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Editors
Dr. Hanna Shelest
Dr. Mykola Kapitonenko

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Contacts:
website: http://ukraine-analytica.org/
e-mail: Ukraine_analytica@ukr.net
Facebook: https://www.facebook.com/ukraineanalytica
Twitter: https://twitter.com/UA_Analytica

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LITIGATING WAR: UKRAINE'S QUEST FOR JUSTICE AT THE "WORLD COURT"

Dr. Mykola Gnatovskyy
European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

The armed conflict between the Russian Federation and Ukraine has changed the attitude of the Ukrainians to international law and, more specifically, to international courts. While the United Nations Security Council has proved unable to provide a solution to the conflict, Ukraine's hope for justice has been vested in various international courts and tribunals. This article attempts to explain the inherent difficulties of Ukraine's quest for justice at international courts, in particular, at the International Court of Justice.

Introduction

International law does not necessarily ensure justice, but at the very least, it gives hope for justice. Less powerful actors can rely on international judicial institutions in their disputes with major powers when any direct interaction (such as, for example, bilateral negotiations) gives them little chance to defend their position.

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The armed conflict between the Russian Federation and Ukraine began in 2014 with Russia's occupation and proclaimed annexation of Crimea, and continued with open hostilities leading to numerous victims and hundreds of thousands of displaced persons in Donetsk and Luhansk regions of Ukraine. Unsurprisingly, this conflict has brought about numerous changes in both countries involved. Its multiple manifestations and implications are going to be felt for many decades to come. One particular aspect of the conflict relates to the changed attitude of Ukrainians to international law and, more specifically, to international courts.

Unlike the Soviet Union and its self-appointed continuator, the Russian Federation, Ukraine has demonstrated a much more positive attitude to the idea of a third-party dispute settlement, including international courts. This could be best illustrated by Ukraine's giving consent in a 1997 bilateral treaty with Romania to the jurisdiction of the International Court of Justice on the issue of maritime delimitation in the Black Sea. Romania instituted proceedings in that case in 2004, and in 2009 the Court unanimously adopted its judgment, which was positively perceived by both parties concerned and laid a good foundation for their positive relations ever since. However, until 2014 international courts have not been seen by Ukraine as a crucial element in its policy.

In 2014, far from being able to liberate its territories and to restore constitutional order there by force, Ukraine turned for help to international institutions. It did not take long to realise that the principal political body of the United Nations charged with maintenance of international peace and security, the Security Council, was hardly capable of offering any solution to the situation, as it has almost invariably been the case when one or more of its permanent members were directly involved in a conflict. International courts, although far less promising in terms of speediness and concreteness of the solution appeared to be a worthwhile alternative.

Legal Nature of the Issues at Stake

The taking over of Crimea by the Russian military forces (disguised as the so-called "polite [little] green men") can only be qualified under international law as belligerent occupation (as the subsequent annexation cannot entail any legal consequences apart from the aggressor's international legal responsibility). The Crimean situation thus signals to the existence of an international armed conflict between the Occupying Power and the state whose territory has been occupied.

The direct involvement of the Russian armed forces in the armed conflict in Donetsk and Luhansk regions of Ukraine also amounted to an international armed conflict between the two states concerned, as confirmed, in particular, by the Prosecutor of the International Criminal Court in her preliminary report on the inquiry into the situation in Ukraine.[1] The same report, albeit cautiously, confirms another obvious aspect of the situation: There are reasons to believe that the anti-government armed groups in Eastern Ukraine operate under the overall control of the Russian Federation, which, if confirmed by the International Criminal Court, would confirm the existence of the inter-state armed conflict since the very beginning of the hostilities. Even if one assumes for a moment that such an overall control would not be confirmed, it would nevertheless not remove the issue of the grave interference of Russia into Ukraine's domestic matters.

> ***"though international courts do not possess unproblematic enforcement machinery, the advantages of having the factual situation reviewed and retold by international judicial institutions in the language of international law should not be underestimated***

It goes without saying, that the gravity of the international law issues raised by Russia's aggression against Ukraine places a very high responsibility on the international courts that will deal with the related issue. Adjudging on matters of war, use of force, and severe interference in the domestic affairs by one state against another has never been an easy task for an international court. The temptation to dismiss such cases on formal grounds will always be high, and the reluctance of one respondent state to have any case decided on merits will never be too easy to overcome.

[1] Cf.: *Report on Preliminary Examination Activities*, The Office of the Prosecutor, International Criminal Court, 2016, Paragraphs 155-170; *Report on Preliminary Examination Activities*, The Office of the Prosecutor, International Criminal Court, 2017, Paragraphs 86-95.

Hope for Justice and the Challenge of Fragmentation

Even though international courts do not possess unproblematic enforcement machinery, the advantages of having the factual situation reviewed and retold by international judicial institutions in the language of international law should not be underestimated. Despite the obvious incompatibility of Russia's actions against the sovereignty, territorial integrity, and political independence of Ukraine, the former has always attempted to justify its actions by some kind of reference to international law. Clear judgments from international courts should in principle discredit such references and define the framework of the conflict in precise legal terms, which should also be helpful in inciting and shaping the political response from relevant actors, both at the level of international intergovernmental organisations and that of individual states.

It would also have positive domestic effects, clarifying many obscure and legally questionable concepts that have been widely used in Ukraine since 2014, such as the "anti-terrorist operation" (while the events on the ground left no doubts as to the existence of an armed conflict), "Russia-terrorist forces", "hybrid war", and so forth. Finally, and most importantly as regards the Autonomous Republic of Crimea and the city of Sevastopol, such judgments should further strengthen Ukraine's case for regaining its control over the illegally annexed territories.

However, achieving those results is not easy. It is worth recalling that international courts, which started emerging in the early 20th century, despite having successfully proliferated in many spheres of international life, still do not offer a systematic solution to all the grievances of the international community and its members. There are several dozens of international courts and tribunals, but only a few of them have compulsory jurisdiction. Even if they do, it is usually coupled with a highly specialised set of issues within their purview. Thus, some of them deal exclusively with the application of WTO-sponsored treaties, while others look exclusively into issues related to the law of the sea, or human rights, or any other particular treaty regime.

Most importantly, the International Court of Justice as the principle judicial organ of the United Nations with a virtually unlimited subject-matter jurisdiction (as long as there is a legal dispute between states) is still unable to deal with contentious cases unless the respondent state has clearly consented to its jurisdiction in a given case.

The entire system can be described as extremely fragmented and creating a significant potential for conflicting judgments and forum shopping (i.e. possibilities to choose between more or less "convenient" fora). It was therefore rather surprising to hear proposals of Ukrainian politicians and even lawyers to come up with one "integrated" or "holistic" lawsuit that would deal with all grievances caused to Ukraine by the Russian aggression. Such an imaginary claim should have covered such diverse matters as the aggressive war (annexation of Crimea and armed intervention in the Donetsk and Luhansk regions), expropriated property, human rights violations, individual responsibility for war crimes and crimes against humanity, navigation in the Black Sea, and so forth. Needless to say, such proposals are completely unrealistic, as an international court capable of dealing with all such issues simply has never existed.

Unsurprisingly, Ukraine has chosen the only realistic way to reach international courts, paying full respect to their respective focuses. This meant that there are now not one but many juridical fronts

on which Ukraine is fighting the Russian aggression, with international law being its only weapon. While proceedings by Ukraine against Russia have been instituted at various international fora, including, among others, the European Court of Human Rights and the Permanent Court of Arbitration, it is the legal battle at the International Court of Justice that has so far been most noticeable.

"The World Court" and Armed Conflicts

The International Court of Justice, sometimes referred to (somewhat exaggeratedly) as "the World Court", has always appeared to be the most suitable forum to adjudicate claims of violation of the United Nations Charter and other foundational rules of international order. The Court indeed has the jurisdiction to deal with disputes between states[2] and it also "may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request"[3]. Both instituting proceedings in an inter-state contentious case (via, most likely, the United Nations General Assembly) should have been (and, most likely, were) seriously considered by Ukraine. These options are not mutually exclusive, and they could be used to address the issues arising from the armed conflict between the Russian Federation and Ukraine, but both are not devoid of inherent problematic aspects.

When it comes to instituting an inter-state case, the major difficulty is that no state may be compelled to accept the jurisdiction of the Court. As Christian Tomuschat aptly remarks, "[t]he absolute freedom of States either to accept or to reject judicial settlement of their disputes may at first glance appear to be anachronistic in the world of today where so many supranational regimes have come into existence [...]. However, [...] at world level, the chances of voluntary compliance are slim. If States were forced under the jurisdiction of the Court, the record of actual compliance with judgments rendered would be abysmal".[4]

Obtaining the Court's advisory opinion is also always an option, which, however, is not very straightforward. To begin with, it requires a question on an unclear matter of international law to be asked. Formulating such a question is not always an easy task. For example, asking the Court as to the status of Crimea makes hardly any sense. As a matter of international law and from the standpoint of the United Nations, the answer to such a question is clear and obvious – Crimea is Ukraine. Illegality of Russia's military intervention in Donetsk and Luhansk regions is also hardly a question to be asked. Whatever question might be asked, the Court's answer does not put any international legal obligation on any state that would be separate from the obligations stemming from the applicable norms of international law. These two reasons would perhaps best explain the decision of the Ukrainian authorities to look for a possibility of starting a contentious case at this stage.

So far, the International Court of Justice has not managed to examine many cases that would resemble the situation of the

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2 Article 34 of the Statute of the ICJ.

3 Article 65 of the Statute of the ICJ; Article 96 of the UN Charter.

4 C. Tomuschat, Article 36, [in:] A. Zimmermann et al. (eds.), *The Statute of the International Court of Justice: A Commentary* (2nd Edition), Oxford University Press, 2012, p. 647¬648.

> ***For Ukraine, finding a way to institute proceedings versus the Russian Federation in the International Court of Justice was not an easy task. It had to search for treaties to which Russia is a party and which contain a clause accepting jurisdiction of the Court***

armed attack and other hostile actions by the Russian Federation against Ukraine. Indeed, neither option of involving the Court in considering such matters leaves the door of a judicial settlement of armed conflicts open too wide. When the nature of relations between the parties often makes any cooperation between them hardly possible, this can inevitably have implications for the Court. In fact, a certain minimum level of cooperation between the parties is indispensable just to agree to submit the dispute to an international judicial or arbitral institution. This explains why there have been only few cases that dealt with the legality of the use of force by one state (or several states) against another (most notably "Military and Paramilitary Activities in and against Nicaragua", Nicaragua v. United States of America, Judgment of 1986 – subsequently discontinued at the initiative of Nicaragua at the stage of determining compensation), and even fewer (only one that has not been removed from the list of cases) that dealt with the actual conduct of an armed conflict ("Armed activities on the territory of the Congo", Democratic Republic of the Congo v. Rwanda, Judgment of 2006).

Ukraine v. Russia at the International Court of Justice

For Ukraine, finding a way to institute proceedings versus the Russian Federation in the International Court of Justice was not an easy task. It had to search for treaties to which Russia is a party and which contain a clause accepting jurisdiction of the Court as regards their application and interpretation. Such treaties should have also had a link to the actual situation of an inter-state conflict. Ultimately two such treaties were identified, namely the International Convention for the Suppression of the Financing of Terrorism (CSFT) and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD). As to the latter treaty, Ukraine had an opportunity to learn from the experience of Georgia, which in 2008 invoked the same Convention to institute proceedings against the Russian Federation that dealt with the events of the armed conflict between the two states in the region of South Ossetia earlier that year. In 2011, the Court dismissed the case for formal reasons (failure of the Georgian authorities genuinely to engage in negotiations with the Russian Federation on the substance of the dispute under the International CERD).

Ukraine submitted its initial application instituting the proceedings against the Russian Federation on 16 January 2017, after having taken steps to meet the jurisdictional requirements set forth by the two conventions. As Ukraine also requested provisional measures to be adopted, the Court held hearings on the subject and made its order on 19 April 2017 where it confirmed the existence of a prima facie jurisdiction under both conventions. Reminding the Russian Federation of its duty to comply with its obligations under the CERD, the Court considered that, regarding the situation in Crimea, the Russian Federation must refrain, pending the final decision in the case, from maintaining or imposing limitations on the ability of the Crimean Tatar community to conserve its representative institutions, including the Mejlis. In addition, the Court ordered the Russian Federation to ensure the availability of education in the Ukrainian language, and, to both parties, to refrain

from any action that might aggravate or extend the dispute before the Court or make it more difficult to resolve.

At the same time, the Court refused to indicate provisional measures under the CSFT and said that it expects the parties, through individual and joint efforts, to work for the full implementation of the Minsk "Package of Measures" of 12 February 2015, endorsed by the United Nations Security Council in its Resolution 2202 (2015) in order to achieve a peaceful settlement of the conflict in the eastern regions of Ukraine.[5] By its order of 12 May 2017, the Court set the dates for the submission of Ukraine's memorial (12 June 2018) and a counter-memorial of the Russian Federation (12 July 2019).

Trying to foresee the outcome of this case is not an easy task. Following the recent timely submission by Ukraine of its memorial, it could reasonably be predicted that the Russian Federation is very likely to raise its preliminary objections to the Court's jurisdiction within the three-month time limit provided for in the Rules of Court (Article 79, paragraph 1). This would be the stage where the Georgia v. Russia case collapsed in 2011. However, it appears that Ukraine's preparations were more thorough and did consider Georgia's negative experience, which is why the chances of having Ukraine's claims under the CERD examined on merits seem to be more substantial. The apparent failure of the Russian Federation to execute the provisional measures indicated by the Court should also play a role in the Court's deliberations.

At the same time, the future of Ukraine's claims under the CSFT is less certain, as this would be the very first time when the International Court of Justice should deal with that convention. Its initial observations contained in the order for the indication of provisional measures seem overly cautious. However, the outcome will largely depend on the persuasiveness of the factual arguments put forward by Ukraine in its June 2018 memorial. Interestingly, the main thrust of the arguments advanced by Russia's legal team during the oral hearings on the provisional measures was that the terrorist-related issues should not be examined by the Court, as the situation in question is in fact an armed conflict, over which the Court has no jurisdiction. While there are many reasons to disagree with this logic (e.g. because terrorist activities can take – and have taken – place under the conditions of both peace and war), it clearly shows the utmost difficulty of litigating war in international courts.

Conclusions and the Way Forward

Ukraine's quest for justice at the International Court of Justice is only a part of its lawfare with the Russian Federation. In seeking legal redress, Ukraine's authorities have also submitted a number of inter-state applications to the European Court of Human Rights and instituted an arbitral tribunal under the United Nations Convention on the Law of the Sea. At the private, or rather diagonal (state-investor) level, its citizens and legal entities have sued (already with some tangible success) the Russian Federation for the loss of their investments made in Russia-occupied

[5] 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*), Request for the Indication of Provisional Measures, Order, 19 April 2017.

Crimea. The International Criminal Court might also have a say in the situation, although it cannot possibly deal directly with the responsibility of Russia as a state. Nevertheless, it is the "World Court" where the decisive battle will take place in the coming years. In a way, Ukraine has given the Court a chance to uphold the very basics of the international legal order. It is now for the Court and its judges to prove that they are not afraid of this tremendous task.

***Mykola Gnatovskyy**, Ph.D., President of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Associate Professor at the Institute of International Relations of Kyiv National University, First Vice-President of the Ukrainian Association of International Law. Member of the National Commission for the Implementation of International Humanitarian Law. Member (present and past) of the editorial boards of many Ukrainian and international law journals, including International Review of the Red Cross (Geneva/Oxford, 2011-2015), Belarusian Yearbook of International Law, Studii Juridice Universitare (Chisinau), Romanian Journal of Legal Medicine. Dr Gnatovskyy is a member of the European Society of International Law, member of the American Society of International Law, and expert on human rights, Office of the OSCE Project Co-ordinator in Ukraine.*