Noble Motives, Unjustified Reasoning: A Comment on Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)

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Abstract: The International Court of Justice recently delivered its Provisional Measures Order on the Ukrainian Genocide case, demanding an immediate suspension of the Russian military operation against Ukraine. This article examines three legal issues deriving from this order. Firstly, it evaluates the establishment of the ICJ's *prima facie* jurisdiction under the compromissory clause of the Convention on the Prevention and Punishment of the Crime of Genocide. It finds that the Order inexplicably departed from the ICJ's jurisprudence in the Legality of Use of Force cases, and that the existence of indispensable external *jus ad bellum* issues in the present case should have deprived the ICJ of its jurisdiction. Secondly, it assesses the plausibility of the rights sought, and finds that there is no plausible right under the Convention on the Prevention and Punishment of the Crime of Genocide to be free from military attacks based on a claim of preventing and punishing, since the parties could not have intended so. Thirdly, it analyzes the link between the claimed rights and the provisional measure granted and finds that this requirement is not satisfied in this case because the provisional measure indicated will also protect a right under *jus ad bellum*, which falls outside the ICJ's jurisdiction. In view of the above, this article argues that although the Order might achieve the political objective of mitigating the conflict, the ICJ's reasoning has been unconvincing or at least incomplete in legal terms, which risks undermining the ICJ's reputation and reliability as well as the coherence and credibility of international law.

Keywords: Ukraine; The Convention on the Prevention and Punishment of the Crime of Genocide; The International Court of Justice; Compromissory Clauses; Provisional Measures

1. Introduction

On March 16, 2022, the International Court of Justice (hereinafter referred to as the ICJ) delivered its Order on the Request for the indication of provisional measures submitted by Ukraine in the case concerning Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation) (hereinafter referred to as the Order).[2] The ICJ, by thirteen votes to two, ordered that Russia shall "immediately suspend" its military operations against Ukraine and ensure that the relevant armed forces "take no steps in furtherance of the military operations"; it also unanimously ordered that both Parties shall refrain from any action which might "aggravate

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[2] See International Court of Justice, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf (accessed on March 16, 2021).

or extend the dispute".[3] This case was originally filed on February 27, 2022 by Ukraine as a response to Russia's "special military operations" against Ukraine beginning on February 24, 2022. In its application, Ukraine creatively invoked the Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter referred to as the Genocide Convention) as the basis for the ICJ's jurisdiction and indication of provisional measures, arguing that Russia has violated the Genocide Convention by falsely accusing Ukraine of committing genocide and by using force based on such a false claim.[4]

The case raises several interesting issues concerning the procedural law of the ICJ, as reflected in both the individual opinions of judges and academic literature.[5] This article examines three of those issues, namely the establishment of the ICJ's jurisdiction under a compromissory clause (Section 2), the plausibility of the rights sought (Section 3), and the link between the claimed rights and the provisional measure (Section 4). It then argues that although the Order might achieve the ICJ's political objective of mitigating the conflict, its reasoning has been relatively weak, or at least incomplete, which risks undermining the ICJ's reputation and reliability as the world's principal judicial organ.

2. The Court's *Prima Facie* Jurisdiction

The ICJ may indicate provisional measures only if it has *prima facie* jurisdiction over the merits of the case.[6] At this stage, the ICJ is not required to definitively establish its

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[3] Id., at 20.

[4] See International Court of Justice, *Allegations of Genocide under the Convention on the Preventi on and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Application Instituti ng Proceedings*, https://www.icj-cij.org/public/files/case-related/182/182-20220227-APP-01-00-EN.pdf [hereinafter Ukrainian Application] (accessed on February 27, 2022); *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of Provisional Measures*, https://www.icj-cij.org/public/files/case-related/182/182-20220227-WRI-01-00-EN.pdf [hereinafter Ukrainian Request for Provisional Meas ures] (accessed on February 27, 2022).

[5] See International Court of Justice, *Allegations of Genocide under the Convention on the Preventi on and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Declaration of Vic e-President Gevorgian*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-01-E N.pdf [hereinafter Declaration of Vice-President Gevorgian] (accessed on March 16, 2022); *Declara tion of Judge Bennouna*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-02 -EN.pdf [hereinafter Declaration of Judge Bennouna] (accessed on March 16, 2022); *Declaration of Judge Xue*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-03-EN.pdf [her einafter Declaration of Judge Xue] (accessed on March 16, 2022); *Separate opinion of Judge Robi nson*, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf (accessed o n March 16, 2022); *Declaration of Judge Nolte* , https://www.icj-cij.org/public/files/case-related/182/ 182-20220316-ORD-01-05-EN.pdf [hereinafter Declaration of Judge Nolte] (accessed on March 16, 2022); Marko Milanovic, *Russia's Submission to the ICJ in the Genocide Case; Russia's Withdraw al from the Council of Europe*, https://www.ejiltalk.org/russias-submission-to-the-icj-in-the-genocide-c ase-russias-withdrawal-from-the-council-of-europe/ (accessed on April 6, 2022); Marko Milanovic, *IC J Indicates Provisional Measures Against Russia, in a Near Total Win for Ukraine; Russia Expelle d from the Council of Europe*, https://www.ejiltalk.org/icj-indicates-provisional-measures-against-russia -in-a-near-total-win-for-ukraine-russia-expelled-from-the-council-of-europe/ (accessed on April 6, 202 2); Matina Papadaki, *Complex Disputes and Narrow Compromissory Clauses: Ukraine's Institution of Proceedings against Russia*, https://www.ejiltalk.org/complex-disputes-and-narrow-compromissory-cl auses-ukraines-institution-of-proceedings-against-russia/ (accessed on April 6, 2022).

[6] See International Court of Justice, *Application of the International Convention for the Suppression of the Financing of Terrorism and of the International Convention on the Elimination of All Forms of Racial Discrimination (Ukraine v. Russian Federation)*, para.17 (2017) [hereinafter *ICSFT and CERD*, Order,

jurisdiction, which means that it may find jurisdiction if the evidence is not "*obviously* excluding its jurisdiction".[7] In fact, the ICJ has on 3 occasions reversed its finding of *prima facie* jurisdiction and eventually dismissed the case during the proceedings of preliminary objections.[8]

In this case, the jurisdictional basis invoked by Ukraine was Article IX of the Genocide Convention, a compromissory clause accepted by both parties that confers on the ICJ's jurisdiction over disputes "relating to the interpretation, application or fulfillment" of the Genocide Convention.[9] Obviously, the key question is whether Ukraine's allegations (and Russia's opposition, respectively) constitute "disputes" within the meaning of this provision. While there is little doubt that Ukraine's allegation of Russia's false genocide accusation falls under this clause and hence the ICJ's jurisdiction,[10] it is much more questionable to establish jurisdiction over the legality of Russia's use of force under the Genocide Convention.

2.1 Unexplained Departure from the Legality of Use of Force Cases

It should be recalled that the ICJ used to be faced with a situation similar to the present one during North Atlantic Treaty Organization's bombing campaign against Yugoslavia in 1999. In the midst of the conflict, Yugoslavia instituted proceedings against 10 North Atlantic Treaty Organization states before the ICJ, claiming *inter alia* that the bombarding has constituted genocide under the Genocide Convention, over which the ICJ had jurisdiction under the compromissory clause of the Genocide Convention.[11] The ICJ held in its Provisional Measures Order that "the threat or use of force against a State cannot in itself constitute an act of genocide within the meaning of Article II of the Genocide Convention", and since the ICJ was not convinced that the bombings "indeed entail the element of intent, towards a group as such, required by the provision", it held that the alleged acts were not "capable of coming within the provisions of the Genocide Convention". Therefore, no *prima facie* jurisdiction could be found under the

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Provisional Measures]; International Court of Justice, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)*, para.16 (2020) [hereinafter *The Gambia v. Myanmar*, Order, Provisional Measures].

[7] See Interhandel (Switzerland v. the United States of America), Order, Provisional Measures, 1957 I.C.J. Rep.105, 117, 119 (Oct. 24) (separate opinion of Lauterpacht, J.).

[8] See International Court of Justice, *Anglo-Iranian Oil Co. (United Kingdom v. Iran)*, Rep.93 (1952); International Court of Justice, *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Georgia v. Russian Federation)*, Rep.70 (2011); International Court of Justice, R*equest for Interpretation of the Judgment of 31 March 2004 in the Case concerning Avena and Other Mexican Nationals (Mexico v. the United States of America)*, Rep.3 (2009).

[9] See Convention on the Prevention and Punishment of the Crime of Genocide.

[10] What makes this claim somewhat exceptional is the fact that it is essentially a "reverse complia nce" claim, i.e. one that asks an adjudicatory body to declare that the applicant did not violate int ernational law. Such claims, albeit relatively scarce, are not entirely unprecedented, especially in W orld Trade Organization disputes; there seems no persuasive reason why "reverse compliance" clai ms cannot fall under jurisdictional clauses. See Deepak Raju, *Ukraine v Russia: A* "*Reverse Compl iance*" *case on Genocide*, https://www.ejiltalk.org/ukraine-v-russia-a-reverse-compliance-case-on-genocide/ (accessed on April 6, 2022).

[11] See International Court of Justice, *Legality of Use of Force (Yugoslavia v. the United States of America), Application instituting proceedings*, https://www.icj-cij.org/public/files/case-related/114/7173.pdf (accessed on April 29, 1999).

compromissory clause of the Genocide Convention.[12]

Despite Russia's explicit reference to these precedents in their submission,[13] the ICJ did not discuss these cases anywhere in the order. In his Declaration, Judge Nolte elaborated on this point and suggested that the ICJ distinguished the present case from the *Legality of Use of Force* cases due to the different content of disputes: while the former concerned whether the use of force with the stated purpose of preventing and punishing genocide violated the Genocide Convention, the latter concerned whether the use of force amounted to "genocide" and thus violated the Genocide Convention, and only the former was "capable of coming within the provisions of the Genocide Convention".[14]

Such reasoning, however, seems confusing. What the ICJ did in the Legality of Use of Force cases was essentially to deny the existence of a dispute based on the unlikelihood of satisfying a condition of the alleged substantive violation of the Genocide Convention. Yet, it is by no means clear that it would be easier to successfully establish Russia's alleged violation of the Genocide Convention in the present case. Moreover, and more importantly, such an issue of non-fulfillment is supposed to be relevant only to the determination of the merits of the case, or perhaps at most the plausibility of the applicant's claim that needs to be examined before indicating provisional measures, but in no way related to the existence of a "dispute" falling within the compromissory clause. Indeed, in the 2017 Ukraine v. Russia case, the ICJ found similarly the unlikelihood of the alleged violation of the Convention for the Prevention and Punishment of Terrorism; however, it did not thereby deny the existence of a "dispute" concerning that Genocide Convention, only rejecting the plausibility of the rights claimed by Ukraine under the Convention for the Prevention and Punishment of Terrorism and accordingly refused to indicate provisional measures based on that Convention.[15] In the author's view, this case has in effect overruled the Legality of Use of Force cases, and the ICJ should have clarified and reaffirmed this correct position in the present order, rather than simply putting the issue aside or drawing an artificial distinction between the precedent and the present case.

2.2 Parallel Disputes and Indispensable External Issues

Another argument made by Russia against the ICJ's jurisdiction (and perhaps the strongest one) was that the only dispute between the parties was about the legality of Russia's use of force against Ukraine under the Charter of the United Nations and customary international law, which had nothing to do with the "interpretation, application or fulfillment" of the Genocide Convention.[16] In response, the ICJ simply quoted its conclusion in Alleged Violations of the 1955 Treaty, stating that "certain acts or omissions may give rise to a dispute that falls within the ambit of more than one treaty", and the existence of such parallel disputes does not deprive the ICJ of jurisdiction over one of them.[17]

Such reasoning, however, seems to have missed the point. For one thing, since Russia

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[12] See *Legality of Use of Force (Yugoslavia v Belgium)*, International Court of Justice, paras.40-41 (1999).

[13] See Russian Federation, *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)*, https://www.icj-cij.org/public/files/case-related/182/182-20220307-OTH-01-00-EN.pdf (accessed on March 7, 2022).

[14] See Declaration of Judge Nolte, supra note 5, at 1.

[15] See *ICSFT and CERD*, supra note 6.

[16] See supra note 13.

[17] See supra note 2.

made clear in its submission that "the Genocide Convention does not provide a legal basis for any military operation…simply because they are beyond its scope of application",[18] it can be reasonably argued that the dispute between the parties as to whether the Genocide Convention can authorize Russia's use of force no longer exists, and hence no jurisdiction for the ICJ.[19] For another, even assuming the existence of the dispute, the reasoning quoted by the ICJ was built on a presumption that a single set of factual circumstances has generated parallel disputes concerning different but separable bodies of international law (e.g. a single military operation simultaneously violating *jus ad bellum* and *jus in bello*), but this is not the situation before the ICJ in the present case. The plain text of the Genocide Convention mentioned nothing about the legality of the use of force, and in the author's view, Ukraine has essentially been arguing that Russia's military operation has violated the Genocide Convention *because* it has violated the Charter of the United Nations and customary rules on the use of force.[20] That is to say, the legality of Russia's military operation under *jus ad bellum* is not separable from its legality under the Genocide Convention; it constitutes a precondition for the determination of the latter issue, and is thus an "indispensable external issue".[21]

It is generally accepted that the existence of three types of indispensable external issues does not affect the jurisdiction of a court or tribunal under a compromissory clause: (1) the external rules are referred to by an express *renvoi* provision in the original treaty; (2) the external rules are utilized as consideration in treaty interpretation; (3) the external rules applied are secondary rules of international law, e.g., those concerning treaty interpretation or state responsibility.[22] This is understandable since these external issues should have been predicted by state parties as an integral part of resolving disputes "relating to the interpretation and application" of a treaty, the jurisdiction over which can

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[18] See supra note 13.

[19] See supra note 5. But note that Ukraine may argue that Russia has only denied the *applicability* of the Convention to its military operations, but has never accepted that its use of force constitutes a *self-standing violation* of the Convention, the latter being the essential assertion of Ukraine; therefore, a dispute between the parties regarding the Convention still exists. On this possibility, see the analysis *infra*.

[20] Ukraine has expressly connected the legality of Russia's use of force under the Genocide Convention to that under *jus ad bellum* in its written submissions, stating that "Article VIII of the Convention further indicates that a Contracting Party taking action with the purported basis of preventing and punishing genocide cannot do so in a manner that violates the United Nations Charter…Russia's military action against a sovereign State based on a manifestly *false* claim of genocide is not consistent with either the Convention, or the provisions of the Charter referred to in Article VIII of the Convention, and thus exceeds the limits permitted by international law." See Ukrainian Request for Provisional Measures, supra note 4. It seems unlikely that Ukraine is claiming a self-standing violation of the Genocide Convention by Russia which is independent of its legality under *jus ad bellum*, because it is almost impossible for that claim to succeed: states could not have intended that a military operation justifiable as self-defence would nevertheless be unlawful under the Genocide Convention simply because one of its stated purpose involves the prevention of genocide.

[21] Legal scholarship has used various terminology of such issues, including "incidental questions", "implicated issues" and "incidental determinations". See Fabian Eichberger, *Give a Court an Inch and It Will Take a Yard? The Exercise of Jurisdiction over Incidental Issues*, 81(1) Heidelberg Journal of International Law (ZAÖRV) 235, 239 (2021). This article uses the term "indispensable external issue" to emphasize that the determination of such issues is inseparable from the alleged issues and that such issues arise from legal sources other than the original treaty.

[22] See Callista Harris, *Incidental Determinations in Proceedings under Compromissory Clauses*, 70(2) International and Comparative Law Quarterly 417, 426-430 (2021).

be evidently presumed to be contained in states' consent expressed in compromissory clauses.

However, as to indispensable external issues not falling within these categories, the law has been rather unclear, and a clear divide exists as to the outcome of relevant judicial decisions. In one line of cases, the mere existence of indispensable external issues seems capable of depriving the adjudicatory body of its jurisdiction. For example, the ICJ has explicitly and implicitly denied its jurisdiction over a delimitation dispute due to an indispensable issue regarding the entitlement of islands to a continental shelf and that over a sovereignty dispute due to an indispensable issue of maritime delimitation;[23] in South China Sea the arbitral tribunal stated in its *dicta* that jurisdiction over a dispute under the United Nations Convention on the Law of the Sea (hereinafter referred to as UNCLOS) might be denied if such a dispute would have required "an implicit decision on sovereignty".[24] In another line of cases, courts and tribunals have also rejected their jurisdiction, whereas they have done so not merely because certain indispensable external issues existed, but because they formed the "real" issue rather than a "minor" or "ancillary" issue in the case. For example, two UNCLOS arbitral tribunals have denied jurisdiction over one dispute concerning legality of the declaration of a marine protected area and that over one about violation of coastal state rights within maritime zones, since the "real issues" in the cases were indispensable external disputes concerning sovereignty.[25] In a third category of cases the existence of indispensable external issues failed to affect the jurisdiction of the respective fora. For example, the Permanent Court of International Justice has exercised jurisdiction both over the legality of expropriation of certain property under a bilateral treaty and the external issue concerning the owner of the property under another treaty.[26] UNCLOS arbitral tribunals and the International Tribunal for the Law of the Sea have exercised jurisdiction both over UNCLOS disputes and external issues of immunity or the legality of use of force;[27] several international courts and tribunals appeared to have ruled simultaneously on the delimitation of the outer continental shelf and the external issue of the delineation of the outer limits of those continental shelves.[28]

While this article does not intend to engage in a lengthy debate over the exact legal

[23] See Aegean Sea Continental Shelf (Greece v. Turkey), International Court of Justice, Rep.3, paras.83-90 (1978); Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia Singapore), International Court of Justice, Rep.12, para.299 (2008).

[24] See The South China Sea Arbitration (Philippines v. China), Permanent Court of Arbitration Case No. 2013-19, Award on Jurisdiction and Admissibility, para.153 (October 29, 2015).

[25] See Chagos Marine Protected Area (Mauritius v. U.K.), Permanent Court of Arbitration, paras.220-221, (2015); Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Ukraine v. Russian Federation), Permanent Court of Arbitration, paras.195-196 (2020).

[26] See Certain German Interests in Polish Upper Silesia (Ger. v. Pol.), Preliminary Objections, Judgment, 1925 P.C.I.J. (ser. A) No.6, at 18 (August 25).

[27] See The 'Enrica Lexie' Incident (Italy v India), PCA Case No. 2015-28, Award, para.808 (May 21, 2020); M/V Saiga (No.2) (St. Vincent v. Guinea), ITLOS Case No.2, Judgment, paras.155, 159 (July 1, 1999); Guyana v. Suriname, PCA Case No. 2004-04, Award, paras.405, 406, 487 (September 17, 2007); M/V Virginia G (Pan. v. Guinea-Bissau), ITLOS Case No.19, Judgment, paras.54, 362 (April 14, 2014).

[28] See e.g. Delimitation of the Maritime Boundary Between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS Case No.16, Judgment, para.394 (March 14, 2012); Bay of Bengal Maritime Boundary Arbitration (Bangladesh v. India), PCA Case No.2010-16, Award, para.83 (July 7, 2014).

effects that should be attributed to indispensable external issues,[29] it suffices here to suggest that one way of reconciling the aforementioned case law is to tackle this question as essentially a task to interpret the scope of consent (usually impliedly) given by state parties in compromissory clauses.[30] In the present Ukraine–Russia litigation, it is highly unlikely that the parties signing the compromissory clause of the Genocide Convention have consented to have an implicated dispute concerning *jus ad bellum* adjudicated by the ICJ; there is no textual or contextual evidence that supports an expansive reading of that provision either.[31] This also seems to be the principal reason that led 3 of the judges to express suspicion of the ICJ's jurisdiction over the present case in their Declarations.[32] Of course, as suggested above, the ICJ is not required to go into a detailed analysis of its jurisdiction at the phase of provisional measures, but it could have at least identified this issue and briefly expressed its attitude rather than merely omitting the issue as a whole, as it did in the present order. Such omission, if taken seriously, will erode the quality of the ICJ's reasoning and in turn the ICJ's professionalism.

One final comment will be made as to the implications of *Oil Platform*, a precedent involving the packaging and shoehorning of a *jus ad bellum* dispute into a compromissory clause akin to the instant case. In that case, Iran claimed that the United States attacks on its offshore oil platforms violated *inter alia* and its obligation to ensure the "freedom of commerce and navigation" between the territories of the two states under article X(1) of the Treaty of Amity, Economic Relations and Consular Rights between them (hereinafter referred to as the 1955 Treaty).[33] In determining whether such violation exists, the ICJ focused on interpreting Article XX(1)(d), an exception clause which precludes the unlawfulness of measures "necessary to protect its essential security interests", expressly connected this provision to an external issue about the legality of the United States attack under the Charter of the United Nations and customary rules on self-defense, and held that its jurisdiction deriving from the compromissory clause of the 1955 Treaty extends to the determination of the latter issue.[34] One may wonder if a similar line of reasoning may apply to the present case so as to enable the Court to determine the external *jus ad bellum* issue in the name of treaty interpretation. This author believes that the answer is no. For

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[29] For representative contributions on this topic, see e.g. Peter Tzeng, *Supplemental Jurisdiction under UNCLOS*, 126 (1) Yale Law Journal 242, 242-260 (2016); Peter Tzeng, *The Implicated Issue Problem: Indispensable Issues and Incidental Jurisdiction*, 50(2) New York University Journal and International Law and Politics 447, 447-507 (2018); Callista Harris, *Claims with an Ulterior Purpose: Characterising Disputes Concerning the "Interpretation or Application" of a Treaty*, 18(3) The law and Practice of International Court and Tribunals 279, 279-299 (2019).

[30] A similar point was also made by Judge Robinson in his dissent in Enrica Lexie. See The 'Enrica Lexie' Incident (Italy v India), Permanent Court of Arbitration, para.52 (2020).

[31] See the Vienna Convention on the Law of Treaties.

[32] See Declaration of Vice-President Gevorgian, supra note 5; Declaration of Judge Xue, supra note 5; Declaration of Judge Bennouna, supra note 5.

[33] See Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, Rep.161, paras.21-26, 31 (2003).

[34] The Court stated that "when Article XX, para.1 (d), is invoked to justify actions involving the use of armed force, allegedly in self-defence, the interpretation and application of that Article will necessarily entail an assessment of the conditions of legitimate self-defence under international law", and that "its jurisdiction under Article XXI, para.2, of the 1955 Treaty…extends, where appropriate, to the determination whether action alleged to be justified under that paragraph was or was not an unlawful use of force, by reference to international law applicable to this question, that is to say, the provisions of the Charter of the United Nations and customary international law." See Id., at 40, 42.

one, the approach taken in Oil Platform has not escaped the criticism by individual judges and commentators as overstepping beyond the jurisdictional limit established by the compromissory clause,[35] and such an expansive approach would only discourage states from participating in adjudication before the ICJ.[36] For another, it is arguably conceivable that the obligation to ensure the "freedom of commerce and navigation" under the 1955 Treaty is distinct and separable from the Charter and customary obligation not to use force. Thus, the ICJ could have rightfully exercised its jurisdiction (limitedly) over the dispute about the 1955 Treaty without controversially determining the external *jus ad bellum* issue;[37] however, the same is not true for the current dispute over the Genocide Convention, as it is unlikely that the Genocide Convention can, or has intended to, create an obligation not to use force that is not identical to its counterpart under *jus ad bellum*. Therefore, it is also difficult for Ukraine to establish the ICJ's jurisdiction relying on a comparison with *Oil Platform*.

3. The Plausibility of the Rights Invoked

To indicate provisional measures, the ICJ shall also be satisfied that "the rights asserted by a party are at least plausible".[38] What this requirement actually entails, however, is somewhat obscure. In some cases, the ICJ seemed to be satisfied when the asserted rights plausibly exist *in abstracto* under international law, and did not require the applicant to show the prospect of success on the merits; in other cases, the applicants were required not only to prove that the asserted rights existed, but also to establish that there is a level of probability that they had been breached according to the evidence presented.[39] It is suggested that the latter approach "lies at the edge of prejudgment with questionable origin, contours, confines and legitimacy, which has the effect of challenging the ICJ's jurisdictional limits and judicial integrity".[40]

Nevertheless, under either definition, while there arguably exists a right "not to be

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[35] As for individual opinions of ICJ judges, Judge Higgins argued that the ICJ has 'invoked the concept of treaty interpretation to displace the applicable law', see Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, Rep.161, para.49 (2003); Judge Oda argued that the dispute over the United Statesthe United States attack "could not be seen as falling within the scope of the 1955 Treaty" since it is "by its very nature irrelevant to the scope of the Treaty, and that the United Statesthe United States" had certainly not intended…to confer jurisdiction upon the Court to deal with such a dispute simply by having concluded such a treaty, see Oil Platforms (Islamic Republic of Iran v. the United States of America), International Court of Justice, para.22 (1996). As for academic comments, see James Green, *The Oil Platforms Case: An Error in Judgment?*, 9(3) Journal of Conflict & Security Law 357, 376-377 (2004).

[36] Ibid.

[37] It is not at all impossible that a forcible action is a violation of the United Nations Charter and customary international law, but not a breach of the 1955 Treaty. Indeed, the Court itself held in that case that the United Statesthe United States could not justify its attack as a lawful self-defence, but at the same time it also did not violated its obligation to ensure the "freedom of commerce and navigation" under Article X(1) because there was no commerce between the parties at the time. See supra note 33; Jorg Kammerhofer, *Oil's Well that Ends Well? Critical Comments on the Merits Judgement in the Oil Platforms Case*, 17(4) Leiden Journal of International Law 695, 704 (2004).

[38] See International Court of Justice, *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)*, International Court of Justice, Rep.139, 151, para.57 (2009).

[39] See Dimitris Kontogiannis, *Provisional Measures in Ukraine v. Russia: From Illusions to Reality or a Prejudgment in Disguise?*, https://www.ejiltalk.org/provisional-measures-in-ukraine-v-russia-from-illusions-to-reality-or-a-prejudgment-in-disguise/ (accessed on April 6, 2022).

[40] Ibid.

subject to a false claim of genocide" under the Genocide Convention, the right "to be free from…military attack…based on a claim of preventing and punishing genocide", in the author's opinion, is barely plausible. Ukraine has essentially put forward two arguments in support of the existence of the latter right, one is that it is a necessary implication of the good faith and non-abusive performance of the duty to prevent and punish genocide (the "good faith" argument), and the other is that the right derives from an implicated requirement that the duty to prevent and punish genocide must be consistent with other rules of international law, including the law on the use of force (the "reference to other international rules" argument).[41] The ICJ sustained both arguments and held in favor of Ukraine in the order.[42]

However, the credibility of these two arguments is questionable. Firstly, although the principle of good faith has been discussed and applied by various international courts and tribunals, to the author's knowledge there has been no decision where a bad faith performance of an obligation alone could give rise to an independent cause of action.[43] Secondly, the reference in the Genocide Convention to the Charter of the United Nations only grants the parties a right to ask the competent organs to prevent and suppress genocide, the ordinary meaning of which does not incorporate the prohibition of the use of force into the Convention.[44] Neither did the ICJ's prior statement that "every State may only act within the limits permitted by international law" when discharging the duty to prevent genocide intend to bring those rules into the Genocide Convention; it was simply a reference to rules extrinsic to the Genocide Convention. Thirdly, it is unreasonable to suggest that the parties have expected to create an implied rule prohibiting the use of force in the disguise of preventing genocide under the Genocide Convention. To do so is simply unnecessary and unintended — the rules use of force has been fully and exclusively provided for under *jus ad bellum*, and no state or commentator seems to have (during the extensive discussions of the legality of humanitarian intervention over the past decades) argued that treaties prohibiting inhumane acts by states like the Genocide Convention authorizes or prohibits the use of force to defuse humanitarian crisis.

To put it simply, it is clear that the Genocide Convention does not *authorize* Russia's use of force against Ukraine, but it does not *prohibit* the use of force either. Such distinction is important. The ICJ, however, seems to have mixed up the two, and inferred a prohibition from a rule of non-authorization.[45] Such confusion risks creating a slippery slope that every forcible operation in the name of enforcing another state's treaty obligation would constitute a violation of that treaty itself, although in fact those acts are simply unregulated

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[41] See supra note 4, at 5.

[42] See supra note 2, at 13.

[43] The good faith principle may arguably generate an obligation not to defeat the object and purpose of the treaty. See Robert Kolb, *Good Faith in International Law*, Hart Publishing, pp.68-71 (2017). However, a violation of this obligation is a violation of general international law, not the treaty in question *per se* that has been argued by Ukraine.

[44] See supra note 9, at Article VIII.

[45] Indeed, after (rightfully) concluded that "it is doubtful that the Convention, in light of its object and purpose, *authorizes* a Contracting Party's unilateral use of force…for the purpose of preventing or punishing an alleged genocide", the ICJ immediately reached a follow-up conclusion that "Ukraine has a plausible *right* not to be subjected to military operations by the Russian Federation for the purpose of preventing and punishing an alleged genocide in the territory of Ukraine." See supra note 2, paras.59-60.

by those treaties.[46] Accordingly, it is submitted that Ukraine should not be regarded as possessing a plausible right under the Genocide Convention to be free from military attacks based on a claim of preventing and punishing genocide.

4. The Link between the Rights and the Measures Requested

If the ICJ is to indicate provisional measures, there must also be a link "between the rights whose protection is sought and the provisional measures being requested".[47] In other words, the ICJ should not indicate provisional measures that address issues other than the rights claimed by the applicant which fall outside the ICJ's jurisdiction.[48] For example, in Bosnian Genocide the ICJ limited its provisional measure to one that only restrained genocide-related acts of the respondent, and dismissed all other requests regarding violation of *jus ad bellum*, international humanitarian law, etc.;[49] similarly, in Georgia v Russia the ICJ restricted its language of the provisional measures to the protection against racial discrimination, which was the sole subject matter that the ICJ might have jurisdiction over under the relevant compromissory clause despite Georgia's request which contained protection in other aspects of international humanitarian and human rights law.[50]

In the present order, the ICJ held that the core provisional measure sought by Ukraine, i.e. the suspension of Russia's military operation, are "by their very nature…aimed at preserving the right of Ukraine that the ICJ has found to be plausible", and thus the link requirement is fulfilled.[51] However, as analyzed above, the only plausible right sought by Ukraine that the ICJ is competent to determine is the right not to be subject to a false claim of genocide, and accordingly the related provisional measure should be one that only requires Russia to withdraw its accusation of genocide. The suspension of the military operation, on the other hand, is certainly unrelated to and goes beyond the protection of this right. Even if we, for the sake of argument, admit that Ukraine has a plausible right not to be subject to an attack based on a claim of preventing and punishing genocide, it should be noted that the need to prevent genocide was not the only justification claimed by Russia for its military operation, and the legality of Russia's attack cannot be determined without assessing the law of self-defense, over which the ICJ has no jurisdiction. Therefore, the requested provisional measure — the cessation of hostilities — will also protect a right not to be subject to an attack not justifiable as self-defense, which falls outside the ICJ's competence in this case and has thus failed the link test. In this sense, the ICJ's unhesitating decision to indicate a provisional measure demanding the immediate cessation of hostilities is comparable with its previous controversial ruling in the Temple of Preah Vihear (Interpretation) case, which generated severe backlash from individual judges and

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[46] Judge Gevorgian made a similar point that if one follows the interpretation advanced by Ukraine, "any purportedly illegal act, including the unauthorized use of force, could be shoehorned into a random treaty as long as the subject-matter regulated by this treaty had some role in the political considerations preceding the respective act". See Declaration of Vice-President Gevorgian, supra note 5, para.7.

[47] See *The Gambia v. Myanmar*, Order, Provisional Measures, para.44.

[48] See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Order, Provisional Measures, 1993 I.C.J. Rep.3, 18-19, paras.33-35 (April 8).

[49] Id., at 24.

[50] See International Court of Justice, *Application of the Convention on the Elimination of All Forms of Racial Discrimination (Georgia v Russian Federation)*, Order, Provisional Measures, para.149 (2008).

[51] See supra note 2, at 14.

scholars.[52] Consequently, it is doubtful that the provisional measures granted by the ICJ have met the link requirement as it firmly proclaimed in its order.

5. Conclusion

The Ukraine-Russia conflict has absolutely been a humanitarian tragedy. So far, the conflict has resulted in at least 3,776 civilian casualties and over 4.2 million refugees.[53] It is thus understandable that the ICJ felt the need to indicate an order demanding an immediate ceasefire, for all possible political or moral motives to pressure Russia into ending its invasion. However, as reflected in the analysis above, despite Ukraine's undoubtedly excellent lawyering, the ICJ has failed to provide satisfactory legal reasoning for its far-reaching conclusion in the order; it has simply created "a bad precedent of manipulative reasoning" to achieve certain political objectives.[54] It must be borne in mind that the ICJ is not the only pathway through which the conflict can be resolved, and that invaders will "remain in any event responsible for acts attributed to them that violate international law" even if their acts may not fall within the ICJ's competence.[55] All international actors including the ICJ should make every effort to foster peace in the region, but should definitely not do so in a way that undermines the coherence and credibility of the already fragile international legal system.

[52] In that case, the Court established in its provisional measures order a demilitarized zone comprising approximately 17 square kilometers surrounding the temple, whereas the parties only disputed whether Thailand's forces in the "vicinity" of the temple, an area of about 5 square kilometers, should be withdrawn. The provisional measure indicated was strongly criticized as pronouncing on rights falling outside the jurisdiction *ratione materiae* of the Court. See Cameron A. Miles, *Provisional Measures before International Courts and Tribunals*, Cambridge University Press, pp.421-423 (2017).

[53] See The Office of the High Commissioner for Human Rights, *Ukraine: civilian casualty update April 6, 2022*, https://www.ohchr.org/en/news/2022/04/ukraine-civilian-casualty-update-6-april-2022 (accessed on April 6, 2022); The office of the United Nations High Commissioner for Refugees, *Ukraine Refugee Situation*, https://data2.unhcr.org/en/situations/ukraine (accessed on April 6, 2022).

[54] See Alexander Orakhelashvili, *Anything Goes? The ICJ's Provisional Measures Order in Ukraine v Russia*, https://blog.bham.ac.uk/lawresearch/2022/03/anything-goes-the-icjs-provisional-measures-order-in-ukraine-v-russia/ (accessed on April 6, 2022).

[55] See Declaration of Judge Xue, supra note 5, at 5.