

Russia, Ukraine, and the International Court of Justice (ICJ): Opening Arguments at The Hague

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Matters have been far from plain sailing for the parties in the Ukrainian conflict, and Kiev was determined to remind international audiences about matters in taking Russia to the International Court of Justice.

This action is one of several fronts the Ukrainian government has been using against the persistent Russian bogey. In addition to making good its January 2016 promise to bring a claim against Russia under the International Convention for the Suppression of the Financing of Terrorism and the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), the state has also made moves in the European Court of Human Rights and the International Criminal Court.[1]

Those scrutinising the case see these points as minor, and here, international relations assumes that of a show enacted in a court of law. “The issues pertaining to terrorism financing and racial discrimination,” argues Iryna Marchuk, “are largely peripheral to the major issue at stake.”[2] (The same issue arose in the ICJ case of *Georgia v Russia*.[3])

The real issue, argues Marchuk, lies in the use of force, lawful or otherwise. But here, Ukraine and Russia are disputants sailing by in the troubled night, with no actual treaty that generates the true jurisdictional nature to address grievances. The Terrorism Financing Convention and CERD (specifically on the issue of banning the Majlis of the Crimean Tartar people) are, to that end, hooks by which to bring Moscow into the room. Russia also accepts the jurisdiction of the ICJ.

Article 22 of the CERD suggests that any dispute between two or more State Parties with respect to the interpretation or application of that convention “shall be referred to the International Court of Justice for decision, unless the disputants agree to another mode of settlement.”

What interested the conventional networks covering the opening of the ICJ case was the surprise registered at the display by the British advocate representing the Russian case. London lawyer Samuel Wordsworth QC tiptoed with balletic grace around the issue of intention in perpetrating various acts of alleged terror.

This is where the bone of contention is both vigorously contested and problematic: was there a link of intention running through the Russian command that led to the shooting down of MH17? Countries such as Australia were already prematurely adjudicating that case ahead of any inquiry findings.

The reaction from certain news outlets at the display of British counsel was one of disbelief.

“An extraordinary thing happened in The Hague this week,” sparkled a disbelieving Steve Cannane for the ABC. Russia’s lawyer, it was said, had “gone off script” in not issuing a standard denial about any role in the downing of MH17.

Cannane referenced Russian Defence Ministry spokesman Major General Igor Konashenko’s gruff remarks in response to the Dutch-led joint investigation team findings that a Buk missile brought across the Ukrainian-Russian border from Russia had found its way into a pro-Russian separatist village, and used to shoot down the ill-fated airliner. “Russian missile defence systems, including ‘BUK’, have never crossed the Russian-Ukraine border.”

This, it was said, did not quite match the slick presentation.

“There is no evidence before the court, plausible or otherwise, that Russia provided weaponry to any party with the intent or knowledge that such weaponry be used to shoot down civilian aircraft, as would of course be required under Article 2.1 [of the International Convention for the Suppression of the Financing of Terrorism].”

Any remotely engaged spectator would have to appreciate the difficulty of trying to impute crystal clear awareness to any actor caught in the unnerving fog of war. Death and desperation flounder in a confused dance, idiocy is enthroned, and mistakes rule. The idea of coherent battle plans and clear methods of war is a generally hard one to entertain, and even more so in the scrap that is the mess in eastern Ukraine. Not even Germanic precision or the doctrinaire approach of Clausewitz could ever dispel the notion that war is not only nasty, but nigh impossible to predict.

For that reason, bringing war into the court room, one messily charged with non-state actors, or supposedly sponsored ones, is problematic. The layers of control and accountability blur, and in some cases, diminish. The idea of constructive responsibility remains difficult to saddle and pad down. While the laws of war and humanitarian conflict stretch for volumes, the reality of their effect on the ground remains contested.

With predictable certainty, sides will present their positions with moral superiority and clarity. The Ukrainian government insists that Russia is a sponsor of state terrorism, a position that paves over the complex nationalist concerns in the east of the country. The Russian position on this has always been that such support does not exist; in any case, the Ukrainians made a meal of it in ignoring separatist and pro-Russian tendencies to begin with.

It is now left to the judges on the bench of the ICJ to deliberate over the distinctly untidy situation it faces. Success is likely to be measured, less in leaps and bounds than tactical moves of a symbolic nature. As former ICJ judge Bruno Simma explained, one such “success” could be an interim injunction, followed by a determination on jurisdiction a year later.[4] The blood of the conflict may still be moist by then.

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[1] http://www.echr.coe.int/Documents/CP_Ukraine_ENG.pdf

[2] <http://www.ejiltalk.org/ukraine-takes-russia-to-the-international-court-of-justice-will-it-work/>

[3] <http://www.icj-cij.org/docket/files/140/16398.pdf>

[4] <http://www.dw.com/en/ukraine-v-russia-a-potential-game-changing-lawsuit-comes-before-the-icj/a-37806132>

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