

Ukraine vs Russia at ICJ, Explained

TANYA BEDNARCZYK, 6:10PM 03/12/2017

205

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What You Need To Know:

- ✓ **Ukraine launched its case against the Russian Federation at the United Nation's International Court of Justice (ICJ) in the Hague, hoping to receive a court order of provisional measures to impede further Russian aggression and interference in Ukraine's east;**
- ✓ **"The purpose of provisional measures is to preserve the rights of parties pending judicial resolution of a dispute and to ensure no further deterioration in a situation" - Professor Lyal S. Sunga;**
- ✓ **"If Ukraine is able to get provisional measures, it shows that it has been able to make a plausible case...to show their rights are being violated;"**
- ✓ **While Professor Sunga highlights the flaws of International Law, particularly the difficulty of enforcing it, he says that legitimacy at the international level is very important.**

Ukraine launched its case against the Russian Federation at the United Nation's International Court of Justice (ICJ) in the Hague, hoping to receive a court order of provisional

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measures to impede further Russian aggression and interference in Ukraine's east. Since 2014, an estimated 10,000 lives have been lost as a result of the conflict in annexed Crimea and occupied Ukrainian territories. According to Lyal S. Sunga, Visiting Professor at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law, "the purpose of provisional measures is to preserve the rights of parties pending judicial resolution of a dispute and to ensure no further deterioration in a situation."

Although receiving a provisional measure could take months, and would in no way force Russia to abide by the orders, Professor Sunga believes that the Ukrainian Government is taking the proper measures to peacefully solve the conflict: "If Ukraine is able to get provisional measures, it shows that it has been able to make a plausible case...to show their rights are being violated."

And while Professor Sunga highlights the flaws of International Law, particularly the difficulty of enforcing it, he says that legitimacy at the international level is very important: "It establishes more clarity from an independent body, a highly respected body-- the judicial arm of the UN--what is right and what is wrong."

Volodymyr Solohub spoke to Lyal S. Sunga, Visiting Professor at the Raoul Wallenberg Institute of Human Rights and Humanitarian Law in March, 2017.

As you know, yesterday the International Court of Justice (ICJ) started their hearings in the case of Ukraine versus Russia. We would like to talk to you as a professional in the area of international law. These provisional measures that Ukraine is asking for will be given to Ukraine if the court declares in favor of Ukraine. How often does the Court grant states such requests for instituting these provisional measures?

The purpose of the provisional measures is to preserve the rights of the parties, pending judicial resolution of a dispute. It's an important tactical move in a way to make sure there is no deterioration in the situation, because a judicial resolution can take some time. Meanwhile people are getting hurt. The sovereign and territorial integrity of a country may be threatened. There are all sorts of threats and associated with criminal activities, and there are allegations of terrorism involved. So these are all very serious things, and we have seen, with regards to Ukraine, that we are already up to something like 10,000 deaths. So it's not like this started yesterday and it is a complicated situation.

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4:00 PM Kyiv time

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So I think that the Government of Ukraine has done something that makes a lot of sense, and that is to resort to the rules that are spelled out in the UN charter and the statute of the International Court of Justice, which provides a ways and means for countries to resolve issues in a peaceful manner, and a peaceful way to settle disputes. By seeking to bring this issue before the International Court of Justice, even if it is on an interim basis, that is a very responsible thing to do in the interests of its citizens and it is in its own interest. So what it is seeking is a cease and desist of financing of terrorist activities with regards to Donetsk and Luhansk, and also that the rights of the Ukrainian minority in the Crimean Peninsula as well as Tatars are respected fully. So there is a full range of human rights that are respected under the Ukrainian constitution, and as well as the Russian Constitution- since it has been occupied.

Ukraine is asking the court to order Russia to stop violating two conventions financing terrorism and convention on all sorts of racial discrimination, but Russia asserts that it is not violating these conventions. So how will this decision help Ukraine if the court finds in favor of Ukraine. What will Ukraine do with these documents?

Before I answer that, let me first say, because many people may not realize that international law in itself is a fairly weak system in terms of enforcement, and in terms of implementation. In a sense, there is no code of compulsory jurisdiction. There is something called compulsory jurisdiction, but even that is consent based.

So nobody can force Russia to come before a court. You cannot lock up a state in jail...

So what's important is that if Ukraine is able to get provisions of these measures, it shows that it has been able to make a plausible case – not to be able to prove its case exactly, that would have to be made on the merits in a full case – but to show that it's a plausible case, that its rights are being violated, that the party that may be responsible for that, should be ordered by the court not to do that anymore, and take corrective measures.



So in terms of the general pressure on all countries to conform to the rules of international law, such a move by Ukraine's provisional measures could send a clear message that it is serious to try to stand up for its right. It's a country that's very vulnerable. That brings me to another point, and that is that the purpose of law, and that includes international law, is to ensure that dignity, rights and obligations of all parties that they are respected regardless of power. So, small states and large states have to have the same obligations in law, and that is very important. So it is the same on the domestic level. A weak person doesn't have any weaker right to life than a strong person. So, it is an effort that could make a difference to how Ukraine is able to wind its way in a very difficult situation.

In terms of procedure, can you explain to us what happens after the order on the provisional measures is or is not delivered. Can the courts still reject Ukraine's case? And can the courts still not review it on the merits?

Yes there are some merits on the case, but I would not like to get into all the details of the case because it is fairly complex. But the provisional measures are intended as an interim solution to prevent any further deterioration in the situation, so that there is no prejudice to one party or the other. So it is to preserve the status-quo, or to make sure things do not get worse. But that does not preclude the court from ruling that it later on does not have jurisdiction over the matter, or, even if it does have jurisdiction, and it needs to take the course- because there are preliminary phases to determine whether there is jurisdiction or not- that eventually it decides that there is no case that it has to rule on. So it is not in any way indicative of what the court could do in its later phases. But as I say, it sends a clear signal, and I think tactically it's an important maneuver for the Ukrainian government to do. And I hope that it is something the Russian Federation also welcomes because it has said that it is not involved in Ukraine on many occasions, or at least in the way it has been accused of, or alleged to have been. This would give it a chance if it strongly committed to the international rule of law as the Russian Federation always has been, to make its case felt clearly and transparently, that it has had no involvement with Ukraine, or very little in some way. But then it has to answer the case, if the Russian Federation decides not to take part in the case at all, that would be a very bad sign, it would reflect very badly on the Russian Federation. So, what I would hope for is that both Russia and Ukraine would continue towards a dialogue through judicial means and political negotiations to make sure the Minsk agreements are resurrected- they are in a pretty bad shape- and also find a solution that's agreeable to all sides, because war is not a good thing and it is ordinary people that are getting hurt.



Today Russia was presenting their case, and in their course of presentation they provided a lot of documents and a lot of facts which were manipulative, and some were out-right lies. Does the court examine the evidence and the documents which are being submitted by the parties? Or do they solely rely on the arguments submitted and which they are presented?

The court will look at the factual assertions, but it is very difficult for the court to determine the credibility or the liability, the veracity of these statements, assertions and counter-assertions. There is a provision under the ICJ statute which governs the operation of the court, that allows for the court to appoint a commission or body that could undertake fact-finding, or some kind of monitoring body, and that is an option, so if the court wanted to do that, I don't think there would be any impediment to it. Of course, if such a body were created it would work best if it had the cooperation of several parties – I mean the government of Ukraine, these claimed authorities in Donetsk and Luhansk and the Russian Federation.

If you had to advise the Ukrainian Government on what to do next, after today's date when Russia submitted tens of hundreds of falsified documents, what would that be?

I haven't looked at the documents themselves, so I don't know if they are false or true.

Let's assume they are false documents and you had to

advise the government what to do.

I would only say this, every government, in a situation where it feels that it has a case to make out, should do so in the most multilateral fashion possible- to engage the United Nations, the OSCE, all the rule of law institutions at its disposal. I think Ukraine has been doing that. They have called in the ICC, it is welcomed in the OSCE, the UNHCR, and UNDP, and they tried to get impartial and fair assistance in the situation. So I would advise it to continue, and I would advise the same thing to the Russian Federation. If it wants its allegations against it to be disproven, and, if it wants its allegations against the government of Ukraine credibly proven, then the best way is to bring in independent and impartial observers.



There is no such thing as absolute objectivity and absolute Independence, but there is such a thing as inviting in countries that don't have an interest on either side. Monitors from different organizations like the United Nations etc, and regional institutions to look at the situation as thoroughly as possible in an unfettered manner, and to have access. Neither party has given full access to monitors. At first the Ukrainian government was a bit limited, but it has opened up in the last year and a half, much more in that it has allowed free access. But the militia in Donetsk and Luhansk, the so called 'DPR' and 'LPR' has not allowed access for monitors, and the Russian Federation has its own practices that it's been following. So again the more objectivity you have moving away from

bilateral confrontation towards a collective solution based on friendly settlements of disputes, which is the plan of the United Nations charter, take it to the Security Council. It's been raised many, many times with the Security Council. Russia has vetoed it and there should be good monitoring of the situation. It would be useful if both parties were more engaged in that. I would say there that the more independence and objectivity you bring in by other, non-interested parties, to observe the situation is very critical.

So apart from the provisional measures we talked about, how can they help Ukraine?

If the court orders some clear measures that the Russian Federation should undertake, for example, it's possible that some support is going through to the Luhansk, so-called Republic 'LNR' and 'DPR'. If there are funds going through as Ukraine alleges through Russian banks etc., it is possible that the government of Russia is not aware of that, and has not been diligent in stopping that, to be generous in the situation, then that could help, if Russia takes action and says listen this is fueling in the conflict, and some of this support is coming from our side. If it follows that sort of orders and if those orders were taken, I think that could assist quite a lot. If there are other kinds of actions that the Russian Federation has been taking, helping the people in Donetsk and Luhansk – that would obviously calm things down. When you have outside parties, if that's what's happening, fuelling the conflict we are getting more blood flowing in the streets. That's all I can say without going into speculation on the facts itself, which are greatly contested.

If we could go back again to the procedure. Historically speaking or, as a matter of practice, how long could it take to get a judgement?

If you are looking at the past cases, it can take a long time before you get a judgment. Some judgments have taken years and years, it's very complex. But if you are talking about provisional measures, that could happen quickly. I think it's a matter of months really before the provisional measures come into play. I am guessing when I say 6 or 8 months. By the time they look at the issue and rule on it, and maybe give some time for follow up, depending what the measures are, it could be done pretty quickly. And it should be done quickly, that's the whole point of provisional measures – to act quickly. Arguments have to be made, and you have to hear the others side with a thorough vetting of the situation in terms of argument, and whatever facts can be asserted, because without that you are jumping to conclusions and jumping to measures. There has to be a thorough argument.



That takes time and there could be delays etc., and then there has to be careful deliberation. That could be done in months not years. One of the issues in provisional measures is that if you look at the terrorist financing convention and the convention on elimination of racial discrimination which form the basis of Ukraine's claim against the Russian Federation, these conventions require that, before you go to the court, there should have been some serious negotiation first between the parties. That has happened between Luhansk and Donetsk. There have been the Minsk 1 and Minsk 2 agreements. Quite a lot of negotiations and bargaining are going on there, but you have not had very much on Crimea. That is one of the conditions. The court doesn't want to order a provisional measure on the basis of one or the other on both of those conventions, unless other avenues have been exhausted. So the formula is that serious negotiations to have taken place already.

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