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THE ICJ ORDER ON PROVISIONAL MEASURES OF JANUARY 2024 IN SOUTH AFRICA V. ISRAEL ON GENOCIDE CASE: AN EXPECTED BUT DISAPPOINTING DECISION

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ABSTRACT: The ICJ's Order on provisional measures in the case of the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) raised a lot of interest, mainly concerning the ceasefire requested by South Africa. After the Order was delivered, a general feeling of disappointment seems to have taken hold. Yet the Court's decision was not entirely unexpected, given the Court's practice as well as the particularities and complexities of the case.

In this work, we critically analyse the path followed by the Court leading to the rendering of its provisional measures. We pay particular attention to the requirements to be met: *prima facie* jurisdiction; the plausibility of the rights and its link with the requested measures; and irreparable prejudice and urgency. This editorial seeks to clarify the Court's position and analysis, relating it to other orders so as to understand the provisional measures delivered.

This case is not merely a legal issue. It is one of social interest. And too much was expected of the Court in the wake of the extraordinary provisional measures rendered in Ukraine v. Russian Federation. In this latter case, however, the unmentioned issue of self-defence played an essential role, permeating the whole process and limiting the extent of the measures.

KEYWORDS: Genocide Convention, Gaza, Palestinians, Israel, South Africa, provisional measures, plausibility, ICJ, self-defence.

LA PROVIDENCIA DEL TIJ SOBRE MEDIDAS PROVISIONALES DE ENERO DE 2024 EN SUDÁFRICA CONTRA ISRAEL SOBRE EL CASO DE GENOCIDIO: UNA DECISIÓN ESPERADA PERO DECEPCIONANTE

RESUMEN: La Providencia del Tribunal Internacional de Justicia sobre medidas provisionales en el caso de Aplicación de la Convención para la Prevención y la Sanción del Delito de Genocidio en la

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Franja de Gaza (Sudáfrica contra Israel), ha suscitado un gran interés, principalmente en relación con el alto el fuego solicitado por Sudáfrica. Tras la publicación de la Providencia, parece haberse instalado en algunos un sentimiento general de decepción, pero la decisión del Tribunal no difiere mucho de lo que cabría esperar, dada la práctica del Tribunal, y las particularidades y complejidades del caso.

Este trabajo pretende ofrecer un análisis crítico del camino seguido por el Tribunal para dictar su providencia de medidas provisionales, prestando especial atención a los requisitos que deben ser cumplidos: la competencia *prima facie*, la plausibilidad de los derechos y su vinculación con las medidas solicitadas, y el perjuicio irreparable y la urgencia. Este editorial pretende aclarar la posición y el análisis del Tribunal, relacionándolo con otras órdenes a fin de entender las medidas provisionales adoptadas.

Este caso no versa solo sobre una mera cuestión jurídica, sino que es un caso de interés social, esperándose demasiado del Tribunal tras las extraordinarias medidas provisionales dictadas en el caso de Ucrania contra la Federación Rusa. Sin embargo, en este caso, la cuestión no mencionada de la legítima defensa jugó un papel esencial, impregnando todo el procedimiento y limitando la extensión de las medidas.

PALABRAS CLAVES: Convención contra el Genocidio, Gaza, Palestinos, Israel, Sudáfrica, medidas provisionales, plausibilidad, CIJ, legítima defensa.

L'ORDONNANCE DE LA CIJ SUR MESURES PROVISOIRES DE JANVIER 2024 EN AFRIQUE DU SUD C. ISRAËL DANS L'AFFAIRE DE GÉNOCIDE : UNE DÉCISION ATTENDUE MAIS DÉCEVANTE

RÉSUMÉ: L'ordonnance de la Cour sur les mesures conservatoires dans l'affaire concernant l'Application de la convention pour la prévention et la répression du crime de génocide dans la bande de Gaza (Afrique du Sud c. Israël) a suscité beaucoup d'intérêt, notamment en ce qui concerne le cessez-le-feu demandé par l'Afrique du Sud. Un sentiment général de déception a pu être aperçu suite à la publication de cette ordonnance. Cependant, on pourrait bien s'atteindre à cette décission, compte tenu de la pratique préalable de la Cour et des particularités et complexité de l'affaire.

Ce travail offre un analyse critique du parcours suivi par la Cour pour rendre ses mesures provisoires et fait attention aux exigences qu' y doivent être satisfaites: d'abord, la compétence prima facie; ensuite, la plausibilité des droits et leur lien avec les mesures demandées; enfin, la situation d'urgence et le risque d'un préjudice irreparable. Cet éditorial vise aussi à expliquer la position et l'analyse de la Cour d'après d'autres ordonnances préalables, pour comprendre ainsi les mesures provisoires rendues dans cette affaire.

D'autre part, l'affaire nous enmène non seulement à une question juridique, mais aussi à une question d'intérêt social. Ainsi, après les mesures provisoires extraordinaires rendues dans l'affaire Ukraine c. Fédération de Russie, Il s'attendait beaucoup de la Cour. Cependant, dans ce cas, la question non mentionnée de la légitime défense a joué un rôle essentiel, present tout au long de la procédure, limitant l'étendue des mesures adoptées.

MOTS CLÉS: Convention contre le Génocide, Gaza, Palestiniens, Israël, Afrique du Sud, mesures provisoires, plausibilité, CIJ, légitime défense.

I. INTRODUCTION

On 29 December 2023, South Africa instituted proceedings against the State of Israel before the International Court of Justice concerning alleged violations of Israel's obligations under the Convention on the Prevention and

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Punishment of the Crime of Genocide[2]. According to South Africa's allegations, Israel's conduct in Gaza violates both the prohibition of committing genocide and the obligation to prevent genocide[3].

South Africa requested nine provisional measures in its filing, including the following: "(t)he State of Israel shall immediately suspend its military operations in and against Gaza"[4], which is probably the most controversial measure, but also the more effective at protecting Gaza's population.

The Court rendered its order on provisional measures on 24 January, that is, less than two weeks after the hearings – which is perhaps an indication of the urgency of the situation, as in the case of Ukraine v. Russia on Allegations of Genocide[5]. Also important to note in this regard is the fact that in the case of Gambia v. Myanmar, the Court took more than a month to deliver its order of provisional measures, even though the committing of genocide was at stake and probably in a clearer way[6].

The quick delivery of the provisional measures would suggest that the Court had taken effective interim measures to protect the Palestinians in Gaza. Nothing, however, could be further from the truth. These provisional measures may have given a chance to the allegations that the Convention of Genocide had been violated, yet they left those who expected that Israel's operations in Gaza would end with a bitter feeling. The latter, it must be said, was highly unlikely.

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[2] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel).

[3] On the conflict, see the editorial of Professor Pons Rafols in this Journal: Pons Rafols, X., "The war in Gaza and the Israeli-Palestinian conflict: A turning point in the midst of an endless cycle of violence", *Peace & Security – Paix et Sécurité Internationales*, nº 12, 2024.

[4] ICJ, Public sitting held on Thursday 11 January 2024, at 10 a.m., at the Peace Palace, President Donoghue presiding, in the case concerning Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Verbatim record 2024/01, p. 83.

[5] ICJ, Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Provisional Measures, Order of 16 March 2022, I.C.J. Reports 2022, p. 211

[6] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Provisional Measures, Order of 23 January 2020, I.C.J. Reports 2020, p. 3.

It was also highly improbable that the obtained measures would be similar to those rendered in the case of Ukraine v. Russia on Allegations of Genocide regarding the ceasefire. Indeed, the situations are different, even if the use of force is entailed in both. The actors on the ground were distinct, so was the context, and the Genocide Convention played a different role. While in the case of Ukraine v. Russia, the applicant was alleged to have committed genocide according to the respondent's abusive interpretation of the Convention, in the case of South Africa v. Israel, the applicant seeks to protect the Palestinians, the party being accused of genocide being the respondent. In addition, in the case of Ukraine v. Russia, Russia's violation of the use of force was so flagrant that the Court probably did not hesitate to suspend the military operations in Ukraine[7]. This does not apply to the case of Israel and although the Court has not delved into the issue of self-defence, the question is hanging over the case. This may be one reason why elusive provisional measures were adopted, mainly regarding the prevention of genocide according to Article II of the Convention:

> Israel must, in accordance with its obligations under the Genocide Convention, 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. The Court *recalls* that these acts fall within the scope of Article II of the Convention when they are committed with the intent to destroy in whole or in part a group as such (see paragraph 44 above)[8].

Does this mean that Israel can continue its military operations in Gaza as long as they are conducted without the intention of committing genocide, as actually claimed by Israel? As expected, intent plays here an essential role.

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[7] ICJ, Order of Order of 16 March 2022, Ukraine v. Russia Federation, para. 59. Moreover, it is doubtful that the Convention, in light of its object and purpose, authorizes a Contracting Party's unilateral use of force in the territory of another State for the purpose of preventing or punishing an alleged genocide.

[8] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Provisional Measures, Order of 24 January 2024, para. 78.

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In the introduction to the Order, the Court seems to make it clear that it understands the position of both Israel and Palestinians on the ground when it refers to the "attack" of Hamas in Israel "killing more than 1,200 persons, injuring thousands and abducting some 240 people". The Court, nevertheless, also notes Israel's response "causing massive civilian casualties, extensive destruction of civilian infrastructure and the displacement of the overwhelming majority of the population in Gaza"[9]. Therefore, the Court acknowledges that both parties have suffered abhorrent damages in the conflict, and that it is aware "of the extent of the human tragedy that is unfolding in the region and is deeply concerned about the continuing loss of life and human suffering"[10], using the same formula as in Ukraine v. Russia. This similar declaration shows the link between both armed conflicts and its consequences for the population, yet it has not led to a similar outcome regarding the provisional measures.

According to the jurisprudence, the following requirements must be satisfied for the Court to render provisional measures: (1) that it has *prima facie* jurisdiction; (2) that the rights whose protection is sought are plausible as well as the link between such rights and the measures requested; and (3), that there is a risk of irreparable prejudice and urgency. All these requirements have been analysed by the Court in this Order. Some of them are more complicated to assess, and the plausibility criterion is a conflictual issue as in previous decisions, due mainly to the absence of the Court's clear definition or standards[11].

In the sections below, we will describe the path followed by the Court, leading to the conclusion that the conditions to render provisional measures were met. The latter may have raised great expectations regarding the provisional measures to be adopted among those present at the Order reading. Yet they ultimately concluded with what corresponded, in reality, to general and real expectations: the non-suspension of military operations in Gaza.

II. PRIMA FACIE JURISDICTION

South Africa sought to establish the Court jurisdiction based on article IX of the Genocide Convention, which requires the existence of a dispute

[9] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 13.

[10] Ibidem.

[11] See Miles, C., "Provisional Measures and the 'New' Plausibility in the Jurisprudence of the International Court of Justice", The British Yearbook of International Law, 2018.

between the parties regarding the interpretation, application, or fulfilment of the Convention. The issue of the existence of a dispute has been widely analysed by the Court. In this sense, the Marshall Islands is perhaps the case[12] that produced the most shocking decision, and it was naturally referred to repeatedly in Israel's allegations.

As is known, in the Marshall Islands case, the Court concluded on the lack of dispute among the parties, on the basis that the alleged public statements in multilateral fora were insufficient to demonstrate the existence of a dispute, since the United Kingdom had not reacted and was therefore unaware that the dispute existed. In this regard, Israel wished to play the card of the lack of reaction to demonstrate the non-existence of a dispute, considering that South Africa did not give Israel an opportunity to respond to such allegations in international settings before going to Court. It also claimed that Israel did not refer to the genocide issue in the response to a Note Verbale sent to its Embassy in South Africa, which included the accusation of such a crime[13].

In addition, upon examination of Israel's allegations, it was suggested that South Africa may have made up the dispute with the Note Verbale merely to fill the requirement: "One wonders whether South Africa at the very last moment suddenly realized that it needed to show the existence of a dispute under the terms of the Genocide Convention and proceeded to hastily formulate and dispatch a flurry of Notes"[14].

One of the Court's decisive statements regarding the existence of a dispute is that its presence is defined not based on form or procedure, but on an objective determination[15], whose effect, in this case, is considerable. In this regard, we can infer that the way the dispute is manifested and the moment in which it crystallises – which must always be before a proceeding is instituted – does not need to comply with fixed elements. The latter would

[12] ICJ, Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v. United Kingdom), Preliminary Objections, Judgment,I.C.J. Reports 2016, p. 833.

[13] ICJ, Public sitting held on Friday 12 January 2024, at 10 a.m., at the Peace Palace, President Donoghue presiding, in the case concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Verbatim record 2024/02, pp. 25-27.

[14] Ibidem. p. 28.

[15] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 25.

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apply, for example, when a public statement in an international forum must be addressed in that forum, or when a Note Verbale must be answered directly. The Court has in fact already established that even if the parties' position has not been stated *expressis verbis*, it could be established by inference.[16]

In the present case, in order to establish the existence of opposite views and the parties' reaction, the Court relied on a document published by the Israeli Ministry of Foreign Affairs on 6 December denying the general accusations of genocide[17], and on the South Africa's declaration at the General Assembly on 12 December accusing Israel of acting against its obligations according to the Genocide Convention[18]. The Court adopted a pragmatic view because to determine the existence of a dispute, it needed merely one manifestation by both parties in different fora to infer opposite views. We can, in fact, consider that in this case, it was South Africa that reacted to Israel's public declaration, complying with the requirement of the "specific reaction" sought by the latter[19].

The Court did not address the Note Verbale issue, which was particularly important in the case of Gambia v. Myanmar. In this latter case, the Court considered Myanmar's failure to respond to Gambia's allegations of non-compliance with the obligations under the Genocide Convention in the Note Verbale as an indication of the existence of a dispute[20]. Therefore, in the present case, Israel's intent of hiding the genocide issue in its response to the Note Verbale in which South Africa was demanding the fulfilment of its obligations under the Genocide Convention – as Gambia had done regarding Myanmar – probably would have failed to have the effect sought by Israel.

As we will address in the issue of genocidal intent, much of the evidence relating to the statements that have supported South Africa's allegations, as

[16] ICJ, Land and Maritime Boundary between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998, p. 315, para. 89.

[17] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 27.

[18] Ibid. para. 26. The statement of the Minister of Foreign Affairs was updated and reproduced on the website of the Israel Defence Forces on 15 December, just three days after South Africa's declaration at the General Assembly, which can also be considered as a response to that declaration.

[19] Verbatim record 2024/02, p. 16.

[20] ICJ, Order of 23 January 2020, para. 28: "the existence of a dispute may be inferred from the failure of a State to respond to a claim in circumstances where a response is called for".

well as the Court's decision, were made against a backdrop of nationalist and populist public reactions to the outrageous Hamas attack, and by a government intent on demonstrating its strength, power and commitment to its people, dismissing any cautious or reflective approach. In this regard, the paper published by the Ministry of Foreign Affairs, responding to the allegations of genocide, accuses of antisemitism all those who suggest that Israel is committing genocide, using tough words such as "morally repugnant" or "sadistic slaughter". The officials seemed to be caught in an escalation of statements, which finally has provided key evidence in the case.

Nevertheless, continuing with the *prima facie* jurisdiction, the Court further specified that in addition to the existence of a dispute, it was necessary to ascertain that the acts or omissions alleged by the applicant could fall within the scope of the Genocide Convention *ratione materiae*. This was not difficult for the Court. Indeed, it is quite clear that some of South Africa's allegations could be included within the scope of Article II of the Convention, e.g.: the killing of Palestinians in Gaza; the causing of serious bodily and mental harm; displacement and mass home expulsions; the deprivation of access to adequate food and water as well as proper medical assistance; or the imposition of measures intended to prevent Palestinian births[21].

Therefore, the Court concluded that *prima facie* jurisdiction existed, moving to the issue of the standing of South Africa, even though it was not contested by Israel.

III. STANDING AND *ERGA OMNES* PARTES OBLIGATIONS

South Africa's standing before the Court was based on *erga omnes partes* obligations under the Genocide Convention and was not challenged by Israel. The Court had already made it clear in Gambia v. Myanmar that any state party in the Genocide Convention may invoke another state party's responsibility, despite not being especially affected, as claimed by Myanmar.

The Court findings in Gambia v. Myanmar regarding the shared values of the Convention, which entails that the "obligations in question are owed by

[21] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel), Application instituting proceedings and request for the indication of provisional measures, 29 December 2023, pp. 30-59.

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any State party to all the other States parties to the Convention"[22], were not the Court's first case of an *erga omnes partes* standing. In Belgium v. Senegal on Questions relating to the Obligation to Prosecute or Extradite[23], the Court had already recognised the standing of Belgium, based on the *erga omnes partes* obligation of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This finding has been followed by the recent Order on provisional measures in the case of Canada and The Netherlands v. Syria on the violation of the said Convention[24].

Even though Israel did not challenge the standing, it is necessary to briefly refer to the *erga omnes partes* standing in order to address suspicions of some scholars regarding the Court's recent acceptance of this standing.

Some risks of this practice have been highlighted: it could affect the willingness of some states to join or remain a party to international treaties that allow it[25]. Also mentioned is the possible introduction of reservations in treaties containing this kind of standing [26], together with the growing refusal to comply with the provisional measures[27].

Yet, presenting such a resource to the judicial settlement of disputes as a hindrance to the effective application of international law seems to be a contradiction in terms. The states' use of all legal and judicial resources to end gross human rights violations, as in the case of genocide or torture – instead of resorting to the illegal use of force as witnessed in the past – justifies the celebration of certain advances in how some international subjects face disputes and the violation of international treaties and obligations. Moreover, it allows states which are not military powers to contribute to the enforcement of international law.

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22 ICJ, Order of 23 January 2020, Gambia v. Myanmar, para 41.

23 ICJ, Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Provisional Measures, Order of 28 May 2009, I.C.J. Reports 2009, p. 139.

24 ICJ, Application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Canada and the Netherlands v. Syrian Arab Republic), Provisional Measures, Order of 16 November 2023.

25 Hachem, A. and Hathaway, O., "The Promise and Risk of South Africa's Case Against Israel", *Just Security*, January 4, 2024, p. 8.

26 Shany, Y. and Cohen, A., "South Africa vs. Israel at the International Court of Justice: A battle over issue-framing and the request ti suspend the war", *Just Security*, January 16, 2024, p. 9.

27 Hachem, A. and Hathaway, O., *op. cit.,* p. 9.

In any case, it would be naïve to believe that this recent judicial activism will not have consequences, which could be linked to recent threats to the rules-based international order posed by some states. On the contrary, it is remarkable how this recent judicial practice has been followed by western states, as in the case of Canada and The Netherlands v. Syria, and also, importantly, by Global South states, such as Gambia or South Africa. Therefore, the fact that the practice has been adopted by the world's two main international blocks may be a sign that it will be long-lasting or fruitful over time.

IV. THE RIGHTS WHOSE PROTECTION IS SOUGHT AND THE CONTROVERSIAL PLAUSIBILITY

The greatest doubts that can be raised regarding the Court's findings relate to the assessment of this requirement. The main problem was to assess the plausibility of the rights to be protected, given that the Court has not provided a detailed description of the plausibility standards[28].

According to the Court, to exercise its power, the condition must be "satisfied that the rights asserted by the party requesting such measures are at least plausible"[29]. The Court expressly introduced the "plausibility" requirement for the first time in the Belgium v. Senegal case [30], and it has been referred to in subsequent orders on provisional measures.

Since then, references to the plausibility requirement in Court orders have not contributed at all to clarifying the standards. Moreover, there is still some confusion as to the degree of flexibility of the plausibility, and whether it is the plausibility of the claim or merely of the rights which has to be assessed. Judge Koroma established the ambiguity of this expression in the Border Area case[31] when he stated that plausibility could "offer parties an opportunity to submit specious claims, which, at a superficial glance, may appear credible but could

[28] ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar), Declaration of Judge ad hoc Kress, 23 January 2020, p. 66.

[29] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 35.

[30] ICJ, Order of 28 May 2009, Belgium v. Senegal, para. 57.

[31] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), Judgment, I.C.J. Reports 2015, p. 665

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mislead the Court to indicate provisional measures"[32]. From Judge Koroma's opinion could be inferred the potential misuse of this judicial procedure, and the request of provisional measures to obtain some sort of temporary rights. This would imply a temporary victory, despite the party being aware of its meagre chances of ultimate success.

Regarding the plausibility assessment, the Court has settled for a formula according to which at this "stage of the proceedings, however, the Court is not called upon to determine definitively whether the rights (…) wishes to see protected exist. It need only decide whether the rights claimed (…), and for which it is seeking protection, are plausible"[33]. Thus arises the question of the degree of determination of such rights. And the issue is even more problematic in the case of genocide allegations because of the question of intent: Is it necessary to determine the existence of intent at this stage of the proceeding in order to consider that the rights are at least plausible? Or should it be determined?

The intent element was also part of the Court's plausibility analysis in Ukraine v. Russia on Application of the ICSFT and CERD case[34]. Here, Ukraine accused Russia of violating, among others, Article 18 of the Terrorism Financing Convention, which establishes the states' obligation to prevent the actions of Article 2 of the Convention, i.e., providing or collecting funds with the *intention* to commit acts of terrorism.

The intention was thus also part of the treaty obligations, since, as stated by the Court, Article 18 and Article 2 had to be read in conjunction[35]. Therefore, as Ukraine was seeking provisional measures based on rights included in Article 18, the Court considered that it was "necessary to ascertain whether

[32] Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, I.C.J. Reports 2011. Separate opinion of Judge Koroma, p. 29.

[33] ICJ, Order of 24 January 2024, South Africa v. Israel, para 36.

[34] 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).

[35] 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), Provisional Measures, Order of 19 April 2017, I.C.J. Reports 2017, para. 74.

there are sufficient reasons for considering that the other elements set out in Article 2, paragraph 1, such as the elements of intention or knowledge (…) are present"[36]. After the assessment, the Court concluded that "Ukraine has not put before the Court evidence which affords a sufficient basis to find it plausible that these elements are present".[37]

This requirement of intent applied to the case of genocide raises the threshold of plausibility, since the Court is asking for evidence in order to demonstrate the plausibility of the intent, moving on from the plausibility of rights to the plausibility of the claim[38], and therefore making it more difficult. In this regard, in the Gambia v. Myanmar allegations, Prof. Schabas expressly referred to the necessary plausibility of the claim, implying evidence of genocidal intent[39], following the Court's line of reasoning in Ukraine v. Russia. However, the Court's answer and reasoning was slightly different, probably because of the significance of the rights at stake.

In Gambia v. Myanmar, the Court did not expressly refer to the need to assess genocidal intent in order to determine the plausibility of the rights. But anyway, a lack of express reference does not mean that the genocidal intent was not present in the analysis. The Court actually based its decision on the plausibility of the rights in the United Nations Report of the Fact-Finding Mission[40], and included among its different quotations the one in which the Fact-Finding mission concluded on the inference of genocidal intent in the acts perpetrated against the Rohingya[41]. In addition, the Court rejected Myanmar's argument according to which, due to the gravity of the allegations, the Court had to refrain from any decision regarding genocidal intent[42], but

[36] Ibidem, para. 75.

[37] Ibidem., para. 76.

[38] Miles, C., *op. cit.*, p. 3.

[39] ICJ, Order of 23 January 2020, Gambia v. Myanmar, para. 47.

[40] United Nations, Report of the Independent International Fact-Finding Mission on Myanmar, UN doc. A/HRC/42/50, 8 August 2019.

[41] ICJ, Order of 23 January 2020, Gambia v. Myanmar, para. 55. The difference between the genocidal intent content of this report and that presented by South Africa is what led Judge Nolte to declare that he is "not persuaded that South Africa has plausibly shown that the military operation undertaken by Israel, as such, is being pursued with genocidal intent". ICJ, Order of 24 January 2024, South Africa v. Israel, Declaration of Judge Nolte, para. 13.

[42] ICJ, Order of 23 January 2020, Gambia v. Myanmar, para. 56.

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without expressly affirming that the intent analysis was part of the plausibility assessment. In his declaration, Judge Kress actually states that "the Court, in the present case, has not proceeded to anything close to a detailed examination of the question of genocidal intent"[43].

In sum, the intent was expressly referred to by the Court in Ukraine v. Russia on the Application of the ICSFT and CERD and can be inferred in Gambia v. Myanmar. Has the Court therefore included the plausibility of intent in cases where intent is an element of the obligation, as a standard of plausibility of the rights whose protection is sought? The Order on provisional measures in South Africa v. Israel confirmed this practice[44].

In this latter Order, according to the Court, the rights to be protected consisted of the "right of the Palestinians in Gaza to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of South Africa to seek Israel's compliance with the latter's obligations under the Convention"[45]. In this case, the Court considered that it was necessary to expressly refer to the intent requirement regarding the committing of genocide, which it had not done in Gambia v. Myanmar, which we believe it was paving the way for the final controversial measures.

The Court reproduces its own findings about the requirement and concept of intent in the Bosnia and Herzegovina v. Serbia and Montenegro case[46], but it is from this point onwards that a cascade of evidence capable of embarrassing any state begins. The Court refers first to the statistics, and despite assuming that figures could not be independently verified, does not hesitate to state that "25,700 Palestinians have been killed, over 63,000 injuries have been reported,

[43] ICJ, Gambia v. Myanmar, Declaration Judge *ad hoc* Kress, para. 5.

[44] In this regard, Judge Nolte considers that "the plausibility of this mental element is (…) indispensable at the provisional measures stage of proceedings involving allegations of genocide" ICJ, Order of 24 January 2024, South Africa v. Israel, Declaration of Judge Nolte, para. 11.

[45] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 59.

[46] According to the Court: "the intent must be to destroy at least a substantial part of the particular group. That is demanded by the very nature of the crime of genocide: since the object and purpose of the Convention as a whole is to prevent the intentional destruction of groups, the part targeted must be significant enough to have an impact on the group as a whole." ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, I.C.J. Reports 2007 (I), p. 126, para. 198.

over 360,000 housing units have been destroyed or partially damaged and approximately 1.7 million persons have been internally displaced". Including such figures in the Court Order has a powerful impact.

Later, the Court refers to different statements and reports issued by United Nations officers or organs, none being as clear regarding genocidal intent as that presented by the Fact-Finding mission in Gambia v. Myanmar. It was possible anyway to infer genocidal intent, the Court making a special reference to the statements of Israeli officials.

We have witnessed an escalation in the radical statements made by Israeli officials seeking to portray themselves as a strong government that will protect its citizens and avenge the Hamas massacre. And as mentioned above, it is these statements that have ultimately supported the Court's plausibility assessment. The Court reproduces various statements: the Defence Minister's statement referring to "human animals"; the President of Israel's declaration that "(i)t is an entire nation out there that is responsible" and that they "will fight until we'll break their backbone."; and the statement of the Minister of Energy and Infrastructure that "(a)ll the civilian population in [G]aza is ordered to leave immediately. We will win. They will not receive a drop of water or a single battery until they leave the world"[47]. All these statements confirmed the genocidal rhetoric alleged by the 37 Special Rapporteurs, Independent Experts, and members of Working Groups part of the Special Procedures of the United Nations Human Rights Council[48].

It should be noted that in his submissions on behalf of Israel, Prof. Shaw did not request the Court to refrain from the analysis of intent, as Prof. Schabas did on behalf of Myanmar. Based on the Myanmar case, he actually defended that intent is a "factor in determining *prima facie* jurisdiction in provisional

[47] ICJ, Order of 24 January 2024, South Africa v. Israel, paras. 51-52. According to Judge Sebutinde, "South Africa has either placed the quotations out of context or simply misunderstood the statements of those officials", and there is no genocidal intent. ICJ, Order of 24 January 2024, South Africa v. Israel, Dissenting Opinion of Judge Sebutinde, para. 22. On the contrary, Judge Bhandari considers that just the "widespread nature of the military campaign in Gaza, as well as the loss of life, injury, destruction and humanitarian needs following from it (…) are by themselves capable of supporting a plausibility finding with respect to rights under Article II, not being necessary to refer to the declarations". ICJ, Order of 24 January 2024, South Africa v. Israel, Declaration of Judge Bhandari, para. 9.

[48] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 53.

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measures proceedings"[49]. This position may owe either to the fact of assuming that it has crystallised as a standard of plausibility in cases in which the intent is a substantial element of the obligation, or because it was considered that intent plausibility was difficult to demonstrate in this case.

Finally, despite the Court's practice on plausibility and the positive results in this case, it is worth noting the humanising vision regarding plausibility of Judge Cançado Trindade, one of the major critics of this assessment. According to Cançado Trindade, the Court's "invention" of "plausibility' as a new 'precondition', creating undue difficulties for the granting of provisional measures of protection in relation to a continuing situation, is misleading, it renders a disservice to the realization of justice"[50]. Judge Cançado Trindade referred especially to cases in which human rights are at stake, the test to be applied being that of "human vulnerability"[51].

Lastly, the Court concluded that the requirement of a link between the measures requested and the rights to be protected was met, without further examining the existence of that link.

Therefore, the Court's adopted provisional measures are even more unsatisfactory considering the Court's findings on the plausibility of the rights of Palestinians in Gaza. The latter does not undermine the importance of the finding, however, since the intent, i.e., the most adverse element of genocide to be demonstrated, is given a chance in this case.

V. CLEAR IRREPARABLE PREJUDICE AND URGENCY

In the case of genocide, and given the nature of the rights to be protected, the question of irreparable prejudice does not pose many problems. The Court affirms that the Genocide Convention "was manifestly adopted for a purely humanitarian and civilizing purpose" and given the "fundamental

[49] Verbatim record, 2024/02, p. 30.

[50] ICJ, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Qatar v. United Arab Emirates), Provisional Measures, Order of 23 July 2018, I.C.J. Reports 2018, p. 406, Separate Opinion of Judge Cançado Trindade, paras. 57-58.

[51] ICJ, Order of 19 April 2017, Ukraine v. Russian Federation, Separate Opinion of Judge Cançado Trindade, paras. 36-44.

values" that it protects, the prejudice of rights sought by the applicant would be of irreparable damage[52].

As for the urgency, the Court has established that there is urgency when there is a "real and imminent risk", and when "the irreparable prejudice can occur "at any moment" before the final decision[53]. In this regard, the Court states that the Gaza population is extremely vulnerable and again refers to the shocking data of deaths, destruction and displacement, and to what could be considered as decisive evidence: a Prime Minister's statement in January 2024 announcing that the military operation will take "more long months"[54].

With all these elements, the Court rightly concluded that there is a humanitarian crisis in Gaza, a catastrophic one, and that the situation could deteriorate further[55]. Therefore, the requirement of irreparable prejudice and urgency is met.

VI. UNSATISFACTORY PROVISIONAL MEASURES

The Court was eventually satisfied that the requirement to order provisional measures was met, including those that we felt might have given it a chance to escape from rendered these measures, such as the question of intent. The Court's final decision led thereafter to tremendous disappointment among those who envisioned the Court as an organ in charge of protecting human rights, rather than one in charge of settling disputes among states. Here is where Cançado Trindade's efforts to humanise international law and the Court can be deemed to be relevant.

In this case, the Court rendered six provisional measures that can be summarised as follows: Israel's obligation to prevent the committing of genocide; to ensure that its military does not commit genocide; to prevent and punish the incitement of genocide; to allow the provision of humanitarian assistance; to prevent the destruction of evidence and ensure its preservation; and to report the fulfilment of the measures to the Court. Therefore, the first and foremost provisional measure requested by South Africa was not rendered: that of suspending the military operations in and against Gaza.

[52] ICJ, Order of 24 January 2024, South Africa v. Israel, paras. 65-66.

[53] Ibidem para. 61.

[54] Ibidem para. 70.

[55] Ibidem paras. 72-74.

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The Court has always declared that the provisional measures to be rendered do not need to be identical to those requested. But it has never explained the reasons why some measures are not adopted or modified, which in this case was even more demanding. The question is this: If the Court acknowledged the applicant's allegations regarding *prima facie* jurisdiction, plausibility of rights, including intent, and irreparable prejudice and urgency, why were the applicant's requested provisional measures not appropriate? The Court has never presented its arguments on this issue, whether in this case or in any other.

In the case under analysis, the main provisional measures requested by South Africa can be linked to those requested in Ukraine v. Russia on the Genocide Convention and Gambia v. Myanmar.

In the case of Ukraine v. Russia, Ukraine demanded the suspension of "the military operations commenced on 24 February 2022 that have as their stated purpose and objective the prevention and punishment of a claimed genocide in the Luhansk and Donetsk oblasts of Ukraine"[56]. In this case, the Court also adopted a different provisional measure and decided on the suspension of the military operations "that it commenced on 24 February 2022 in the territory of Ukraine"[57], thereby making it clear that the order affected all the military operations and the whole territory, not only Luhansk and Donetsk.

Even though the provisional measure requested by South Africa was similar, the situation was not. Russia was not accused of genocide, their military operations did not amount to genocide, and there was no risk that Russia's military operations would entail genocide. However, the Court ordered the suspension of the military activities even when the risk of genocide was not present. So why did the Court not adopt the same measure in a case where the risk of genocide was present? The Court does not provide an answer.

The Court's lack of explanation is not a reason for us not to seek it and, as we stated above, we must note that the question of self-defence is hanging over the case. Israel, in its allegations, referred to the fact that the Court must protect the interest of both parties in providing provisional measures, the case of Israel being the right to self-defence[58]. Hamas's attack plays an important

[56] ICJ, Order of 16 March 2022, Ukraine v. Russia Federation, para 5.

[57] Ibidem para. 86.

[58] Verbatim record, 2024/02, pp. 38-39.

role in this analysis since the killing of more than 1,000 people and the possibility of future attacks cannot be ignored by the Court. In the Ukraine v. Russia case, Russia also alleged the right to self-defence, but there had not been any previous attack from Ukraine or any other group against Russia, so it was easier to dismiss the existence of a risk.

In addition, as South Africa rightly stated in its allegations, Hamas cannot be party in the Genocide Convention and therefore cannot be party in the proceeding and, "as a matter of law, under the Convention, South Africa cannot request an Order from this Court against Hamas"[59]. Therefore, to render a ceasefire order merely with regard to Israel may entail the risk of diminishing this state's right to self-defence.

The question of the right to self-defence in the case of South Africa v. Israel is a controversial issue. It has been questioned by different scholars, however its analysis, it not the objective of this work. This was probably also the Court's opinion: it was aware of the key role of self-defence and the complexity of the analyses, and decided to bear it in mind when deciding on the measures, but without expressly referring to it, since that would have called for its examination. The issue of self-defence could be regarded as an elephant in the room in this Order: Does Israel have the right to self-defence against non-state actors according to Article 51? Can the right to self-defence be exercised in an occupied territory? Are the measures adopted by Israel proportional? Can the Court limit a state's right to self-defence? There are many questions to be answered in an order of provisional measures.

On the other hand, as we have mentioned, the provisional measures requested by South Africa were also similar to those requested by Gambia, as "(t)he 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 the Palestinian people as a group protected by the Convention on the Prevention and Punishment of the Crime of Genocide, desist from the commission of any and all acts within the scope of Article II of the Convention (…)"[60]. In both cases, the Court decided to render the measure using the same formula in the first part, but adding a sentence in the case of

[59] Verbatim record, 2024/01, p. 76.

[60] Verbatim record, 2024/01, p. 14.

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South Africa v. Israel that could be described as the result of the spectre of self-defence running through the Court's decision.

In the case under consideration, the Court decided to "recall" that the acts prohibited by Article II of the Genocide Convention are those "committed with the intent to destroy in whole or in part a group as such"[61], a new addition to the Gambia v. Myanmar formulation. Why did the Court need to recall that requirement? In our opinion, the Court wished to make it clear that Israel could pursue its military operations in "self-defence". As long as Israel claims that the military operations are intended towards self-protection, and stops making genocidal statements, it has a green light. Again, the Court did not wish to prevent Israel from exercising the right to self-defence, but could the Court have limited its self-defence activities? For example, by prohibiting air strikes – which have caused thousands of deaths?

This is not an easy question either. To limit Israel's military operations, the Court could have rendered that unprecedented measure without having to analyse self-defence, as it did in the present Order. However, the question is whether the Court has the capacity and knowledge to determine the appropriate military measures that are necessary for a state to protect itself in such a short time. We must remember that this proceeding is one of provisional measures, not entering into the merits that requires a deep analysis. This could be another reason why the Court adopted such an ineffective measure to protect the Palestinians in Gaza.

Added to these measures, the Court also rendered others requested by South Africa such as the obligation to prevent and punish the incitement to genocide, and one that could probably be a truly effective measure: "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"[62]. In this case, South Africa referred specifically to certain basic needs the Gaza population should be allowed to have access to, such as fuel, shelter, clothes, hygiene, sanitation, and medical supplies[63]. The Court refers to none of them, and this ambiguity

[61] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 78.

[62] ICJ, Order of 24 January 2024, South Africa v. Israel, para. 86

[63] Verbatim record, 2024/01, p. 15.

may be leaving it to the hands of Israel to determine the basic services and humanitarian assistance.

As we noted, that could have been the only effective measure to alleviate the Palestinians' suffering, but recent developments, just three days after the Order was delivered, regarding the allegations against a few UNRWA workers[64], facilitates Israel's non-implementation of this measure. Since the UNRWA may be defunded[65] and may thus be unable to provide humanitarian assistance, Israel will not need to prevent the entrance of such assistance. Nevertheless, other actors are providing assistance, and in those cases, Israel must allow them to do so. What will happen next remains to be seen.

VII. FINAL REMARKS

The Order on provisional measures is certainly insufficient to protect the Palestinians in Gaza. Conversely, it was highly unlikely that Israel would have complied with an order that requested a ceasefire or limited its military operations, so the Palestinians' situation would have been the same as that which we are witnessing today, though Israel would have been under greater pressure.

This result does not necessarily compromise the value of the Order. This step is merely the first in a long process in which some key elements have begun to be disclosed, one of them being the question of the intent of genocide.

With these provisional measures, the Court has recognised the risk that Israel could commit genocide. The Court refers to the plausibility of the right of the Palestinians in Gaza to be protected from genocide, and recognises that this right is at risk owing to Israeli actions. The potential moral and political impact of suspecting that a state that represents the people who suffered one of the major genocides in history commits genocide is indisputable.

Israel's answer to the Order? Business as usual: accusing the Court of anti-Semitism[66]. In this regard, in an abusive use of its people's tragic history,

[64] UN News "UNRWA to investigate allegations 'several' staffers played role in 7 October attacks", 26 January 2024. Available at https://news.un.org/en/story/2024/01/1145942.

[65] UN News, "Gaza: Aid cuts to UN agency could be felt in weeks", 30 January 2024. Available at https://news.un.org/en/story/2024/01/1146047.

[66] The Guardian, "Israeli officials accuse international court of justice of antisemitic bias", 26 January 2024. Available at https://www.theguardian.com/world/2024/jan/26/israeli-

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Israel has embarked on a campaign to discredit all international institutions and states that dare to criticise its military activities in Gaza.

This case is not the first time that the Court has to decide about Israel's violation of international norms. In the Advisory Opinion on the Wall, the Court found that the construction of the wall in the Occupied Palestinian Territory and the implemented regime were contrary to international law. The non-compulsory character of the Court's decision does not undermine the legal assessment made of the violation of international law. In this case, Israel did not comply and is still not complying with the Court's decision. Indeed, the non-compliance does not imply the decision is violated but still entails a breach of the international norms that the Court considered violated.

The situation is different now, since as the Court clarified in Le Grand case[67], the Court's provisional orders are binding and create international legal obligations. Can Israel comply with the provisional order while maintaining the scale of its military operations? It seems plausible, for example, that it could refrain from genocidal statements and comments or reduce some of its operations – which given the current situation in Gaza, may not have a significant impact on the strategy.

In any case, an operation-scale reduction is not the option envisaged by Israel. In this regard, concerns have again been raised by the international community following the country's recent announcement of a large-scale operation in Rafah, the place of settlement of the Palestinians who fled from Israeli attacks in the north. The announcement has also led South Africa to request a new provisional measures order to protect the population[68]. In this case, South Africa has not requested any specific measure, but has asked the Court merely to adopt the appropriate provisional measures to protect the rights of the Palestinians in Gaza according to article 75. 1 of the Court statute. The latter allows the Court to "at any time decide to examine *proprio motu* whether the circumstances of the case require the indication of provisional measures".

officials-accuse-international-court-of-justice-of-antisemitic-bias#:~:text=Israeli%20officials%20have%20accused%20the,issued%20an%20emergency%20interim%20ruling.

[67] LeGrand (Germany v. United States of America), Judgement, I. C. J. Reports 2001, p. 466, para. 109.

[68] Request for additional measures under Article 75(1) of the Rules of Court submitted by South Africa, 12 February 2024.

Here, the Court faces the same dilemma: Can it determine how Israel must exercise the right to self-defence? Unfortunately, it appears that the Court's response has again be unsatisfactory to protect the population since no new measure has been rendered[69]. Indeed, the basis of this case is the violation of the Genocide Convention, and the Court's response has focused once more on preventing Israel from committing acts of genocide. Israel, nonetheless, seems to have learned its lesson: the statements of the Israeli officials referred to by South Africa to support its new request centre on Hamas, avoiding any allusion to the Palestinians in general.

Regarding humanitarian assistance, as mentioned previously, the possibility of defunding UNRWA would decrease the amount of assistance provided, making it therefore easier for Israel to allow some of it to enter. The inaccuracy of the provisional measure regarding the content of that assistance would therefore have major consequences.

And in relation to the prevention and punishment of the incitement to commit genocide, the Court has already recognised that Israel had taken some steps that should be encouraged. Israel should therefore not find it difficult to comply with this, including refraining from genocidal statements, which, as we have noted, seems to be the present position of the state.

We could also mention the Security Council's role in enforcing the measure, but it does seem quite limited. Since the provisional measures do not contain the ceasefire, any resolution demanding it based on the Court's Order could be vetoed. And this would not be problematic, based on the following the reason: that is not what the Order establishes. A resolution that simply requests compliance with the measures in the Order will be more easily adopted because conforming will be of little detriment to Israel.

At this point we must be clear: the conflict has been going on for almost eighty years and it is not the Court that is going to solve it. The ineffectiveness of the Order demonstrates this. The Court may have a role to play, for example by confirming that Israel's activities are illegal in order to put pressure

[69] "This perilous situation demands immediate and effective implementation of the provisional measures indicated by the Court in its Order of 26 January 2024, which are applicable throughout the Gaza Strip, including in Rafah, and does not demand the indication of additional provisional measures". ICJ, Press release 2024/16. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel) - Decision of the Court on South Africa's request for additional provisional measures.

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on the states and its allies. As we all know, even if the Court had adopted restrictive provisional measures regarding Israel's military activities, this would not have put an end to the Gaza massacre. Israel, like the new illiberal regimes, has sidestepped the international order, rejecting the decisions and calls of international institutions. Israel has its own agenda in this conflict and is determined to follow it through.

In addition, while the Court's obligation is to decide on disputes regarding the violation of international norms, one may wonder whether the immense pressure put on the Court to settle a situation that we all know it cannot resolve may lead to a major discreditation. In this regard, Israel's unfounded accusations may harm the Court's credibility with some sectors. But that is not all. The fact of requesting the Court to adopt measures that it probably cannot render also poses a risk: it can generate a feeling among the population that the Court and International Law is worthless. We must remember that international institutions also need social legitimacy and acceptance, so the states should avoid pushing the Court to its limits.

Therefore, the solution of the conflict is in the hands of the major powers, in the hands of the states that support Israeli actions and supply arms, those that do not condemn them, do not steer the parties towards a solution, and look away from a tragedy that the region has been suffering for decades.