

MCNAIR

CHAMBERS

RUSSIAN INVASION OF UKRAINE AND PROCEEDINGS BEFORE INTERNATIONAL COURTS

Background

As is widely known, on 24 February 2022, Russia launched a full-scale military invasion on Ukraine following the declaration of the President of the Russian Federation, Vladimir Putin, that he had decided to conduct a “special military operation” against Ukraine. The military action is undoubtedly leading to loss of life and significant destruction.

The invasion has received widespread international condemnation, with political and economic sanctions targeting both the Russian State, related entities and Russian oligarchs worldwide, with the economic sanctions having a significant negative impact on the global economy which is still recovering from the Covid-19 pandemic.

Legal proceedings have also been commenced globally. This is a fast moving area, and the below summary is intended to provide an introduction only. For detailed advice on any of the issues identified in this briefing, please contact us urgently.

Commencement of legal proceedings

(i) ICJ proceedings: Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)

On 26 February 2022, Ukraine instituted proceedings before the International Court of Justice against Russia, citing the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (to which Russia and Ukraine are both parties) (the “Genocide Convention”).

In its Application Instituting Proceedings, Ukraine stated that the Russian Federation has falsely claimed that acts of genocide have occurred in the Luhansk and Donetsk oblasts of Ukraine, and on that basis recognized the so-called “Donetsk People’s Republic” and “Luhansk People’s Republic,” and then declared and implemented a “special military operation” against Ukraine with the express purpose of preventing and punishing purported acts of genocide that have no basis in fact. On the basis of this false allegation, Russia is now engaged in a military invasion of Ukraine involving grave and widespread violations of the human rights of the Ukrainian people. Ukraine emphatically denied that any such genocide has occurred and brought the Application to

establish that Russia has no lawful basis to take action in and against Ukraine for the purpose of preventing and punishing any purported genocide.

Ukraine requested that the ICJ:

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 of non-repetition 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.

On the same day, Ukraine also filed an application for Provisional Measures, in which it requested:

a. The Russian Federation shall immediately suspend the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine.

b. The Russian Federation shall 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 which have as their stated purpose and objective preventing or punishing Ukraine for committing genocide.

c. The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.

d. The Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court.

By a letter dated 5 March 2022, the Ambassador of the Russian Federation to the Netherlands indicated that the Russian Federation had decided not to participate in the oral proceedings. In the same letter, the Russian Federation set out its view that the Court did not have jurisdiction on the basis that the Genocide Convention did not regulate the use of force between States, and the legal basis for Russia's "special military operation" was actually Article 51 of the United Nations Charter and customary international law.

A hearing took place before the ICJ on 7 March 2022.

On 16 March 2022, the ICJ handed down its Order for Provisional Measures. By thirteen votes to two (Vice President Gevorgian and Judge Xue dissenting), the Court ordered:

- (1) The Russian Federation shall immediately suspend the military operations that it commenced on 24 February 2022 in the territory of Ukraine;
- (2) The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1).

The Court unanimously ordered that the parties refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.

Vice President Gevorgian (Russia) dissented on the basis that he did not consider that the Court had jurisdiction to entertain the dispute; however, he felt able to vote on the non-aggravation measure on the basis that the power to indicate such a measure is a power inherent to the Court, and not necessarily linked to the Court's prima facie jurisdiction over the parties' substantive rights or obligations on the merits of a case.

Judge Xue (China), while reserving his position on the first two points on the basis of lack of jurisdiction, "*fully endorse[d] the call that the military operations in Ukraine should immediately be brought to an end so as to restore peace in the country as well as in the region*". He further queried the effect of any such Order for Provisional Measures, stating, "Moreover, in the context of an armed conflict, one may wonder how those provisional measures can be meaningfully and effectively implemented by only one Party to the conflict. When the situation on the ground requires urgent and serious negotiations of the Parties to the conflict for a speedy settlement, the impact of this Order remains to be seen."

The Court has ordered the Memorial of Ukraine to be filed by 23 September 2022, and the Counter-Memorial of the Russian Federation to be filed by 23 March 2023.

Further information on the ICJ proceedings is available [here](#).

(ii) *Other proceedings*

European Court of Human Rights

On 28 February 2022, Ukraine filed a request for urgent interim measures with the European Court of Human Rights (“EHCR”) in relation to “massive human rights violations being committed by the Russian troops in the course of the military aggression against the sovereign territory of Ukraine”.

On 1 March 2022, the ECHR granted the requested interim measures, stating that it had *“decided, in the interests of the parties and the proper conduct of the proceedings before it, to indicate to the Government of Russia to refrain from military attacks against civilians and civilian objects, including residential premises, emergency vehicles and other specially protected civilian objects such as schools and hospitals, and to ensure immediately the safety of the medical establishments, personnel and emergency vehicles within the territory under attack or siege by Russian troops.”*

ICC proceedings

The International Criminal Court (ICC) (founded by the Rome Statute of the International Criminal Court which entered into force on 1 July 2002) has jurisdiction over four main crimes: genocide, war crimes, crimes against humanity and the crime of aggression. The ICC may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes were committed on or after 1 July 2002 and either the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or the crimes were referred to the ICC Prosecutor by the United Nations Security Council pursuant to a resolution adopted under chapter VII of the UN charter. The ICC investigates and, where warranted, tries individuals charged with the gravest crimes of concern to the international community: genocide, war crimes, crimes against humanity and the crime of aggression.

Although Ukraine is not a State Party to the Rome Statute, it has twice exercised its prerogatives to accept the Court's jurisdiction over alleged crimes under the Rome Statute occurring on its territory, pursuant to article 12(3) of the Statute. Russia has signed but has not ratified the Rome Statute, and indeed withdrew its signature in 2016 as a symbolic gesture following the publication of the ICC's report which classified the Russian annexation of Crimea as an occupation.

On 28 February 2022, Karim A.A. Khan QC, the ICC Prosecutor, announced his decision to seek authorisation to open an investigation into the situation in Ukraine, encompassing any new alleged crimes falling within the jurisdiction of the International Criminal Court. In the same statement, he indicated that active investigations by my Office would be significantly expedited if a State Party to the Rome Statute were to refer the situation to my Office, as provided in article 14 of the Statute. By 11 March 2022, it had been announced that 41 State Parties had referred the situation to his Office.

16 March 2022