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The International Court of Justice Provisional Measures: A Shield Against Genocide or a Paper Tiger?

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ABSTRACT

The International Court of Justice (ICJ) has played a critical role in establishing legal precedents and frameworks for dealing with genocide. Landmark cases have helped to shape international law by establishing standards for accountability and justice in the instance of a humanitarian crisis. The ICJ's provisional measures under Article 41 of its Statute have the potential to serve as a deterrence, affecting state actors' behaviour and preventing future genocides. However, one of the ICJ's major shortcomings is its lack of enforcement measures. Provisional measures are often seen as a moral obligation by states. While the ICJ has the authority to issue judgments, enforcing compliance by sovereign governments, particularly powerful ones remains challenging without the involvement of other organs of the United Nations. The current global scenario requires an analysis of the impact of ICJ provisional measures on perpetrators' conduct, particularly whether states have complied or will comply with any provisional measures mandated by the ICJ.

Keywords: *genocide, provisional measures, accountability, compliance.*

I. INTRODUCTION

The International Court of Justice was established in 1945 by the UN Charter and began its work in 1946. It is the principal judicial organ of the United Nations and a central institution for the peaceful settlement of legal disputes between States. It functions in accordance with its Statute, which forms an integral part of the UN Charter. Situated at the Peace Palace in The Hague and Composed of 15 judges, the Court's jurisdiction is twofold². It decides, in accordance with international law, disputes of a legal nature that are submitted to it by States (contentious cases); and it gives advisory opinions on legal questions at the request of the organs of the United Nations, specialized agencies or one related organization authorized to make such a request³. The ICJ statute also provides that the jurisdiction of the Court comprises all matters

¹ Author is an Advocate in India.

² Article 96 of the UN Charter.

³ Article 65 of the ICJ Statute.

specially provided for in treaties and conventions in force⁴. Such matters are normally brought before the Court through a written application instituting proceedings⁵. Hence, ICJ's jurisdiction is based on consent, which means that States have to agree to judicial supervision. Consent of the States parties to a dispute can be expressed in the form of a special agreement, reservations, the inclusion of a jurisdictional clause in a treaty or the optional clause declarations⁶.

The ICJ's role is especially important when it comes to the use of force. When states voluntarily submit to the ICJ's jurisdiction, they are bound by the ICJ's orders. As a result, an ICJ ruling can have a significant impact on peace, justice, and humanitarian rights. The law of armed force is founded on a dualist theory, which distinguishes the law of recourse to force (*jus ad bellum*) from the law controlling the conduct of hostilities (*jus in bello*)⁷ also called International Humanitarian Law (IHL). Article 51 of the United Nations Charter recognises self-defence and collective security as exceptions to the prohibition on the use of force. Some claim that even if IHL is prohibitive, it might conflict with morality. IHL prohibits the killing of all civilians yet some philosophers think that, sometimes, killing some civilians might be moral if not legally permitted⁸. Under Article 41(1) of the Statute of the International Court of Justice and Article 75(1) of the Rules of the ICJ, the ICJ has the power to 'indicate' provisional measures. States seek provisional measures to bring an issue to the notice of the international community. Ten of the 23 instances in which the ICJ advised interim measures are related to human rights. These cases were concerned with (1) the prohibition of genocide; (2) human rights in the context of armed conflict; (3) the right to be free from racial discrimination; and (4) the rights of individuals.

II. PROVISIONAL MEASURES: HOW AND WHY

The ICJ is tasked with maintaining peace and security. To achieve these goals, it can use its discretionary power to impose interim measures that generate a binding obligation on the states. Article 41 of the ICJ Statute states that,

*"1. The Court shall have the power to indicate if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party.
2. Pending the final decision, notice of the measures suggested shall forthwith be given to the parties and the Security Council"*⁹.

⁴ Article 36, Para 1 of the ICJ Statute.

⁵ Article. 40, Para 1 of ICJ Statute.

⁶ Article 36, Para.2, of the ICJ Statute

⁷ YORAM DINSHTEYN, WAR, AGGRESSION AND SELF-DEFENCE (4 ed. 2005).

⁸ Jeff McMahan, *in* KILLING IN WAR 203–231 (2009).

⁹ Statute of the International Court of Justice, STATUTE OF THE COURT OF JUSTICE <https://www.icj-cij.org/statute>

They are hence temporary measures intended to preserve the rights of the parties if circumstances so require. The Court may order such provisional measures at the request of a State¹⁰, or *proprio motu*¹¹. To impose the measures, the ICJ must have prima facie jurisdiction. The ICJ has to be satisfied, amongst other things, that there is a real and imminent risk that irreparable prejudice will be caused, that the party seeking protection has at least a plausible claim to the rights in question and that a condition of urgency is met. There should also be a link between the measures requested and the rights protected. In LaGrand¹² the Court confirmed that provisional measures have a mandatory nature and create legal obligations. The nature of the ICJ's provisional measures was highly debated prior to the LaGrand case. By its judgement in the case, the Court, however, ended all questions and stated that, in accordance with the subject and purpose of Article 41 of its Statute, provisional measures of the Court shall be binding in order to prevent the violation of the rights of parties stipulated in the Court's judgement¹³. While contemporary international law recognizes the binding nature of obligations arising from the ICJ interim measures, an assessment of the Court's case law reveals that it has been difficult to monitor their implementation¹⁴. No article of the Statute and the Rules of the Court is dedicated to the implementation of the provisional measures. Similarly, the Rules of the Court do not indicate whether there is a time limit for implementing provisional measures ordered by the ICJ. The ICJ may employ Article 78 of the Rules to pursue the implementation of any provisional measures it has indicated, requesting the party or parties to provide information on the steps taken to implement these measures. While this provision makes it more likely that the provisional measures will be implemented, it is notable that it remains unexplored in the Court's case law. For example in *Islamic Republic of Iran v. United States of America*, Iran filed the case in 2018, alleging that the United States violated the treaty when it reimposed sanctions against Iran. However, the provisional measures it granted fell significantly short of the relief Iran sought. The ICJ issued provisional measures on October 3, 2018, instructing Iran to immediately restore the Embassy to U.S. control, release all U.S. nationals held as hostages, and provide full protection to U.S. diplomatic and consular personnel. A few months after it ordered the provisional measures it requested the United States of America to notify the Court of any measures taken to execute the provisional measures within

(last visited Jan 7, 2024).

¹⁰ Article 76 of the ICJ Statute.

¹¹ Article 75.1 of the ICJ Statute.

¹² *LaGrand (Germany v. United States of America)*, I.C.J. Reports 2001, Para. 466.

¹³ *ibid.* Para. 102, 108.

¹⁴ Bazzar, V., Nazhandimanesh, H., 'Implementation of ICJ Provisional Measures: An Innovative Approach to Article 78 of the Rules of the Court', *Iranian Review for UN Studies*, 3(1), pp. 1-19 (2020).

a maximum of 48 days. The ICJ only monitors or assesses the implementation of provisional measures at the merits stage of a case. The information that the Court could request under Article 78 did not appear as a monitoring proceeding. Under Article 94(2) of the Charter when “any party to a case fails to perform the obligations incumbent upon it under a judgment rendered by the Court, the other party may have recourse to the Security Council” in an attempt to pursue the implementation of provisional measures¹⁵. Simultaneously, the United Nations Security Council took action by unanimously adopting Resolution 457 (1979). This resolution urgently called upon Iran to release the U.S. Embassy personnel. When Iran failed to comply, the Security Council adopted another resolution, Resolution 461 (1979), reaffirming Resolution 457. It expressed disapproval of Iran's continued detention of hostages, citing the I.C.J. order. The Council warned of potential "effective measures" under Articles 39 and 41 of the Charter, including economic or diplomatic sanctions, if Iran did not comply with the resolutions and the I.C.J. order. This has caused a lot of debates and controversies, especially concerning the competence of the Security Council of the UN and the extent of the measures available to the Council for implementing the judgments of the International Court of Justice. A party may also bring such complaint under Articles 10, 11, 14, 22 and 35 of the Charter. The provision of Resolution 377 popularly referred to as Uniting for Peace Resolution states that the General Assembly can act when the Security Council fails to act due to a lack of unanimity among its five permanent members.

III. GENOCIDE AND INTERVENTION

Raphael Lemkin in 'Axis Rule in Occupied Europe' labelled the "crime without a name" as "genocide" for the first time in 1944. The evidence produced at the Nuremberg trial gave full support to the concept of genocide by way of the prosecutions of responsible Nazi members at the International Military Tribunal¹⁶. Genocide is a massive human rights violation that shakes the conscience of humanity. A humanitarian crisis has been the main focus of the United Nations' primary organizations and its special agencies since its foundation in 1945. The United Nations General Assembly first recognised genocide as a crime under the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (the Genocide Convention). As of April 20, 2022, 153 states had ratified the Convention¹⁷. The definition of the crime of genocide contained in Article II of the Genocide Convention is defined in the same terms as in the

¹⁵ Article 94 of the United Nations Charter

¹⁶ Raphael Lemkin, *Genocide as a crime under International Law*, GENOCIDE AND HUMAN RIGHTS, pp.3–9 (2017).

¹⁷ United Nations Office on Genocide Prevention and the Responsibility to Protect, UNITED NATIONS, <https://www.un.org/en/genocideprevention/genocide.shtml> (last visited Jan 7, 2024).

Genocide Convention in the Rome Statute of the International Criminal Court¹⁸. Article II defines genocide as any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, 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 one group to another group.

Any civilian casualties that are expected to arise as a side effect of an attack against a military target must be minimized as much as possible according to the legal rule of necessity or the principle of precautions in attack¹⁹. The Geneva Conventions and subsequent rulings by international tribunals show that proportionality is not a numbers game where the toll of civilian casualties on one side can be compared to the other, rather such casualties should be proportionate to the direct and concrete military advantage expected from that specific attack.

The International Court of Justice (ICJ) has stated on multiple occasions that the prohibition of genocide is a presumptive norm of international law. This means that regardless of whether a country has ratified the Genocide Convention, it is obligated by the premise that genocide is a crime under international law. Article I of the Genocide Convention states that genocide can occur in the context of an armed conflict, whether international or non-international and even in a peaceful scenario. Article I of the Genocide Convention reads as follows: "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." As a result, countries are required to take steps to "prevent and punish" genocide. Article I of the Convention makes no mention of what steps a government can take to fulfil its commitment to prevent and punish genocide. However, such actions are mentioned in Articles VIII and IX of the Genocide Convention. Article VIII empowers contracting states to request that the United Nations take any action it deems necessary to prevent and suppress genocide. Article IX is a compromissory clause, which implies that the parties accept that any disputes between them under the treaty will be resolved by an independent body such as the ICJ. As per the UN Charter, the UNSC

¹⁸ Article 6 Rome Statute of the International Criminal Court.

¹⁹ Dill, J. and Schubiger, L.I., Attitudes toward the Use of Force: Instrumental Imperatives, Moral Principles, and International Law. *American Journal of Political Science*, pp. 612-633 (2021)

may take actions under Chapter VII if there is a threat to the peace, breaches of the peace or acts of aggression, including economic sanctions and the use of force. When there are human rights violations on a massive scale in a sovereign state, humanitarian intervention is an option for the UNSC. It should only be carried out as a last resort, and if the violation is of such character it can only be stopped by humanitarian intervention.

IV. ICJ AND RESPONSE EFFORTS

The first lawsuit filed in the ICJ is the genocide case filed by Bosnia and Herzegovina against Yugoslavia in 1993 under Article IX of the Genocide Convention. The ICJ stated in *Bosnia and Herzegovina v. Serbia and Montenegro*²⁰, that states acting to avert genocide "may only act within the limits permitted by international law". The ICJ eventually found that genocide had been committed in Srebrenica, which Serbia had failed to prevent although it had an obligation under international law to do so. Except for Srebrenica, the Court stated that there was no breach of Article 2 of the Convention since the applicants could not prove the "special intent to destroy" (*dolus specialis*) that is unique to the crime of genocide. It was also declared that Serbia did not secretly organise genocide, support genocide, or participate in genocide. The most criticised part of the decision, according to the ICJ, is that it has not been shown that the perpetrators of genocide in Srebrenica are organs of the State of Serbia or associated persons and units.

In the *DRC v Rwanda* case²¹ the provisional measures were rejected because Rwanda had made a reservation to Article IX of the Genocide Convention. The Court found that it did not have *prima facie* jurisdiction to indicate provisional measures in the Armed Activities on the Territory of the Congo. The proceedings lasted several years and its decision on December 19, 2005, the Court found that Uganda's invasion of the Democratic Republic of the Congo was an illegal military operation. It was made clear that the conditions for self-defence were not met in this instance. The Court further emphasised the State's international responsibilities under the law of occupation. The Court ruled that because Uganda was the occupying power in the region, it was responsible not only for violations of IHL and human rights law committed by its armed forces but also for those committed by non-state armed groups operating in territory under its control and occupation.

The ICJ emphasised that the Genocide Convention specifies duties that must be met by everyone (*erga omnes*), based on the principle of "proof beyond a reasonable doubt" in showing the specific intent that distinguishes genocide. The ICJ issued a verdict in February 2021

²⁰ *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment, I.C.J. Reports 2007 (I)

²¹ *Democratic Republic of the Congo v. Rwanda*, Jurisdiction and Admissibility, Judgment, I.C.J. Reports 2006, Para. 69-72

ordering Azerbaijan to lift its blockade of 120,000 ethnic Armenians in the Nagorno-Karabakh territory²². The situation has not changed since the decree. Azerbaijan is now legally required to take to facilitate the unhindered movement of people, vehicles, and freight via the Lachin corridor under the provisional measure. Two external factors can help ensure that Azerbaijan obeys the ICJ's order. First, the United Nations Security Council can enact a resolution to impose the provisional action, pending compliance by all five permanent members. Second, if Azerbaijan does not comply with the ruling, the European Union and members of the international community may threaten additional involvement in the region.

In November 2019, Gambia accused Myanmar of genocide against the Rohingya ethnic minority during 'clearing operations in 2017. Myanmar's military forces committed major human rights crimes during these operations, which culminated in the evacuation of 740,000 predominantly Rohingya refugees to Bangladesh, including mass executions, torture, rape, destruction of homes and mosques.

With the former state counsellor Aung San Suu Kyi as the Agent for Myanmar, the ICJ heard arguments in December 2019 and issued an order on 23 January 2020 instructing Myanmar to "take all measures within its power" to avoid the commission of actions listed in the Genocide Convention, including ensuring that the military and any irregular armed units do not commit these acts. The Court also ordered Myanmar to "take effective measures to prevent the destruction and ensure the preservation of evidence" relating to the ICJ proceedings, as well as to submit periodical reports on its compliance efforts²³. The ICJ rejected Myanmar's challenges to the Court's jurisdiction in 2022, citing the Convention's central aim of ensuring the prevention and punishment of genocide as a 'common interest' of all signatories. In the meantime, Canada, Denmark, France, Germany, the Netherlands, and the United Kingdom filed a joint declaration of intervention on November 15, 2023, citing their "common interest in the accomplishment of the high purposes" of the Genocide Convention²⁴. The Maldives also filed an intervention declaration, expressing great concern over the ongoing human rights violations and barbaric assaults against Rohingya Muslims and recognising the need for international cooperation in the quest to prevent and punish genocide.

Following the Russian army's military invasion of its territory on February 24, 2022, Ukraine filed an application with the International Court of Justice (ICJ) against Russia on February 27,

²² Armenia v. Azerbaijan, Provisional Measures, Order of 7 December 2021, I.C.J. Reports 2021, p. 361

²³ The Gambia v. Myanmar, Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3

²⁴ Canada, Denmark, France, Germany, the Netherlands, the United Kingdom (jointly) and the Maldives file declarations of intervention in the proceedings under Article 63 of the Statute, INTERNATIONAL COURT OF JUSTICE (Nov. 16, 2023), <https://www.icj-cij.org/node/203289>.

2022, citing an issue over how the Genocide Convention should be interpreted. As one of the excuses for Russia's invasion of Ukraine on February 23, 2022, Russian President Vladimir Putin claimed multiple times that Ukraine's government and military perpetrated genocide against Russian speakers at Luhansk and Donetsk in eastern Ukraine. Ukraine requested that the ICJ declare that Russia's aggressive war could not be justified by false allegations of genocide. This is a 'negative genocide' case in which Ukraine must prove that it did not commit genocide in the Donbas to deny Russia's legal justification for the invasion. The ICJ ruled in Ukraine's favour and ordered provisional measures. It recognised Ukraine's contention that it has a right under the Genocide Convention not to be subjected to a false charge of genocide, which is subsequently exploited as a justification for deploying force against it. The International Court of Justice ruled that Russia must immediately cease its military actions in Ukraine and both Russia and Ukraine shall refrain from any action that might aggravate or extend the dispute.

Russia has not followed the ICJ instructions, which is an important difference from the Myanmar issue. The ICJ's provisional measures orders are binding on the parties to the proceedings. There was no considerable cost of noncompliance for Myanmar. The Rohingya exodus occurred in 2017, long before the ICJ case and verdict. Compliance, however, would essentially cancel Russia's invasion of Ukraine. Non-compliance with court decisions should be an issue for the United Nations Security Council to take up and condemn. But the realities of the UNSC's makeup, with Russia as a permanent veto-ing member, make this unlikely. In the case of Myanmar, China and Russia's support for the junta has a negative impact on any UNSC efforts to address the atrocities that continue to be committed, as well as on the issue of non-compliance. The only way to hold Russia accountable is by creating a new tribunal, a one-time ad-hoc exception.

On December 29, 2023, following the same procedural approach as Ukraine and Gambia, South Africa in community interest filed an application instituting proceedings against Israel before the International Court of Justice concerning alleged violations by Israel of its obligations under the the Genocide Convention in relation to Palestinians in the Gaza Strip. Israel joined the Genocide Convention almost as soon as the state was established since the convention was written in the wake of the Holocaust, in hopes of preventing another genocide. As both states are party to the Convention, there is a treaty basis for the ICJ jurisdiction and South Africa's obligation to prevent genocide even as a non-participating state. Empowered under Article 9 of the Convention the ICJ is competent in disputes concerning the interpretation or application of the convention or the direct determination of genocide actions. The ICJ does not need to

determine whether Israel has committed acts of Genocide. It has to determine whether acts complained of by South Africa fall under the provisions of the Genocide Convention and whether the Palestinians in Gaza face a real and imminent risk of Genocide going forward. The ICJ has an extremely restrictive approach to Genocidal intent. The ICJ has required that where a pattern of conduct is to be accepted as evidence of intent to destroy the group in whole or part it must be the only reasonable inference that can be drawn²⁵. It is rare for evidence of intent to be explicitly spelt. Even today there are multiple attempts of incitement and evidence of intent. South Africa has submitted a number of horrendous statements alleging Israel of incitement to genocide, failure to punish such incitement as well as inadequate domestic laws and failure to allow investigations. They also acknowledge and condemn Hamas' attacks. The preventive measures sought by South Africa are similar to those requested against Myanmar.

South Africa seeks provisional measures directing Israel to suspend military operations in Gaza, abide by its obligations under the Genocide Convention and prevent forced displacement, deprivation of food, water, humanitarian aid and destruction of Palestinian life in Gaza. South Africa also asks the ICJ to direct Israel to prevent destruction of evidence including by not denying access to fact-finding missions, to support periodic reports on measures taken to implement the provisional measures and to refrain from acts which might aggravate the dispute. Assuming the test for provisional measures is met the ICJ is likely to direct Israel to abide by its obligations under the Genocide Convention and preserve evidence. A bigger question is whether the ICJ will be more specific about the actions Israel needs to take to mitigate the risk of Genocide. As we await public hearings on the 11th and 12th of January 2024, ultimately the Court's findings on imminent risk of Genocide may be more consequential than provisional measures. If it goes through, ICJ will order Israel to withdraw from Gaza immediately hand over evidence relevant to the case and initiate Genocide proceedings which might take several years.

V. CONCLUSION

Provisional measures do not require the court to quickly rule on the case, they are intended to protect the positions of the parties while the case is pending. The relative costs and benefits of complying with the Court tend to drive compliance with provisional measures. On the plus side, compliance can aid in the resolution or at least mitigation of an existing dispute. Obeying the Court can help a country's status on the international stage, which is especially significant for countries that value their reputation as law-abiding actors. In the situations of Ukraine and

²⁵ Bosnia v. Serbia I.C.J. Reports 2007 (I) at 6.

Armenia, the leaders of both Russia and Azerbaijan saw the two crises as crucial to their regimes. And, for decades, the Myanmar military leadership has used national security concerns to excuse crimes against the Rohingya, which is unlikely to change given the government's potential advantages. Human rights organisations, continue to record serious violations against the Rohingyas. As previously mentioned, neither Russia nor Azerbaijan have complied with the two sets of provisional measures that the court ordered. What use are such proceedings if states are unlikely to follow the ICJ's provisional measures and their failure to do so will only result in a referral to the impasse-ridden Security Council. With the Israel-Gaza conflict, the world is watching the most live-streamed and documented genocide in history. The UN has warned that Gaza is now uninhabitable with more than 85% dead and 20,000 displaced. Military support from states such as the US, UK and Germany makes them complicit in aiding and abetting genocide. It is unfortunate that even when the war ends and future preventive measures are in place a Gaza's population would eventually succumb to deaths from preventable health causes and collapse of their economy.
