160, at 620; Erasmus, *supra* note 160, at 42.

violated the UN Charter.¹⁶² It is open to political debate whether the censorship of Russia in this manner is desirable. Nonetheless, the ongoing and persistent violation of the ICJ's provisional measures decision, which in turn constitutes a contravention of UN Charter obligations, provides a clear route for the assembly to reject Russia's credentials in the future.

VI. CONCLUSION

Allegations of Genocide provides the latest iteration of a state strategically invoking the ICJ's jurisdiction as part of a wider campaign for compliance with international law. Case studies into particular instances of strategic litigation before the ICJ warrant consideration as to the goals of the litigants (both applicant and respondent), the strategic choices made by the Court in its decisions, and the impacts produced by the litigation, both intended and unintended. In this respect, the ICJ's interim remedy jurisdiction affords an applicant with a particularly valuable tool to promote its cause given the lower threshold needed to demonstrate a risk of irreparable harm to existing rights than is required to win a decision on the merits. The interim remedy also offers a relatively quick way to obtain an ICJ judgment that can then in turn be used to support an international campaign, using rule of law symbolism.

Tracking the goals and impact of *Allegations of Genocide* in the month following the provisional measures decision, a number of conclusions are warranted. From the perspective of Ukraine, it is clear that the decision served to amplify its claim to the international public that Russia had violated international law, achieving a "complete victory" before the Court. Several other states, too, endorsed the decision and called for Russia's compliance with it. However, despite Professor Koh's prediction that the ICJ's decision would act as a spark for international organisations to act, there are only few instances where this has explicitly been the case so far (e.g., the ILO's membership decision). Moreover, it is apparent that international accountability discourse subsequently shifted away from the reasons for Russia's invasion towards the conduct of its troops in Ukraine, with particular emphasis being placed on the role of the ICC in delivering accountability for international crimes. From the respondent's perspective, too, the case has apparently failed to alter Russia's preferences or discourse concerning the decision to commence its military operation in Ukraine. Russia did not appear before the ICJ, nor offer substantively new information (in comparison to its prior justifications for the invasion) in its written submissions. Indeed, President Putin doubled down on the genocide-prevention imperative just days after the provisional measures decision was released, in a further act of defiance against the Court.

162. See, e.g., Jhabvala, *supra* note 160, at 615–17; Erasmus, *supra* note 160, at 40–41.

This Article has not sought to consider the possible longer-term impact of *Allegations of Genocide*, although it has provided a basic structure for future researchers to carry out this task. An important consideration will be whether Ukraine continues with the case or simply discontinues the case now that it has obtained its “complete victory.” If the length of comparable cases provides any indication of a timeframe, then it will take over a decade for the case to conclude.¹⁶³ In that time, it is possible that Ukraine negotiates a peace agreement with Russia, perhaps with discontinuance of the case being a bargaining chip in these negotiations. On the other hand, the continuation of hostilities will provide every incentive for Ukraine to press ahead with its claim and possibly also widen its case to include allegations that Russia has committed genocide. A recharacterization of their claim, from the seeking of a negative declaration (on the non-occurrence of genocide) to a positive declaration that Russia has committed genocide, will, in turn, justify further studies into the impact of the case from the perspective of attaining accountability for both state and individual criminal responsibility for acts of genocide.

163. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), 2007 I.C.J. *Bosnia and Herzegovina v. Serbia and Montenegro* took fourteen years to conclude from initiation of proceedings on Mar. 20, 1993, to the publication of the final judgment on Feb. 26, 2007. See *id.* ¶ 1.