Assessing The Effectiveness and Adequacy of Provisional Measures in Genocide Cases: A Comparative Study

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Abstract: In international law, provisional measures refer to orders directed at the parties in a pending dispute, requiring them to act or refrain from acting in a certain way to safeguard their rights until a final judgment is rendered. The vast majority of international courts are vested with the authority to issue provisional measures. As the International Court of Justice (ICJ) highlighted in the *Nuclear Tests Case*, provisional measures constitute an inherent power of the Court. Similarly, in the *Fisheries Jurisdiction Case*, the ICJ emphasized that the purpose of such measures is to preclude irreparable harm and ensure the protection of the parties' rights until the conclusion of the case. In its *LaGrand* Case, the ICJ further underscored that provisional measures are binding. However, despite their binding nature, the enforcement of provisional measures still remains problematic. Given that their implementation is generally deemed to be ensured and enforced by the Security Council, even in cases involving the prevention of genocide -a *jus cogens* norm- provisional measures have failed to meet expectations. While the enforceability of provisional measures is frequently debated, their legal capacity is less scrutinized. However, the primary duty of the Court is to issue measures capable of preventing and precluding irreparable harm. Under the Genocide Convention, the ICJ has so far dealt with four cases -Bosnia, Myanmar, Ukraine, and Gaza- where the adequacy of the provisional measures ordered so far has been subject to criticism. In cases like Bosnia, Myanmar, and Gaza, the Court's measures have been questioned for being insufficient, whereas in Ukraine, the Court's approach has been contested for misconceptualizing the issue. Moreover, in certain cases, ICJ judges argued the insufficiency of provisional measures. This study will first outline the general framework and purpose of provisional measures. Subsequently, it will provide a comparative analysis of the provisional measures issued by the ICJ in the four genocide-related cases, opening a discussion on the adequacy and effectiveness of the Court's orders.

Keywords: International Law, Provisional Measures, Genocide, ICJ, Adequacy

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Introduction

The prohibition of genocide is recognized as a *jus cogens* norm, as affirmed by the work of the International Law Commission (ILC, 2022: 6). The concept of genocide, first introduced by Raphael Lemkin, was subsequently codified into a binding international treaty through the efforts of a commission that included Lemkin himself. This process culminated in the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948, which was entered into force in 1951 (Genocide Convention, 1948). Article 2 of the Convention enumerates acts that may constitute genocide, provided they are committed with the specific intent (*dolus specialis*). Moreover, Article 9 grants jurisdiction to the International Court of Justice (ICJ) over disputes arising from the Convention. Article 2 of the Convention defines genocide as follows: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: (a) Killing members of the group; (b) Causing serious bodily or mental harm to members of the group; (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; (d) Imposing measures intended to prevent births within the group; (e) Forcibly transferring children of the group to another group. Meanwhile, Article 3 of the Convention not only criminalizes the commission of genocidal acts enumerated in Article 2 but also penalizes conspiracy to commit genocide, direct and public incitement to commit genocide, attempted genocide, and complicity in genocide: The following acts shall be punishable: (a) Genocide; (b) Conspiracy to commit genocide; (c) Direct and public incitement to commit genocide; (d) Attempt to commit genocide; (e) Complicity in genocide. The Convention also includes a dispute resolution mechanism under Article 9: Disputes between the Contracting Parties relating to the interpretation, application or fulfilment of the present Convention, including those relating to the responsibility of a State for genocide or for any of the other acts enumerated in article III, shall be submitted to the International Court of Justice at the request of any of the parties to the dispute (Genocide Convention, 1948: art.2-9).

By January 2025, four cases have been brought before the International Court of Justice (ICJ) under the Genocide Convention: Bosnia and Herzegovina v. Serbia

and Montenegro, Gambia v. Myanmar, Ukraine v. Russia and South Africa v. Israel. In all genocide-related cases, the applicants have requested the indication of provisional measures, and in each of these four cases, the Court has granted certain provisional measures. Given that any kind of attempt to violate the prohibition of genocide results in severe humanitarian crises, it is expected that the ICJ's provisional measures will be effective. However, both in the Bosnia case which is heard before the *LaGrand* judgment, and in the subsequent Myanmar, Ukraine, and Israel cases, the Court's provisional measures have proven ineffective. One of the underlying reasons is the unresolved issue of enforcement, namely, the uncertainty surrounding the authority responsible for implementing the Court's orders. Another reason is that states have interpreted the Court's decisions as mere recommendations rather than binding orders. This outcome has been influenced by the ICJ's tendency to use a language that merely recalls obligations rather than the one that explicitly imposes specific measures. In the following sections of this study, the ICJ's authority and conditions for ordering provisional measures are first examined to lay the groundwork for the study. Subsequently, a comparative analysis of the provisional measures granted in the four genocide cases before the ICJ is conducted in detail. This allows for an assessment of the sufficiency and effectiveness of the ICJ's provisional measures in genocide cases from the first case to the most recent one.

Authority of International Court of Justice to Indicate Provisional Measures

Conditions for Provisional Measures

Provisional measures in international law refer to orders issued to the parties in an ongoing dispute to preserve their rights and prevent irreparable harm until a final decision is rendered (Kempen & He, 2009: 919). The International Court of Justice (ICJ) underscored this principle in its first case involving provisional measures, *Anglo-Iranian Oil Company*, emphasizing the necessity of such orders (Anglo-Iranian Oil Company, 1951: 93). Similarly, in the *Fisheries Jurisdiction* Case, the Court reiterated that the primary objective of provisional measures is to prevent irreparable harm and to safeguard the rights of the parties pending

the final judgment of the dispute (Fisheries Jurisdiction, 1972: 12-16). Given that inter-state litigation may extend over several years, loss of rights might occur in this process, which necessitates such an interim relief. In this regard, some scholars argue that the function of provisional measures is to maintain the *status quo*, while others contend that their purpose is to ensure the effectiveness of the Court's final decision (Oxman, 1987: 324-326). In the *Société Commerciale de Belgique* Case, the Permanent Court of International Justice (PCIJ) emphasized that provisional measures serve a dual function: preventing the parties from taking actions that might render the final decision ineffective and avoiding the escalation or deepening of the dispute (Electricity Company of Sofia and Bulgaria, 1939: 199). Another critical point, as noted by Wolfrum, is that the Court must refrain from granting provisional measures that would effectively predetermine the outcome of the case. ICJ should take care to ensure that provisional measures do not amount to a temporary final judgment (interim judgment) (Wolfrum, 2006: 38-40).

When human life is concerned, the function of provisional measures, namely *preventing irreparable harm,* becomes even more evident. This was explicitly recognized in the *LaGrand* and *Avena* cases, where the individuals concerned were sentenced to death, and the Court emphasized that execution would result in irreparable harm (LaGrand, 1999: 23-34; Avena, 2003: 49-55). Therefore, a request for provisional measures must inherently demonstrate a degree of *urgency*. However, the ICJ assesses the level of urgency on a case-by-case basis, considering the specific circumstances of each dispute. While urgency is not explicitly codified in the ICJ's Statute or its Rules of Procedure (Rules of Court), the Court has repeatedly affirmed in its jurisprudence that an urgency assessment is necessary (Great Belt, 1991: 23; Land and Maritima Boundary, 1996: 35). For instance, in the *LaGrand* case, Walter LaGrand's execution was scheduled for March 3, 1999, yet the requesting state submitted its application for provisional measures on March 2. Recognizing the urgent nature of the situation, the Court rendered its decision within 24 hours—an unprecedented speed in its history (Miles, 2017: 232). Conversely, in the *Arrest Warrant* case, the Court denied the request for provisional measures, reasoning that the individual subject to the arrest warrant was no longer serving as Minister of Foreign Affairs and had

significantly reduced international travel, thus concluding that the situation did not require urgency (Arrest Warrant, 2000: 72).

The provisional measures issued by the ICJ are generally referred to as 'orders'. In this sense, the ICJ's provisional measures may impose an obligation on the parties to either take specific actions or refrain from certain conduct, to cease ongoing actions, or to restore a previous state of affairs. These orders may also call on the parties to halt violations of international law. For example, in the *Tehran Hostages* case, the Court issued provisional measures requiring Iran to restore the embassy building to its previous condition and immediately release the hostages (Tehran, 1979: 21). Similarly, in the *Nicaragua* case, the Court issued an order directing the United States to immediately cease its mining activities, which were endangering the Nicaraguan ports (Nicaragua, 1984: 22). Likewise, in the *Avena* case, the Court issued provisional measures requiring the United States to fulfill its obligations under Article 36 of the Vienna Convention on Consular Relations (Avena, 2003: 19).

Procedure for Provisional Measures

The vast majority of international courts are endowed with the authority to issue provisional measures. As indicated by the ICJ in the *Nuclear Tests* case, provisional measures are an inherent power of the Court (Nuclear Tests, 1974: 23). In the case of the ICJ, Article 41 of the Court's Statute serves as the foundational (the basic) rule for this power. According to the article 41: 1) If the Court is of the opinion that the circumstances require so, it may issue any provisional measure to safeguard the rights of each party. 2) The measures indicated must be communicated to the parties and to the Security Council prior to the final decision (ICJ Statute, 1945: art.41). Thirlway has criticized the use of the term "right" in the article, arguing that a right, when violated, does not disappear but may become more difficult to exercise. In this sense, the author suggests that instead of using the term 'safeguarding rights', an alternative term that refers to protecting either specific content of the right or exercise of the right should be used (Thirlway, 1994: 7).

An important question that arises regarding the authority to issue provisional measures is what happens to the ICJ's power to indicate provisional measures if it lacks jurisdiction over the merits of the case. This is because the ICJ can only render a judgment on the merits if it is competent to do so; otherwise, it must issue a ruling of lack of jurisdiction. In practice, the ICJ addresses this issue by conducting a *prima facie* jurisdictional examination when indicating provisional measures. In other words, when the ICJ indicates provisional measures, it determines the jurisdiction based on the available evidence, using a presumption of jurisdiction. According to the Court, if the available evidence strongly suggests that the Court has jurisdiction, it is deemed sufficient to proceed with the provisional measures (Gambia v. Myanmar, 2020: 16). Indeed, as reported by Oellers-Frahm, the ICJ has followed this approach in all of its provisional measures (Oellers-Frahm, 2012: 1026).

The provisions of Articles 73 to 78 of the Court's Rules of Procedure, under the heading "Interim Protection", regulate the details of the provisional measures procedure. First and foremost, Article 73 outlines how the provisional measures process is initiated by the parties: 1. A written request for the indication of provisional measures may be made by a party at any time during the course of the proceedings in the case in connection with which the request is made. 2. The request shall specify the reasons therefor, the possible consequences if it is not granted, and the measures requested. A certified copy shall forthwith be transmitted by the Registrar to the other party (Rules of Court, 1978: art.73). Article 74 of the Rules of Procedure stipulates how the Court will address a request for the indication of provisional measures: 1. A request for the indication of provisional measures shall have priorityover all other cases (Frowein, 2002: 55). 2. The Court, if it is not sitting when the request is made, shall be convened forthwith for the purpose of proceeding to a decision on the request as a matter of urgency. 3. The Court, or the President if the Court is not sitting, shall fix a date for a hearing which will afford the parties an opportunity of being represented at it. The Court shall receive and take into account any observations that may be presented to it before the closure of the oral proceedings. 4. Pending the meeting of the Court, the President may call upon the parties to act in such a way as

will enable any order the Court may make on the request for provisional measures to have its appropriate effects (Rules of Court, 1978: art.74).

On the other hand, Article 75 of the Rules of Procedure stipulates that the Court is not bound and restricted by the request when examining the content of the provisional measures: 1. The Court may at any time decide to examine proprio motu whether the circumstances of the case require the indication of provisional measures which ought to be taken or complied with by any or all of the parties. 2. When a request for provisional measures has been made, the Court may indicate measures that are in whole or in part other than those requested, or that ought to be taken or complied with by the party which has itself made the request. 3. The rejection of a request for the indication of provisional measures shall not prevent the party which made it from making a fresh request in the same case based on new facts (Rules of Court, 1978: art.75). In addition, Article 76 provides that a provisional measures order may be lifted or modified by the Court: 1. At the request of a party or proprio motu, the Court may, at any time before the final judgment in the case, revoke or modify any decision concerning provisional measures if, in its opinion, some change in the situation justifies such revocation or modification. 2. Any application by a party proposing such a revocation or modification shall specify the change in the situation considered to be relevant. 3. Before taking any decision under paragraph 1 of this Article the Court shall afford the parties an opportunity of presenting their observations on the subject (Rules of Court, 1978: art.76). Finally, Articles 77 and 78 of the Rules of Court contain provisions regarding the implementation of provisional measures. In this regard, according to Article 77, measures taken pursuant to Articles 73 and 75, as well as decisions made under paragraph 1 of Article 76, shall be communicated by the Court to the Secretary-General for transmission to the Security Council, in accordance with paragraph 2 of Article 41 of the Statute (Rules of Court, 1978: art.77). According to Article 78, the Court may request information from the parties on the implementation of any provisional measures or any related matters (Rules of Court, 1978: art.78).

Binding Nature of Provisional Measures

The binding nature of provisional measures has been debated, as the Statute of the ICJ and the Rules of Court do not contain a clear provision regarding the binding effect of provisional measures. Similarly, prior ICJ decisions, until the *LaGrand* case, did not issue a definitive ruling on this matter. The emphasis in earlier decisions that "states must comply with provisional measures" does not necessarily indicate binding authority. As a result, scholars have been divided on the issue of the binding nature of provisional measures. Some argue that the ICJ's authority is discretionary and that the silence in the Statute suggests that provisional measures are not binding. In the absence of an explicit provision, to claim otherwise would interfere with States' sovereignty. Indeed, if a provisional measure is issued in a case and the final judgment is rendered as lack of jurisdiction, binding States by a decision contrary to their consent would violate international law, sovereignty, and the principle of consent (Lauterpacht, 1966: 208; Goldsworthy, 1974: 274).

On the other hand, scholars who advocate for the binding nature of provisional measures argue that the authority to issue provisional measures is a natural consequence of judicial activity and stems from the general principles of law. Otherwise, the Court's decision could be interpreted merely as imposing a moral obligation on the parties, which would be inconsistent with the ICJ's legal function (Collier & Lowe, 2000: 175; Mani, 1970: 367). Although this debate may not be concluded theoretically, the ICJ, in the *LaGrand* case, made a clear ruling in its own practice, emphasizing the binding nature of provisional measures (Kammerhofer, 2003: 67). According to the Court, to assert that provisional measures are not binding would be contrary to the object and purpose of the ICJ Statute, whose function is to resolve disputes between States through "binding" decisions. Moreover, when considering the rules of interpretation under the 1969 Vienna Convention on the Law of Treaties, to interpret Article 41 of the ICJ Statute in the opposite manner would contradict the Statute's object and purpose. The authority to issue provisional measures is essential for the Court to perform its functions effectively (LaGrand, 2001: 102).

Implementation of Provisional Measures

An essential point regarding provisional measures is how the Court acts and responds when its provisional measures are not complied with. If provisional measures are binding, its violation must constitute a breach of international law and lead to state responsibility (Draft Articles, 2001: 2). This issue was raised in the *Bosnia* case, where Bosnia and Herzegovina requested symbolic compensation for the violation of the provisional measures. The Court, however, only issued a decision in the form of satisfaction, confirming that the respondent state had failed to comply with the provisional measures (Bosnia v. Serbia, 2007: 197). In this regard, the Court's primary sanction for non-compliance with provisional measures is to issue a decision in the form of satisfaction or a declaratory judgment (Iwamoto, 2012: 256-259; MacIntyre, 2012: 107).

The implementation of the Court's provisional measures has also been discussed in the context of the United Nations Security Council. Article 41, paragraph 2, of the Statute refers to the 'notification to the Security Council'. It should be noted that Article 94 of the UN Charter provides that, if a decision of the ICJ is not complied with, the other party may refer the matter to the Security Council. In this regard, the Security Council can take any measures it deems necessary for the enforcement of the decision (UN Charter, 1945: art.94). However, the term "decision" here generally refers to final judgments (Reisman, 1969: 14-15). It should be emphasized that Article 94 essentially and explicitly indicates that the final discretion lies with the Security Council. Therefore, although Article 41, paragraph 2, of the ICJ Statute refers to notification, there is no obstacle to the Security Council taking the necessary measures under Article 94 of the UN Charter in response to a violation of provisional measures that endangers peace and security.

Genocide Cases Before International Court of Justice and Provisional Measures

Bosnia v. Serbia and Montenegro Case

The policies developed during the Federal Yugoslavia era aimed at maintaining a multi-ethnic societal structure were weakened by nationalist rhetoric during the war, with Bosnia and Herzegovina becoming the most fragile region due to its pluralistic demographic composition. After the dissolution of Yugoslavia, Bosnia and Herzegovina, one of the federal units, declared its independence by exercising its constitutional right. However, this decision was not supported either by the Serbs, one of Bosnia's ethnic groups, or by Serbia and Montenegro, which claimed to be the successor of Yugoslavia. The 1992 independence referendum was boycotted by Bosnian Serbs, and subsequently, separatist initiatives were launched by Serb nationalists led by Radovan Karadžić, who conducted large-scale military operations against independent Bosnia and Herzegovina. Serb nationalists carried out mass violence and massacres against Bosniaks in Eastern Bosnia and other regions, following an "ethnic cleansing" strategy. The international community's inadequacy in intervening led to significant humanitarian losses, particularly during the Siege of Sarajevo and the Srebrenica genocide. The safe areas established by the United Nations, particularly Srebrenica, were unable to effectively protect civilians from attacks by Serb militias during the final stages of the war, which increased international outrage. As a result of diplomatic pressure, the parties ended the war through the 1995 Dayton Agreement. While this agreement legally guaranteed Bosnia and Herzegovina's independence and territorial integrity, it also structured and shaped the country's political system based on ethnic-based administrative divisions. Meanwhile, the humanitarian law violations caused by the war were prosecuted by the International Criminal Tribunal for the Former Yugoslavia (ICTY), established in 1993. Notably, Serb leaders like Radovan Karadžić and Ratko Mladić were convicted of genocide and other crimes (Kazansky, Musladin & Ondrejmiskova, 2021: 50-64).

Bosnia and Herzegovina filed a lawsuit against Serbia and Montenegro before the ICJ during the ongoing war. Shortly after submitting the application on March 20, 1993, Bosnia and Herzegovina requested provisional measures pursuant to

Article 41 of the ICJ Statute. After hearing from the parties, the Court, in its order of April 8, 1993, indicated certain provisional measures to ensure the protection of rights under the Genocide Convention. The Court ruled the following measures: 1) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should immediately, in pursuance of its undertaking in the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948, take all measures within its power to prevent commission of the crime of genocide, 2) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary 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, do not commit any acts of genocide, of conspiracy to commit genocide, of direct and public incitement to commit genocide, or of complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group, 3) The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Government of the Republic of Bosnia and Herzegovina should not take any action and should ensure that no action is taken which may aggravate or extend the existing dispute over the prevention or punishment of the crime of genocide, or render it more difficult of solution (Bosnia v. Serbia, 1993: 52).

In the first ruling on provisional measures in the Bosnia case, no decision was rendered on the cessation of military actions. The Court merely reminded Serbia and Montenegro of their obligations under the Genocide Convention. No specific operation or region name, such as Srebrenica, was mentioned. In fact, there is no rule stipulating that provisional measures must be short and general in nature. The Court has the discretion to use as much detail as it desires and is not bound by the requests. Nevertheless, the Court's use of overly general language in its measures raises questions about their sufficiency. Indeed, the applicant state, citing the inadequacy of the provisional measures, requested further measures, but in its second order on 13 September 1993, the Court merely confirmed its previous ruling of 8 April 1993 (Bosnia v. Serbia, 1993: 61). The Court's decision to reaffirm its earlier ruling rather than providing further detailed measures was criticized by ad hoc Judge Lauterpacht. Indeed, the Court should

have both elaborated on the provisional measures and clarified the nature of these measures. While Judge Weeramantry addressed the binding nature of provisional measures in his separate opinion, the Court did not establish clear case law on this matter until the 2001 *LaGrand* case. In such a case, it is possible for states, such as Serbia and Montenegro, who are the addressees of the provisional measures, to interpret provisional measures as recommendations and act arbitrarily, especially given that Article 41 of the Statute uses the expressions "ought to be taken" and "measures suggested." Examining the states' practices, it is observable that the States have not effectively enforced provisional measures.

Gambia v. Myanmar Case

The Rohingya genocide refers to the ongoing persecution and mass killings of the Muslim Rohingya people by the Myanmar military since 2016. This process has led to over a million Rohingyas fleeing to Bangladesh and other parts of Southeast Asia, creating one of the largest refugee crises in the world. The systematic oppression against the Rohingya people dates back at least to the 1970s and has been a long-standing policy pursued by the Myanmar government and Buddhist nationalists. In late 2016, the Myanmar military and police launched a large-scale crackdown in Rakhine State, located in the country's northwest, during which allegations of ethnic cleansing and genocide were raised by United Nations officials. Reports published by the UN revealed widespread human rights violations, including extrajudicial executions, mass killings, gang rapes, the burning of villages, and the killing of infants (Sparling, 2019: 49-59).

On November 11, 2019, Gambia filed a lawsuit against Myanmar before the ICJ, based on *erga omnes* obligations arising from the Genocide Convention. According to Gambia, Myanmar's actions against the Rohingya since October 2016 constitute violations of the Genocide Convention. In this regard, Gambia requested the ICJ to indicate provisional measures on the day the case was filed. On January 23, 2020, the Court indicated following provisional measures: 1) The Republic of the Union of Myanmar shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to the members of the Rohingya group in its territory, take all measures within its power to prevent the commission of all acts within the scope

of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to the members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group; 2) The Republic of the Union of Myanmar shall, in relation to the members of the Rohingya group in its territory, ensure that its military, as well as any irregular armed units which may be directed or supported by it and any organizations and persons which may be subject to its control, direction or influence, do not commit any acts described in point (1) above, or of conspiracy to commit genocide, of direct and public incitement to commit genocide, of attempt to commit genocide, or of complicity in genocide; 3) The Republic of the Union of Myanmar shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II of the Convention on the Prevention and Punishment of the Crime of Genocide; 4) The Republic of the Union of Myanmar shall submit a report to the Court on all measures taken to give effect to this Order within four months, as from the date of this Order, and thereafter every six months, until a final decision on the case is rendered by the Court (Gambia v. Myanmar, 2020: 86).

The provisional measures issued in the Myanmar case are strikingly similar to those in the Bosnia case. However, 27 years had passed between the two cases, during which the Court had addressed the importance and binding nature of provisional measures in the *LaGrand* case. In the Myanmar ruling, the Court did not impose the detailed and specific measures that were expected of it, nor did it move away from the generalizing language it had used in its previous decision.

Ukraine v. Russian Federation Case

The Ukraine-Russia crisis, which began with the annexation of Crimea in 2014, further deepened in 2022 with Russia's "special military operation." Both Ukraine and the Western states supporting it have attempted to launch various military and legal measures to halt Russia's actions (Brunk & Hakimi, 2022: 687-697). Among these legal sanction efforts, one has led to a decision rarely seen in international law's history. Specifically, Ukraine brought the issue of alleged

genocide in Donetsk and Luhansk—one of the justifications for Russia's military operations—before the ICJ on February 22, 2022, through a request for a negative determination. According to Ukraine, conducting military operations based on such a "false" claim and Ukraine's rejection of it demonstrates a dispute concerning the interpretation and application of the Genocide Convention between the two states. Ukraine also requested the Court to indicate provisional measures. In its decision on March 16, 2022, the Court ruled as follows regarding provisional measures: 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 above, 3) Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve (Ukraine v. Russia, 2022: 86).

The ICJ's decision in the Ukraine case has sparked debates. The operative part of the decision does not use the term "genocide" in any way and instead orders Russia to cease all military operations. Judges Gevorgian, Bennouna, and Xue expressed in their separate opinions that they believed the case was fundamentally about the use of force, rather than genocide. In a case where the connection to the Genocide Convention was even controversial, the Court, while asking the respondent state (Russia) to unconditionally stop all military operations, merely reminded States of its obligations under the Genocide Convention in the Bosnia and Myanmar cases. In fact, there is no evidence or UN report that Russia committed or attempted to commit genocide. The issue of genocide was not brought up in the investigation (Situation in Ukraine) before the International Criminal Court.

South Africa v. Israel Case

The occupation of Palestine, which began with the implementation of the Balfour Declaration by the British Mandate authorities, continued with the establishment of Israel in 1948. This situation, which violates the right of the

Palestinian people to self-determination, reached a new level (turned into a more complex phase) in 1967 when East Jerusalem, the West Bank, and Gaza were occupied. Over time, Israel withdrew from some areas but continued its indirect practices of occupation. Notably, after withdrawing from Gaza in 2005, Israel imposed a blockade on Gaza, controlling it by land, air, and sea. Palestinians living under the blockade have occasionally faced Israeli attacks (Quigley, 2005: 153). Most recently, on October 7, 2023, the "Aqsa Flood" operation was launched, breaking the blockade and taking some Israeli civilians hostage. In response, Israel subjected Gaza to massive destruction from land, air, and sea, resulting in a humanitarian crisis. As the crisis deepened, on December 29, 2023, the South Africa filed a case before the ICJ, alleging that Israel's actions violated the Genocide Convention. On the same day, a request for indication of provisional measures was made. On January 26, 2024, the Court indicated the following provisional measures: 1) The State of Israel shall, in accordance with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, in relation to Palestinians in Gaza, take all measures within its power to prevent the commission of all acts within the scope of Article II of this Convention, in particular: (a) killing members of the group; (b) causing serious bodily or mental harm to members of the group; (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and (d) imposing measures intended to prevent births within the group; 2) The State of Israel shall ensure with immediate effect that its military does not commit any acts described in point 1 above; 3) The State of Israel shall take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip; 4) The State of Israel shall take immediate and effective measures to enable the provision of urgently needed basic services and humanitarian assistance to address the adverse conditions of life faced by Palestinians in the Gaza Strip; 5) The State of Israel shall take effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Convention on the Prevention and Punishment of the Crime of Genocide against members of the Palestinian group in the Gaza Strip (South Africa v. Israel, 2024: 86).

After its initial ruling, the Court indicated a second round of provisional measures. Specifically, the following decision stands out: Take all necessary and effective measures to ensure, without delay, in full co-operation with the United Nations, the unhindered provision at scale by all concerned of urgently needed basic services and humanitarian assistance, including food, water, electricity, fuel, shelter, clothing, hygiene and sanitation requirements, as well as medical supplies and medical care to Palestinians throughout Gaza, including by increasing the capacity and number of land crossing points and maintaining them open for as long as necessary (South Africa v. Israel, 2024: 51). ICJ emphasized that Israel should cooperate with UN institutions and refrain from obstructing humanitarian aid.

Finally, the ICJ issued its third provisional measures decision in the Gaza case on May 24, 2024. After confirming its previous two rulings, the Court issued several detailed orders and, for the first time in the Gaza case, decided to halt military operations partially. The following orders, in particular, can be highlighted: 2) The State of Israel shall, in conformity with its obligations under the Convention on the Prevention and Punishment of the Crime of Genocide, and in view of the worsening conditions of life faced by civilians in the Rafah Governorate: (a) Immediately halt its military offensive, and any other action in the Rafah Governorate, which may inflict on the Palestinian group in Gaza conditions of life that could bring about its physical destruction in whole or in part; (b) Maintain open the Rafah crossing for unhindered provision at scale of urgently needed basic services and humanitarian assistance; (c) Take effective measures to ensure the unimpeded access to the Gaza Strip of any commission of inquiry, fact-finding mission or other investigative body mandated by competent organs of the United Nations to investigate allegations of genocide (South Africa v. Israel, 2024: 57).

As previously stated, the Court could have issued all of these provisional measures in its first decision. In the Ukraine case, the ICJ demanded Russia to urgently cease its military actions, but it did not adopt the same approach in the Gaza case, where the events were classified as genocide by UN rapporteurs. This raises several questions: Is there any obstacle preventing the Court from issuing detailed and specific orders? Why does the Court adopt a conservative approach. Of course, the answers to these questions will likely remain subjective.

The reason behind this stance is not necessarily owing to one of the parties being Hamas. While it may seem that the Court could not call for the cessation of actions from Israel because it did not demand the same from Hamas, this interpretation is not entirely accurate. Since, the obligation to prevent in the Convention requires state parties to act even in cases of non-international armed conflicts. Therefore, the Court must overcome its hesitancy and adopt measures that are both effective and sufficient for the specific case at hand. Furthermore, the Court should not only take such action but also clearly state that the Security Council is authorized to enforce provisional measures. Given that the Court acknowledged the binding nature of provisional measures in the *LaGrand* case, it should now clarify how these binding measures should be enforced.

Conclusion

When asked about the most important rule in contemporary international law, the unequivocal response would undoubtedly be the prohibition of genocide. The obligation to effectively utilize the provisional measures in pursuance of authority granted by Article 41 of the Court's founding Statute is most crucial in the context of the crime of genocide. Throughout its history, the Court has adjudicated four separate cases pertaining to the Genocide Convention. It should be noted that the failure of the Security Council to enforce the Court's rulings and their ineffectiveness is not the fault of the Court. However, the inadequacy of the provisional measures itself is indeed a shortcoming of the Court. The Court must issue provisional measures with sufficient capacity to prevent irreparable harm to the rights of the parties. The Court's decisions are interim and urgent. In this sense, while the Court is expected to be more courageous in indicating provisional measures, it has, in fact, adopted a conservative approach. This can be observed in the provisional measure decisions rendered in the four genocide cases brought before the Court.

When examining the first provisional measures decision issued by the ICJ under the Genocide Convention, in the Bosnia case, no measures were taken to halt military operations. The Court issued very general statements, ordering Serbia and Montenegro to comply with their obligations under the Genocide

Convention, which led to criticism from some of the Court's judges. During this period, since the *LaGrand* case had not yet been decided, the state concerned could have interpreted the provisional measures as mere recommendations, as the Court's Statute, specifically Article 41, leaves room for such an interpretation. Nevertheless, the Court opted not to resolve these uncertainties. 27 years later, in the Rohingya case, the Court continued its conservative approach and avoided issuing detailed and specific measures. The Ukraine case is the most contentious of the four cases, as the Court did not mention genocide at all in the operative part of its decision, yet ordered Russia to cease all military operations. This decision was criticized by the Court's own judges, with some arguing that the case was essentially about the use of force rather than genocide. The only case where the Court partially delved into the details was the Gaza case. The Court issued its orders through three separate provisional measures decisions over time, rather than addressing them all at once. However, the Court did not issue an order for Israel to cease all military operations but only partially ordered a suspension of operations in the Rafah region. The Court's cautious behavior in failing to issue adequate and effective provisional measures, particularly in such a critical issue as the prohibition of genocide, has drawn significant criticism.

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