BURDEN OF PROOF AT THE ICJ CASE *ALLEGATIONS OF GENOCIDE UNDER THE CONVENTION ON THE PREVENTION AND PUNISHMENT OF THE CRIME OF GENOCIDE (UKRAINE V. RUSSIAN FEDERATION)*: FINDING "THE WAY HOME"

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Abstract

The commentary points out the fundamental evidentiary issues, which the International Court of Justice would face soon deciding the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* at the merits stage. The author believes that the burden of proof considerations are at the heart of the whole procedural picture of this unique inter-state dispute. The analysis shows that in this case, pursuant to the *actori incumbit onus probandi* principle (it is for the claimant to prove his claim), the burden of proof remains — as it should — with the Applicant (Ukraine) and should not be arbitrarily shifted to the Respondent (the Russian Federation). Ukraine's primary access to direct evidence regarding the legal nature of its acts should also be taken into account when establishing the appropriate burden of proof.

Key words

international justice, evidence, burden of proof, legal remedy, due process

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Procedural history

On 26 February 2022, Ukraine filed in the International Court of Justice (hereinafter — ICJ, the Court) an Application, by which it instituted proceedings against the Russian Federation concerning a dispute relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (hereinafter — the Genocide Convention, the Convention). Ukraine contended, *inter alia*, that the Russian Federation falsely claimed that acts of genocide had occurred in the Lugansk and Donetsk oblasts of Ukraine, and on that basis recognised the Donetsk and Lugansk People's Republics, and then started a special military operation against Ukraine. Ukraine "emphatically denies" that such acts of genocide have occurred and states that it submitted 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".

On 2 February 2024, the Court rendered its Judgment on the preliminary objections (hereinafter — the PO Judgment), in which it found that it had jurisdiction to examine only the claim of Ukraine requesting the Court to "[a]djudge and declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine".[1] By an Order also dated 2 February 2024, the Court fixed 2 August 2024 as the time-limit for the filing of the Counter-Memorial of the Russian Federation. This time-limit was subsequently extended until 18 November 2024. The Russian Ministry of Foreign Affairs declared in its official press-release: "…on November 18, the Russian Federation submitted comprehensive materials to the ICJ concerning genocide committed by Ukraine in Donbass… The document presented, termed the Counter-Memorial of the Russian Federation, comprises 522 pages of core text and over ten thousand pages of annexes. The specific contents remain confidential at this juncture, with all materials set to be disclosed only after

[1] URL: https://www.icj-cij.org/sites/default/files/case-related/182/182-20240806-pre-01-00-en.pdf (accessed: 13.01.2025).

the completion of the proceedings… Ukraine must now address Russia's Counter-Memorial".[2] So, it looks like the case *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)* (hereinafter — the Case) could therefore proceed further shortly.

I shall start from a declaration of a personal standpoint with respect to this case and commentary thereto. I am not the counsel of the Russian Federation and I am not an insider in this landmark dispute in the ICJ, although, used to be in thousands of other cases at the European Court of Human Rights (hereinafter — the ECtHR), serving as the country's governmental agent at that international tribunal from 2017 to 2021. I, surely, do not know all the details of the Case, have not seen all the materials (except for that in public domain) and not aware of the strategies of the Parties. But what I have learnt from the numerous cases in domestic courts, international tribunals, investment and commercial arbitrations worldwide, and what now my students learn from me as a law professor, is the K. Evans' *Advocacy in Court* maxim that *defence* counsel (Russia is the defendant in this Case, as in all other inter-state cases ever known[3]) have to show the judges "the way home", that is, how to arrive at the desired outcome by the least painful means[4] (I will add, — by the shortest and clearest legal route, ideally — which leads to the termination of the case on procedural grounds without going to the merits). The advocacy should be seen to have a clear idea of what it is arguing for and to have an understanding of the relative strengths of the possible arguments, to sort the relevant from the irrelevant and then re-sort to refine the available material down to what the court *really wants to know about*, to focus on what lies *at the heart* of the specific case.[5]

Onus probandi

At this stage of the proceedings, the Case involves complex questions — not just because of the subject matter, but due to the absence of a clear procedural (evidential) algorithm of handling such cases by the Court. One may see these unanswered questions in most of the opinions and declarations of the judges of the Court to the PO Judgment. They show that the judges have questioned what exact international legal remedy is sought in Ukraine's surviving claim,[6] as well as what are the standard and burden of proof applicable to it. Judge Tomka was fair in concluding remarks in his Declaration, saying that he "[takes] no position at this time on the question of how the burden of proof should be allocated in the present Case concerning the question whether Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts". He went on to "point out that it would be useful for the Parties to address this fundamental question as the Case proceeds to the merits".[7]

We cannot foresee what the positions of the Parties regarding the burden of proof issue will eventually be, but what is clear now is that this issue is obviously the key to the whole Case, which cannot be resolved properly without a structured roadmap of distribution of the burden of proof (*onus probandi*) between the Parties, based on international law, procedural principles and common legal

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[2] URL: https://www.mid.ru/ru/foreign_policy/news/1982157/?lang=en#sel=4:1:D,4:1:D;4:9:3UI,4:23:lMx (accessed: 13.01.2025).

[3] The only known inter-state case, in which Russia was the initial applicant is ECtHR, *Russia v. Ukraine,* Application no. 36958/21. The application was lodged with the ECtHR against Ukraine on 22 July 2021, concerned the Russian Government's allegation of a pattern ("administrative practice") since 2014 in Ukraine of, among other things, killings, abductions, forced displacement, restrictions on the use of the Russian language (apparently, mostly similar to the Russian allegations in the current ICJ case). On 18 July 2023, the application was finally struck out of the list of cases as the ECtHR concluded that the Russian Government no longer wished to pursue it and had repeatedly failed to reply to the procedural correspondence after the cessation of the state's membership at the Council of Europe in 2022. Moreover, the ECtHR found no grounds, which would require that it should nonetheless continue examination of the inter-state case as there are almost 8,500 individual applications which are still ongoing concerning the events since 2014 in various parts of Ukraine (ECtHR. *Russia v. Ukraine*. Application no. 36958/21. Decision of 18 July 2023). Four other inter-state cases upon the applications of Ukraine against Russia are still pending at the ECtHR Grand Chamber, despite the non-appearance of the Russian Federation. URL: https://www.echr.coe.int/cases-pending-before-the-grand-chamber (accessed: 13.01.2025).

[4] Cit. ex.: Evans K. *Advocacy in Court* / ed. by R. McPeake. 15th ed. Oxford : Oxford University Press, 2010. P. 57.

[5] Ibid. P. 56–57.

[6] PO Judgment, §151: "[The Court] [f]inds that it has jurisdiction, on the basis of Article IX of the Convention on the Prevention and Punishment of the Crime of Genocide, to entertain submission (b) in §178 of the Memorial of Ukraine".

[7] ICJ. *Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation: 32 States intervening).* Declaration of Judge Tomka. §20.

sense.[8] Below is the attempt to assist in constructing this kind of a roadmap by attracting the attention to some specific aspects of the Case.

What is the genuine application about?

An important procedural aspect of the Case is that the PO Judgment put the Russian Federation (the Respondent) to some extent in the position of a *de facto* applicant, and Ukraine (the Applicant) — of the *de facto* respondent (despite its legal status as the Applicant in this Case).[9] We shall see below that this *ad hoc* situation does not change the fundamental procedural role of the Parties with respect to the production of evidence.

As indicated in the PO Judgment, the subject of the examination of Ukraine's original case on the merits will be limited to the question of whether there is credible evidence that Ukraine has committed genocide in the territories of the Donetsk and Lugansk regions. All other claims of Ukraine were dismissed on jurisdictional grounds.[10] While this means that Ukraine's case concerns allegations of acts of genocide committed in the said regions (objective element), for the purposes of this particular claim, evidence relating to the wider territory (not only the Donetsk and Lugansk regions) will constitute evidence of genocide and existence of specific genocidal intent behind the said actions. This evidence is primarily not under Russian control (in the Donetsk and Lugansk regions), but in Ukraine and specifically in Kiev — where the central authorities and military command of Ukraine are located.

When is the *actori incumbit onus probandi* applicable?

The fundamental rule for the distribution of the burden of proof is the maxim *actori incumbit onus probandi* (the burden of proof lies on the plaintiff (*actor*)), which is widespread not only in the practice of the Court, but also of other international tribunals.[11] It may be assumed, it is Russia that *alleges* that Ukraine committed genocide, therefore Russia is the *actor* (who bears the onus of proof).[12] But it would not be the correct application of this general principle to the situation at hand. No one would object that the *actori incumbit onus probandi* is a purely legal concept, since it concerns exclusively the allocation of the burden of proof in court proceedings.[13] Clearly, Russia's statements of the genocide committed by Ukraine, which are referred to by the Applicant, were of political nature, initially made outside the Court, were extra-procedural and it was therefore not incumbent upon Russia to prove these statements in an adversarial manner prescribed by any legal procedures. To the contrary, Ukraine's allegations that these political declarations are ill-founded constitute the very foundation of the Case. Hence, under the *actori*

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[8] The observers have been waiting for a long time for "the ICJ… to provide guidance on the principles regarded by the Court as underpinning practice in relation to burden of proof in international courts and tribunals in future cases", since "relative certainty about the rules on proof will reinforce international actors' commitment to legal means of dispute settlement and their adherence to international law more generally". Foster C. *Burden of Proof in International Courts and Tribunals* // Australian Year Book of International Law. 2010. Vol. 29. P. 84–86.

[9] What makes this case unprecedented, is that the Applicant, Ukraine, denies the allegation of genocide made by the Respondent, Russia. Usually, in any litigation a claimant alleges and a respondent denies. See: Ishizuka C. *Impact of the Ukraine Conflict on Inter-State Dispute Settlement Procedures: The Allegations of Genocide Case (Ukraine v. Russia)* // Global Impact of the Ukraine Conflict / ed. by S. Furuya, H. Takemura, K. Ozaki. Singapore : Springer Nature Singapore : Imprint: Springer, 2023.

[10] PO Judgment.

[11] Brown C. *A Common Law of International Adjudication*. Oxford University Press, 2007. P. 89.

[12] The problem of allocation of the burden of proof in the commented case was also analysed recently by A. Nalgiev. See: Nalgiev A. *Bremya dokazyvaniya otritsatel'nykh faktov v praktike mezhdunarodnykh sudov i arbitrazhei: chto sulit rassmotrenie iska Ukrainy po delu o zayavleniyakh o genotside? [Burden of Proof of Negative Facts in the Practice of International Courts and Tribunals: What Does the Consideration of Ukraine's Claim in the Allegation of Genocide Case Has in Store for Us?]* // Zakon. 2024. № 10. C. 140–153.

[13] The first principle in regard to the burden of proof is stated in the *Corpus Juris*: *semper necessitas probandi incumbit illi qui agit* (D.22.3.21). If one person claims something from another *in a court of law*, then he has to satisfy the court that he is entitled to it. The second principle is "*Agere etiam is videtur, qui exceptions utitur: nam reus in exceptione actor est*" (D.44.1.1). The person against whom the claim is made holds the burden of proof if only it sets up a special defence, not just mere denial of the claim. See: https://journals.co.za/doi/pdf/10.10520/EJC85093 (accessed: 13.01.2025). A. Grebelsky suggests that the classical Roman evidentiary maxim *ei incumbit probatio, qui dicit, non qui negat* and *actore non probante reus absolvitu* consider that the obligation to present this or that evidence can be assigned to the other party only when that party is the *only* one who can have such evidence [italics added], and it is undoubtedly not Russia in the present case. See: *Raspredelenie bremeni dokazyvaniya v mezhdunarodnom arbitrazhe // Voprosy mezhdunarodnogo chastnogo, sravnitel'nogo i grazhdanskogo prava, mezdunarodnogo kommercheskogo arbitrazha: LIBER AMICORUM v chest' A.A. Kostina, O.N. Zimenkovoi, N.G. Eliseeva [Distribution of Burden of Proof in International Arbitration // Issues of International Private, Comparative and Civil Law, International Commercial Arbitration: LIBER AMICORUM in Honour of A. A. Kostin, O. N. Zimenkova, N. G. Eliseev]* / ed. by S. Lebedev, E. Kabatova, A. Muranov, E. Vershinina. Moscow : Statut, 2013.

incumbit onus probandi principle it is for Ukraine to prove them. There are no grounds for releasing Ukraine from this burden of proof, which it bears as the initial Applicant and the author of its claims. Judge Abraham specifically highlighted this in his partly dissenting opinion to the PO Judgment.[14]

As Judge Bennouna correctly pointed out in his Declaration to the PO Judgment, the only situation known to law when the respondent under the specific norms bears the burden of proof of the correctness of its own allegations made *extra-procedurally*, outside the context of any legal remedy, is *defamation*. At the same time, as Judge Bennouna also mentioned (and it is impossible to dispute), "even if an accusation of genocide is false, international law — unlike domestic law — does not allow States to institute what are simply defamation proceedings".[15]

The purely legal nature of the *actori incumbit onus probandi* general rule also means that it is limited to indications that the party bears the burden of proof in relation only to those facts that form the basis of its claims or objections, but *not just any facts* that are otherwise mentioned in its position. As C. Foster specifically notes,

> It can be seen that the requirement for a party to prove all the facts it asserts is generally taken as convenient shorthand for the requirement that a party should prove all the facts going to make up its legal case. The assumption is that the facts a party asserts will be those *required* for its case… it would be appropriate for international courts and tribunals to place greater emphasis on the need for a party to establish the facts supporting its *legal* claims and defences, rather than *merely the facts asserted*… an *emphasis on claims and defences rather than simply on fact* [italics added].[16]

When the disputed statements regarding facts of genocide were made by the Russian officials, they were never accompanied by a reference to the Convention or any other legal instrument. They clearly never intended to form or constituted any *legal* remedy or position regarding the interpretation and application of the Genocide Convention. The contrary, to put it simply, would be like calling somebody a "killer" in the street and then having to prove in court under all evidentiary standards applicable to criminal proceedings (with presumption of innocence,[17] priority of direct evidence, etc.) that the person had actually killed. For illustration, such logic had been challenged by the ECtHR:

> In so far as he also quoted as saying that he considered Mr… to be a "corruptionist" and a "thief", the Court acknowledges that these are strong words which suggest involvement in criminal activities. However, the absence of a criminal conviction does not necessarily exclude the reality of the alleged facts, in particular, where such allegations have not yet been officially investigated.[18]

Consequently, within the defamation regime, one should rather distinguish situations in which one *extra-procedurally* accuses of a crime the person, whose innocence has been knowingly confirmed by the proper investigation, or accuses of a crime the person, against whom there was no investigation, and accordingly, he may be guilty. The allegations are valid so long as the accused is considered innocent in the legal proceedings. The commented Case is much closer to the second situation, where Ukraine, for all we know, has not investigated the apparently genocidal criminal acts committed, so naturally opened a floor for the further probabilistic statements that the crime of genocide has actually took place.

The bottom line is that nothing in international law and the Court's practice precludes state officials to note publicly that, to the best of their knowledge, another State has committed certain misconduct. These notes are not automatically equated to a legal claim. As the Court pointed in the *Kosovo Advisory Opinion*:

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[14] PO Judgment. Partly Dissenting Opinion of Judge Abraham. §18: "The Russian Federation, which is not an applicant in the case, will not be required to produce before the Court any evidence in support of the allegations it has made outside the judicial framework..." ("La Fédération de Russie, qui n'est pas demanderesse dans l'affaire, ne sera pas tenue de produire devant la Cour les preuves dont elle dispose au soutien des allégations qu'elle a formulées en dehors du cadre judiciaire, à supposer qu'elle dispose de telles preuves").

[15] PO Judgment. Declaration of Judge Bennouna. §11.

[16] Foster C. T. *Op. cit.* P. 41–42.

[17] It is said that even in the landmark international criminal proceedings the presumption of innocence has not precluded the tribunals from shifting the burden of proving its innocence to the accused party. See: Lisova A. *Raspredelenie bremeni dokazyvaniya v praktike mezhdunarodnykh sudov [Distribution of the Burden of Proof in the Practice of International Courts]* // Mezhdunarodnoe pravo i mezdunarodnaya yustitsiya. 2022. № 3. P. 23–25.

[18] ECtHR. *Kommersant and Others v. Russia*. Applications nos. 37482/10 and 37486/10. Judgment of 23 June 2020. See also: ECtHR. *Marian Maciejewski v. Poland*. Application no. 34447/05. Judgment of 13 January 2015. §72–76; ECtHR. *Vitrenko and Others v. Ukraine*. Application no. 23510/02. Decision on Admissibility of 16 December 2008. P. 4.

> It follows that the task which the Court is called upon to perform is to determine whether or not the declaration of independence was adopted in violation of international law. The Court is not required by the question it has been asked to take a position on whether international law conferred a positive entitlement on Kosovo unilaterally to declare its independence or, *a fortiori*, on whether international law generally confers an entitlement on entities situated within a State unilaterally to break away from it. Indeed, it is entirely possible for a particular act — such as a unilateral declaration of independence — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the first point, not the second.[19]

To rephrase the Court's finding in the *Kosovo*: "It is entirely possible for a particular act — such as a proclamation of committing a genocide by another state — not to be in violation of international law without necessarily constituting the exercise of a right conferred by it. The Court has been asked for an opinion on the proclamation, not the genocide itself". It begs no mention that claims are referred to the Court exclusively by a formal application under Article 38 of the Rules of Court — not by any public statement. Again, the Russian Federation had not engaged the Court for the instant matter — Ukraine did.

Actori incumbit onus probandi is not an abstract rule about proving any fact in the world — as mentioned above, it is a legal principle that applies specifically to facts indicated as the base for legal claims made before the competent judicial institutions in support of a party's legal position. Facts are not just facts when referred to in court: they become the basis for the application of particular legal rules on which the party grounds its legal position. In turn, any legal position is based on a particular legal instrument (in the Case — the Convention), which lays down the applicable substantive law in the dispute and the facts that must be proved in order for this law to apply.

It is clear that just any public reference to facts which a reasonable person (incl. non-lawyer) may consider to be genocide in the common meaning of the word does not require their immediate qualification under a particular legal instrument (e.g. the Convention), unless the allegations in questions are formally submitted to a court by the party, which made them. Becoming a claimant (counter-claimant) — is always a discretional right, not a duty.

Notably, while Ukraine may rely on the perception that it is the victim of false allegations and hence the injured party, this would not be entirely honest — the Russian Federation, as the Respondent, is the actual target of allegations (in contrast to Ukraine, not of a factual, but of a legal nature) in these proceedings. While Ukraine challenges factual allegations, the Russian Federation as the Respondent has to deal with allegations of a legal nature — the kind that the *actori incumbit onus probandi* principle applies to.

To conclude this part, the subject-matter of this Case is the procedural attempt of Ukraine, not Russia, to legally qualify specific facts (i.e. as covered or not covered by the Convention). In this Case, it is Ukraine that primarily carries the burden of proof regarding its particular claims of the absence of said facts. While the Russian Federation also may submit evidence in defence, since the statements of its public officials were originally *extra-procedural,* under the *actori incumbit onus probandi* the burden of proof regarding the *subject-matter* of the Case remains (as it should) with the Applicant (Ukraine) and could not be arbitrarily shifted to the Respondent (the Russian Federation).

Where is the evidence?

Ukraine's inherent *onus probandi* in respect of its declaratory claim also stems from its ability to produce direct evidence of the planning, conduct and nature of the acts concerned. In fact, this issue is an integral and defining characteristic of the configuration of the dispute.

In the Case, as mentioned, it is of foremost importance that all direct evidence (originals of the relevant documents, orders, records of meetings, witnesses) is located in the territory controlled by Ukraine and is squarely within Ukraine's possession. Accordingly, regardless of what evidence the Russian Federation may produce, it is still for Ukraine to substantiate its claim that the Russian Federation has falsely alleged that Ukraine's actions amounted to genocide.

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[19] ICJ. *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo.* Advisory Opinion of 22 July 2010. I.C.J. Reports 2010. P. 403. § 56.

The above is supported by the Court's approach in *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo)*, where the party's authorities, being in charge of the direct evidence of their actions (or lack thereof), were determined to be much better placed to prove that they have duly discharged their obligations.[20]

There is no reason to assert that it would be more difficult for Ukraine to prove that its own acts did not encompass genocide than it would be for the Russian Federation to prove otherwise. Nothing prevents Ukraine from revealing evidence that the Russian Federation was wrong and Ukraine did not commit genocide (or that none of its plans had any traces of genocidal intent), as it has claimed in the Case, and certainly from commenting on the evidence presented by the Russian Federation.

It would therefore not be unfair to rest the burden of proving the absence of genocide on Ukraine, as it should be, given Ukraine's procedural status as both the Applicant and the Party that brought the claim in the first place. More than this, there is no convincing justification as to why the Russian Federation as the Respondent should in principle be required to substantively engage with Ukraine's declaratory demands more than is usually implied by the duty of the parties to cooperate with the Court.[21]

To summarise this point, there are no circumstances in the Case which could constitute grounds for the Court to deviate from the generally recognised literal interpretation of the *actori incumbit onus probandi* rule by mechanically shifting the burden of proof to the Respondent (Russia), rather than to emphasise the duty of the Parties to cooperate "in the provision of such evidence as may be in [their] possession that could assist the Court in resolving the dispute submitted to it".[22] The Russian Federation as the Respondent could not be held responsible for Ukraine's claim that the Russian Federation falsely alleged genocide, which has been formally advanced against the Russian Federation by the Applicant — Ukraine — the Party which solely initiated the legal assessing of its own compliance with the Convention.

As correctly noticed by the above-noted judges in their declarations and opinions, Ukraine cautiously changed the wording of its claims in the Memorial from the way they were formulated in its Application. While in the Application Ukraine asked to "declare that … no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine",[23] the prayer for relief in the Memorial requests from the Court to "declare that there is no credible evidence that Ukraine is responsible for committing genocide in violation of the Genocide Convention in the Donetsk and Luhansk oblasts of Ukraine".[24] In order to establish the absence of any acts of genocide, it is necessary to prove that *all* actions and events that took place do not fall within the *actus reus* and *dolus specialis* of genocide as embodied in the Convention.

At the same time the amended claim demands only "credible evidence" that Ukraine is responsible for genocide in Donbass. This claim is phrased in much less confident language as regards existence of genocide *per se* and appears to be much less demanding on the Russian Federation's evidence therefor.

In light of these circumstances, international practice would also call for greater leniency with respect to the evidence submitted by the defendant. In particular, full weight should be given to circumstantial evidence, and a less stringent standard is overall warranted. This stems from the textbook approach adopted by the Court in the *Corfu Channel* case[25] and is widely shared by other international judicial organs. For illustration, in the award of 29 July 2008 in the case *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan* an ICSID tribunal stated that "in general, international tribunals have given full weight to circumstantial evidence",[26] including the situation when "direct evidence of fact is unavailable",[27] directly referring to the Court's Judgment in the *Corfu Channel*

[20] ICJ. *Ahmadou Sadio Diallo (Republic of Guinea v. Democratic Republic of the Congo).* Judgment of 30 November 2010 (Merits). I.C.J. Reports 2010 (II). P. 660. § 55.

[21] See e.g. ICJ. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia).* Judgment of 3 February 2015. I.C.J. Reports 2015. P. 73. § 173; ICJ. *Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of 20 April 2010. I.C.J. Reports 2010. P. 71. § 163.

[22] ICJ. *Pulp Mills on the River Uruguay (Argentina v. Uruguay).* Judgment of 20 April 2010. I.C.J. Reports 2010. P. 71. § 163.

[23] ICJ. *Genocide case (Ukraine v. Russia)*. Application instituting proceedings of 27 February 2022. § 30(a).

[24] ICJ. *Genocide case (Ukraine v. Russia)*. Memorial of Ukraine of 1 July 2022. § 178(b).

[25] ICJ. *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania).* Judgment of 9 April 1949. [1949] I.C.J. Report Rep. 4, § 18: "[T]he other State [the claimant], the victim of a breach of international law, is often unable to furnish direct proof of facts giving rise to responsibility. Such a State should be allowed a more liberal recourse to inferences of facts and circumstantial evidence. This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions".

[26] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan.* ICSID Case no. ARB/05/16. Award of 29 July 2008. § 444.

[27] Ibid.

case.[28] A similar position was expressed by the ICSID tribunal in the award of 27 August 2009 rendered in the *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I)* case,[29] where the decision of the Court in the *Corfu Channel* case was cited in support of the admissibility of references to circumstantial evidence. Furthermore, the arbitral tribunal in the award dated 27 June 1990 rendered in the *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka* case has indicated the principle under which "in cases where proof of a fact presents extreme difficulty, a tribunal may thus be satisfied with less conclusive proof, i.e., *prima facie* evidence[30] as one of the general *"international law rules of evidence"* [italics added].[31]

It is particularly notable that Ukraine itself has tried to benefit from exactly the same approaches, as described above, in other inter-state proceedings against the Russian Federation. For instance, in its Reply in the *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)* case, Ukraine argued the following:

> [A]cross the entirety of the case, Russia ignores the fact that the financiers of terrorism and the perpetrators of racial discrimination are located in territory controlled by Russia, and that as a consequence, Ukraine must under this Court's jurisprudence be 'allowed a more liberal recourse to inferences of fact and circumstantial evidence.'[32]

Consequently, the Court took this factor into account in its Judgment in the said case.[33]

Ukraine also fronted this position before the ECtHR. Particularly, in the case *Ukraine v. Russia (Re Crimea)*, Ukraine "emphasised the practical difficulties associated with gathering evidence in Crimea and the fact that the Government of the Russian Federation was in exclusive possession of substantial evidence relating to the administrative practices [pertaining to alleged human rights abuses] complained of".[34] This prompted the ECtHR to pronounce in the Judgment of its Grand Chamber dated 25 June 2024 that unfavourable inferences of fact against the Russian Federation were allowed[35] and to find "*prima facie evidence in favour of [Ukraine's] version of events*" [italics added] is enough so as to shift the burden of proof on the respondent.[36] Consequently, the ECtHR held that, along with primary sources, including the testimony of direct witnesses, participants of the relevant events or actual victims of violations, attention is paid to circumstantial evidence,[37] the duty to refute which, as a consequence, is placed on the party whose alleged violations were in question (in the case before the ECtHR — Russia, and in the present Case before the Court — Ukraine).

Conclusion

The subject-matter of the commented Case is the *procedural* attempt of Ukraine, not Russia, to legally qualify specific facts and actions. So, pursuant to the general *actori incumbit onus probandi* legal principle it is Ukraine that primarily carries the burden of proof regarding its particular claims of the absence of genocide.

In the end, in many proceedings, Ukraine used the same logic and approaches to ensure a favourable decision against the Russian Federation where its evidence was at best circumstantial. So, the concluding two questions are the following: "Shall the Court allow Ukraine to backpedal from the

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[28] Ibid.
[29] *Bayındır İnşaat Turizm Ticaret ve Sanayi A.Ş. v. Islamic Republic of Pakistan (I).* ICSID Case no. ARB/03/29. Award of 27 August 2009. § 142.
[30] Ibid*.* § 56.
[31] *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka.* ICSID Case No. ARB/87/3. Award of 27 June 1990. § 85.
[32] ICJ. *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).* Reply of Ukraine, 29 April 2022. § 12.
[33] ICJ. *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).* Judgment of 31 January 2024. P. 42. § 80; P. 63. § 169.
[34] ECtHR. *Case of Ukraine v. Russia (re Crimea)* [GC]. Applications nos. 20958/14 and 38334/18. Judgment of 25 June 2024. § 30.
[35] Ibid. § 846 (citing Judgement of 16 December 2020, § 436), 971.
[36] Ibid. § 846 (citing Judgement of 16 December 2020, § 437–438).
[37] Ibid. § 846 (citing Judgement of 16 December 2020, § 443–445).

strategy that it itself employed against Russia in other fora?”, and, most importantly, “Will the Court clearly demonstrate that all states are treated equally and fairly even in unprecedented cases?” Answers are pending.

БРЕМЯ ДОКАЗЫВАНИЯ В ДЕЛЕ МЕЖДУНАРОДНОГО СУДА *ЗАЯВЛЕНИЯ О ГЕНОЦИДЕ ПО КОНВЕНЦИИ О ПРЕДУПРЕЖДЕНИИ ПРЕСТУПЛЕНИЯ ГЕНОЦИДА И НАКАЗАНИИ ЗА НЕГО* (*УКРАИНА ПРОТИВ РОССИЙСКОЙ ФЕДЕРАЦИИ*): В ПОИСКАХ «ДОРОГИ ДОМОЙ»

ГАЛЬПЕРИН М. Л.

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Аннотация

В комментарии освещаются фундаментальные вопросы доказывания, которые вскоре встанут перед Международным Судом в деле *Заявления о геноциде по Конвенции о предупреждении преступления геноцида и наказании за него* (*Украина против Российской Федерации*) на стадии рассмотрения по существу. Автор утверждает, что вопросы распределения бремени доказывания составляют основу всей процессуальной картины этого уникального межгосударственного разбирательства. Анализ показывает, что в соответствии с принципом *actori incumbit onus probandi* (истец должен доказать свои требования) бремя доказывания остается на заявителе (Украине) и не может быть произвольно переложено на ответчика (Российскую Федерацию). Исключительный доступ Украины к прямым доказательствам, касающимся правовой природы ее действий, также должен быть принят во внимание при надлежащем распределении бремени доказывания в этом деле.

Ключевые слова

международное правосудие, доказательства, бремя доказывания, способ защиты, принципы надлежащего процесса

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