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INTERIM MEASURES OF PROTECTION IN THE INTERNATIONAL COURT OF JUSTICE ORDER OF 23 JANUARY 2020 IN CASE GAMBIA V MYANMAR

Tymczasowe środki zabezpieczające w postanowieniu Międzynarodowego Trybunału Sprawiedliwości z 23 stycznia 2020 r. w sprawie Gambia vs Birma (Mjanma)

W artykule przeanalizowano zarządzenie MTS wskazujące środki tymczasowe w sprawie stosowania Konwencji o zapobieganiu i karaniu zbrodni ludobójstwa (Gambia vs Birma) z 23 stycznia 2020 r. Różne aspekty tradycyjnych wymagań dotyczących wskazania środków tymczasowych zostaną przedstawione w oparciu o orzecznictwo MTS, szczególnie w odniesieniu do jego mocy wiążącej, po wydaniu wyroku w sprawie *LaGrand*, w którym Trybunał wyjaśnił, że jego postanowienia dotyczące tymczasowej ochrony są wiążące. Przedstawiony został również jeden nowy wymóg – wiarygodności praw chronionych – sformułowany przez Trybunał po raz pierwszy w sprawie Belgia vs Senegal.

Pojęcia kluczowe: Artykuł 41; Międzynarodowy Trybunał Sprawiedliwości, środki tymczasowe, tymczasowe środki ochrony, wymogi, wiarygodność, warunki przyznawania środków tymczasowych; skutki prawne środków tymczasowych; zapobieganie sporowi

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1. History of the proceedings

On 11 November 2019, the Republic of The Gambia ("The Gambia") filed in the Registry of the Court an Application instituting proceedings against the Republic of the Union of Myanmar ("Myanmar") concerning alleged violations of the Convention on the Prevention and Punishment of the Crime of Genocide ("Genocide Convention" or "Convention"). In its Application The Gambia argued in particular that Myanmar has committed and continues to commit genocidal acts against members of the Rohingya group, which it describes as a "distinct ethnic, racial and religious group that resides primarily in Myanmar's Rakhine State". The Application contained a Request for the indication of provisional measures, seeking to preserve, pending the Court's final decision in the case, the rights of the Rohingya group in Myanmar, of its members and of The Gambia under the Genocide Convention.

On 23 January 2020 the ICJ unanimously delivered its Order on the Request for the indication of provisional measures submitted by the Republic of The Gambia in the case concerning *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)*[1].

Vice-President Xue and judge Cancado Trindade appended separate opinions to the Order and a judge *ad hoc* Kress appended a declaration to the Order.

In the Operative clause (para. 86) of the order, the ICJ indicated the following provisional measures:

> "(1) Unanimously,
> 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:
> killing members of the group;
> causing serious bodily or mental harm to the members of the group;
> deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; and
> imposing measures intended to prevent births within the group;
> (2) Unanimously,
> 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;

[1] https://www.icj-cij.org/files/case-related/178/178-20200123-ORD-01-00-EN.pdf

Unanimously,
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;
Unanimously,
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."

2. Conditions for the indication of provisional measures

The Court may indicate provisional measures only if the provisions relied on by the Applicant appear, *prima facie*, to afford a basis on which its jurisdiction could be founded. The Court must also satisfy itself that the rights whose protection is sought are at least plausible and that there is a link between those rights and the measures requested. The Court may indicate provisional measures only if there is a real and imminent risk that irreparable prejudice will be caused to the rights in dispute before the Court gives its final decision.

a. Irreparable prejudice and urgency

The Court, pursuant to Article 41 of its Statute, has the power to indicate provisional measures when irreparable prejudice could be caused to rights which are the subject of judicial proceedings or when the alleged disregard of such rights may entail irreparable consequences[2].

Such a criterion has been repeated in the Court's jurisprudence, notably in the cases concerning *Nuclear Tests (Australia v* France*) (ICJ Reports 1973,* p. 103); *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran) (ICJ Reports 1979*, p. 19); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)* (*ICJ Reports 1993*, p. 19); and *Vienna Convention on Consular Relations (Paraguay v United States of America)* (*ICJ Reports 1998*, p. 36); *LaGrand (Germany v United States of America)* (*ICJ Reports 1999*, p. 15); and the case concerning *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) (ICJ Reports 2000*, p. 127, para. 39).

[2] Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v United States of America*), Provisional Measures, Order of 3 October 2018, *ICJ Reports 2018 (II)*, p. 645, para. 77; See Arrest Warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), Provisional Measures, Order of 8 December 2000, *ICJ Reports 2000*, p. 182; dissenting opinion of the judge ad hoc Bula-Bula, p. 222 quoting my statement in post-graduate diploma (Ewa Sałkiewicz, Geneva, Institut des Hautes Etudes Internationales [IHEI], 1984) about the irreparable prejudice; *The Statute of the International Court of Justice, A Commentary*, second edition, A. Zimmerman, K. Oellers-Frahm, Oxford 2012, p. 1028 (Art. 41 of the ICJ Statute); C. Miles, *Provisional measures before international courts and tribunals*, Cambridge 2017, pp. 225-244.

The important issue here is the definition of the "irreparable prejudice". In the dissenting opinion in case concerning the arrest warrant of 11 April 2000 (*Democratic Republic of the Congo v Belgium*), request for the indication of provisional measures, order of 8 December 2000, the judge *ad hoc* Bula-Bula said: "This, I believe, is a type of irreparable prejudice" (see Ewa Stanislawa Alicja Salkiewicz, *Les mesures conservatoires dans la procédure des deux Cours de La Haye,* 1984, p. 69, concerning "damage not capable of any reparation", p. 222).

However, the power of the Court to indicate provisional measures will be exercised only if there is urgency, in the sense that there is a real and imminent risk that irreparable prejudice will be caused before the Court gives its final decision. The condition of urgency is met when the acts susceptible of causing irreparable prejudice can "occur at any moment" before the Court makes a final decision on the case. The Court must therefore consider whether such a risk exists at this stage of the proceedings[3].

The Court in paras. 64-75 is of the opinion that the prejudice to the right of the Rohingya group in Myanmar could cause irreparable harm.

b. *Prima facie* jurisdiction

The Court may indicate provisional measures only if the provisions relied on by the Applicant constitutes, *prima facie*, a basis on which its jurisdiction could be founded, and it does not need to satisfy itself in a definitive manner that it has jurisdiction on the merits of the case[4].

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[3] *Iran v United States of America*, op. cit. pp. 645-646, para. 78. For the application of the standard of "irreparable harm" see *Fisheries Jurisdiction (United Kingdom v Iceland)*, ICJ Reports 1972, p. 11 (the power to grant provisional measures "presupposes that irreparable prejudice should not be caused to rights which are the subject of a dispute in judicial proceedings") (at [34]), applied in e.g. *Pulp Mills on the River Uruguay (Argentina v Uruguay), ICJ Reports 2006*, p.113, at [61-2] and *ICJ Reports 2007*, p. 3, at [32]; Case Concerning the *Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Georgia v Russia)*, above, at [128]); *Construction of a Road in Costa Rica Along the San Juan River (Nicaragua v Costa Rica), ICJ Reports 2013*, p. 398, at [24]-[25]); and *Questions Relating to the Seizure and Detention of Certain Documents (Timor-Leste v Australia), ICJ Reports 2014*, p. 147, at [32].

Irreparable can mean non-compensable: *Nuclear Tests (Australia v France), ICJ Reports 1973*, p. 99, [27], [30]); *United States Diplomatic and Consular Staff in Teheran (US v Iran), ICJ Reports 1979*, p. 20, [42]: "[with the] continuation of the situation, the subject of the present request exposes the human beings concerned to privation, hardship, anguish and even danger to life and health and thus a serious possibility of irreparable harm"; *Frontier Dispute (Burkina-Faso v Republic of Mali), ICJ Reports 1986*, p. 10, at [21]; *Land and Maritime Boundary between Cameroon and Nigeria, Provisional Measures, ICJ Reports 1996*, p. 13 at [38]; *LaGrand (Germany v United States), ICJ Reports 1999*, p. 9, at [24]; *Avena and others Mexico v United States of America), ICJ Reports 2003*, p. 77, at [55].

[4] See, *inter alia*, Alleged Violations of the 1955 Treaty of Amity, Economic Relations and Consular Rights (*Islamic Republic of Iran v United States of America*), Provisional Measures, Order of 3 October 2018, *ICJ Reports 2018 (II)*, p. 630, para. 24.

In the *Interhandel Case (Switzerland v United States) (Interim Measures of Protection)*, *ICJ Reports 1957,* p. 105, Judge Sir Hersch Lauterpacht said (separate opinion, at [17] that "the correct principle ... which has been uniformly adopted in international arbitral and judicial practice is as follows: The Court may properly act under the terms of Article 41 provided that there is in existence an instrument such as a Declaration of Acceptance of the Optional Clause, emanating from the Parties to the dispute, which *prima facie* confers jurisdiction upon the Court and which incorporates no reservations obviously excluding its jurisdiction." In the *Anglo-Iranian Oil Co. Case (United Kingdom v Iran)*, *ICJ Reports 1951,* p. 89 at [93], the ICJ, in granting provisional measures, said that it could not be accepted that the claim fell completely outside the scope of international jurisdiction. Since the *Fisheries Jurisdiction Case (United Kingdom v Iceland)*, *ICJ Reports 1972,* p. 1, at [16], the Court has consistently required that the instrument invoked by the parties conferring jurisdiction on the Court "appears, *prima facie*, to afford a possible basis on which the jurisdiction of the Court might be founded."

Accordingly, the Court must be satisfied that it has *prima facie* jurisdiction over the merits before it can grant interim measures: see e.g. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)*, *ICJ Reports 1984,* p. 169 at [179]; *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, *ICJ Reports 2002,* p. 219 at [30]; *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*, *ICJ Reports 2006,* p. 113 at [57]; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)*, *ICJ Reports 2009,* p. 139 at [40]; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, *ICJ Reports 2014,* p. 147 at [18].

In the *Legality of Use of Force* cases, *ICJ Reports 1999,* p. 124 and the *Case Concerning Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)*, *ICJ Reports 2002,* p. 219, the Court refused to make orders for provisional measures because it did not have *prima facie* jurisdiction.

The ICJ in its order (paras. 16-38) notes, that The Gambia founds its jurisdiction on Article IX of the Genocide Convention. Article IX of the Genocide Convention reads: "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."

It observes that this Article IX may apply only if there is a dispute between the Parties relating to the interpretation, application

or fulfilment of the Convention. The Gambia maintained that it has a dispute with Myanmar regarding its own rights under the Genocide Convention. Myanmar denied that it has committed any of the violations of the Genocide Convention alleged by The Gambia and said that, there is lack of any genocidal intent. The ICJ did not accept this reasoning of Myanmar saying in the Order, that at least some of the acts alleged by The Gambia are capable of falling within the provisions of the Genocide Convention. The Court concluded that, pursuant to Article IX of the Genocide Convention it has *prima facie* jurisdiction, to deal with the case.

c. Sufficient link between the rights whose protection is sought and the subject-matter of the case in relation to which the request for protection is made[5]

Already the predecessor of the ICJ, The Permanent Court of International Justice (PCIJ) in three cases referring to the Article 41 of the PCIJ Statute, spoke of provisional measures "which ought to be taken to preserve the respective rights of the parties"[6]. The ICJ in the *Fisheries Jurisdiction* cases decided that: "the right of the Court to indicate provisional measures (...) has as its object to preserve the respective rights of the Parties pending the decision of the Court"[7]. This position has been reaffirmed in the case *Certain Documents and Data*[8].

In the jurisprudence of the ICJ this "link" requirement, it means that the rights to be protected by the provisional measures must be linked to those rights that are the subject of the main claim[9]. As for example in *Arbitral Award of 31 July 1989*, Guinea-Bissau asked the Court to order provisional measures against Senegal with respect to activities in the maritime areas and the Court rejected its request because: "...the alleged rights sought to be made the subject of provisional measures are not the subject of proceedings before the Court on the merits of the case"[10].

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[5] H. Sakai, *New Developments of the Orders of Provisional Measures by the International Court of Justice*, "52 JYIL" 2009, p. 231, 237.

[6] *Denunciation of the Treaty of November 2nd, 1865, between China and Belgium, 1927 (Belgium v China)*, PCIJ Series A No. 8, p. 6; *Legal Status of the Sourth-Eastern Territory of Greenland (Denmark v Norway)*, 1932 PCIJ Series A/B No. 48, p. 284; *Polish Agrarian Reform and the German Minority (Germany v Poland)*, 1933 PCIJ Series A/B No. 58, p. 177.

[7] *Fisheries Jurisdiction (UK v Iceland), Interim Protection, ICJ Reports 1972*, p. 12; *Fisheries Jurisdiction (FRG v Iceland), Interim Protection, ICJ Reports 1972*, pp. 30, 34.

[8] *Question relating to the Seizure and Detention of Certain Documents and Data (Timor-Lest v Australia)*, ICJ, Order of 3 March 2014, para. 22.

[9] I. Uchikova, *Provisional Measures before the International Court of Justice*, "12 LPICT", 2013, pp. 404-407.

[10] *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal), Provisional Measures, ICJ Reports 1990*, pp. 64, 70.

In the *Pulp Mills on the River Uruguay (Argentina v Uruguay)*[11] the Court said that the link test is an independent requirement in the indication of the provisional measures.

As it was said above, the main reason of the provisional measures is to protect a right *pendente lite*.

The ICJ considered in its Order of 23 January 2020 in paras. 43-63 the issue of the rights whose protection was sought and the link between such rights and the measures requested. The Court repeated the opinion expressed previously in its jurisprudence that "The Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible"[12].

Based on this statement, the Court in para. 56 decided that: "In the Court's view, all the facts and circumstances mentioned above (see paras. 53-55) are sufficient to conclude that the rights claimed by the Gambia and for which it is seeking protection – namely the right of the Rohingya group in Myanmar and of its members to be protected from acts of genocide and related prohibited acts mentioned in Article III, and the right of The Gambia to seek compliance by Myanmar with its obligations not to commit, and to prevent and punish genocide in accordance with the Convention – are plausible"[13].

d. Plausibility of rights

The object of the provisional measures under Article 41 of the Statute is the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits. The Court must be concerned to preserve by such measures the rights which may subsequently be adjudged by it to belong to either party. Therefore, the Court may exercise this power only if it is satisfied that the rights asserted by the party requesting such measures are at least plausible[14].

The Court introduced this requirement in its 2009 order in *Belgium v Senegal*, when it said that: "the power ...to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible"[15].

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[11] *ICJ Reports 2007, Provisional Measures*, pp. 3, 10.

[12] Order of 23 January 2020 (*Gambia v Myanmar*), p. 14, para. 43, *Qatar v United Arab Emirates, Provisional Measures*, Order of 23 July 2018, *ICJ Reports 2018 (II)*, pp. 421-422, para. 43.

[13] Order of 23 January 2020, *Gambia v Myanmar*, op. cit., p. 18, para. 56.

[14] See, for example, *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, *ICJ Reports 2018 (II)*, pp. 421-422, para. 43.

[15] *Questions relating to the obligation to prosecute or extradite (Belgium v Senegal)*, Order on Provisional Measures of 28 May 2009, *ICJ Reports 2009*, p. 139, at [151], para. 57.

Since this case, in all orders on provisional measures, the Court has assessed plausibility of rights[16].

The judge Cançado Trindade in his separate opinion elaborated this superficial use of "plausible", which is in his words "devoid of a meaning" (para. 76)[17]. Moreover, he said that:

"Thus, in my Separate Opinion in the case of *Application of the U.N. Convention on the Elimination of All Forms of Racial Discrimination* (CERD – Qatar *versus* United Arab Emirates, provisional measures of protection, Order of 23.07.2018), I pondered that "The test of so-called 'plausibility' of rights is, in my perception, an unfortunate invention – a recent one – of the majority of the ICJ. (...) It appears that each one feels free to interpret so-called 'plausibility' of rights in the way one feels like; this may be due to the fact that the Court's majority itself has not elaborated on what such 'plausibility' means. To invoke '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" (paras. 57 and 59)".

That is why he considered that the rights protected by the present Order of provisional measures of protection are not simply "plausible", as the Court said, but they are truly fundamental rights, such as the right to life, right to personal integrity, right to health among others (para. 75)[18].

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[16] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order on Provisional Measures of 8 March 2011, *ICJ Reports 2001*, p. 6 at [18], para. 53; *Request for Interpretation of the Judgement of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)*, Order on Provisional Measures of 18 July 2011, *ICJ Reports 2011*, p. 537 at [545], para. 33; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua); Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica)*, Order on Provisional Measures of 22 November 2013, *ICJ Reports 2013*, p. 354 at [360], para. 27; *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v Costa Rica); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v Nicaragua)*, Order on Provisional Measures of 13 December 2013, *ICJ Reports 2013*, p. 398 at [403-404], paras. 17-19; *Questions Relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v Australia)*, Order on Provisional Measures of 3 March 2014, *ICJ Reports 2014*, p. 147 at [152], para. 22; *Immunities and Criminal Proceedings (Equatorial Guinea v France)*, Order on Provisional Measures of 7 December 2016, *ICJ Reports 2016*, p. 1148 at [1165- 1166], para. 71; *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)*, Order on Provisional Measures of 19 April 2017, *ICJ Reports 2017*, p. 104 at [126], para. 63; *Jadhav Case (India v Pakistan)*, Order on Provisional Measures of 18 May 2017, para. 35, available at www.icj-cij.org/files/case-related/168/168-20170518-ORD-01-00-EN.pdf

[17] Separate opinion of judge Cancado Trindade, para. 76, p. 18.

[18] C. Miles, *Provisional measures and the „new" plausibility in the jurisprudence of the International Court of Justice*, BYIL, 2018, pp. 1-46; M. Lando, *Plausibility in the Provisional Measures. Jurisprudence of the International Court of Justice*, "Leiden Journal of International Law" 2018, Vol. 31, Issue 3, pp. 641-668; T. Sparks, M. Somos, *The humanisation of provisional measures? Plausibility and the Interim Protection of Rights before the ICJ*, MPIL, Research Paper Series No. 2019-20.

e. Non-aggravation of the dispute

At the early stage of its jurisprudence, the ICJ had often indicated in the operative part of its orders non-aggravation measures[19].

In the Order of 23 January 2007, in case *Pulp Mills on the River Uruguay*, the Court refused to indicate a general measure of non-aggravation arguing, that: "...whereas in those cases provisional measures other than measures directing the parties not to take actions to aggravate or extend the dispute or to render more difficult its settlement were also indicated"[20].

The question arises, what are the circumstances which may justify the indication of non-aggravation measures. Based on the case law of the ICJ, one may suggest there are: the urgency and the risk of irreparable prejudice[21].

The Gambia has requested the Court to indicate measures aimed at ensuring the non-aggravation of the dispute with Myanmar. In the fourth and fifth measures, the Gambia asked to: "... require both Parties not to take any action, and positively to act to prevent any action, which might aggravate the dispute, or render it more difficult of resolution, and to provide a report to the Court on implementing measures"[22]. These request is based on the Court's jurisprudence[23].

The Court in its Order said, that: "In this respect, the Court recalls that when it is indicating provisional measures for the purpose of preserving specific rights, it also possesses the power to indicate additional provisional measures with a view to preventing the aggravation or extension of the dispute whenever it considers that the circumstances so require"[24].

The Court however did not indicate this measure, because in its view: "... in the circumstances of the present case, and in view of the specific provisional measures it has decided to take, the Court does not deem it necessary to indicate and additional measure relating to the non-aggravation of the dispute between the Parties".

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[19] *Anglo-Iranian Oil Co. Case (United Kingdom v Iran), Provisional measures*, Order of 5 July 1951, *ICJ Reports*, p. 93.

[20] *Pulp Mills on the River Uruguay (Argentina v Uruguay), Provisional Measures*, Order of 23 January 2007, paras. 49-50, *ICJ Reports*.

[21] P. Palchetti, *The Power of the International Court of Justice to indicate provisional measures to prevent the aggravation of a dispute*, "Leiden Journal of International Law" 2008, No. 21, p. 627-630; C. Miles, *Provisional measures before International Courts and Tribunals*, Cambridge 2018, pp. 209-216.

[22] Verbatim record, CR 2019/18, p. 67.

[23] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro), Provisional Measures*, Order of 8 April 1993, *ICJ Reports 1993; Frontier Dispute (Burkina Faso v Republic of Mali), Provisional Measures*, Order of 10 January 1986, *ICJ Reports 1986*; *Avena and Other Mexican Nationals (Mexico v United States of America), Provisional Measures*, Order of 5 February 2003, *ICJ Reports 2003*.

[24] Order of 23 January 2020, p. 24, para. 83; *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand), Provisional Measures*, Order of 18 July 2011, *ICJ Reports 2011 (II)*, pp. 551-552, para. 59.

3. The problem of the binding force

As noted by Judge Oda "the provisional measures indicated by the Court in the past have usually not been implemented"[25].

It was only in 2001, *LaGrand* Judgment, that the Court for the first time clarified this issue finding that its "orders on provisional measures under Article 41 have binding effect"[26]. Germany had argued that the measures are binding; the United States had taken the view, frequently expressed by States so far, that wording and history of Articles 41 and 94 of the Charter show the contrary[27].

Another reason why States have occasionally been non-compliant is that the Court lacks the power to enforce its decisions and that Article 94 paragraph 2 of the Charter of the United Nations ("[i]f 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, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment") does not apply to orders of the Court. But it does not mean that the ICJ has no way to sanction it. In that case the Court indicated the interim measures, the State in whose favor certain measures have been indicated, may contain in its final submissions in the pending case a request to this effect. In that case, the Court may grant relief in the form of a declaration that the order has been violated or even take this into consideration in its determination of the compensation due[28].

In legal doctrine and in separate opinions the position has been taken that orders must be seen as binding because of their specific importance for the protection of the judicial procedure[29].

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[25] S. Oda, *Provisional measures: The practice of the International Court of Justice*, [in:] *Fifty years of the International Court of Justice*, eds. V. Lowe, M. Fitzmaurice, Cambridge 1996, p. 541 at [555].

[26] *LaGrand (Germany v United States of America)*, Judgment, *ICJ Reports 2001*, p. 466 at [506], para. 109.

[27] Ibidem at para. 93 (argument by Germany) and at para. 96 (argument by the United States of America).

[28] In the *Bosnian Genocide* case the Court refused to treat violation of the order for protection as a separate ground for compensation reasoning that "the question of compensation for the injury caused to the Applicant by the Respondent's breach of aspects of the Orders indicating provisional measures merges with the question of compensation for the injury suffered from the violation of the corresponding obligations under the Genocide Convention." (See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, *ICJ Reports 2007*, p. 43 at [231], para. 458); E. Salkiewicz-Munnerlyn, *Interim Measures of Protection in the Two Orders of The ICJ Genocide Cases (Bosnia and Herzegovina v. Serbia and Montenegro*, "Strani pravni život" 2009, No. 1, pp. 53-71, https://www.ceeol.com/search/article-detail?id=582668

[29] Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v Yugoslavia (Serbia and Montenegro)), Provisional Measures*, Order of 13 September 1993, Separate Opinion of judge Weeramantry, *ICJ Reports 1993*, pp. 325, 374-389; M. Lando, *Compliance with provisional measures indicated by the International Court of Justice*, "Journal of International Dispute Settlement" 2017, No. 8, pp. 22-55; M. Vucic, *Binding effect of provisional*

In the case *Gambia v Myanmar*, the Court reaffirms that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (*LaGrand, Germany v United States of America, Judgment, ICJ Reports 2001*, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed[30].

4. *Jus Cogens* under the Convention against Genocide and the Corresponding Customary International Law

Provisional measures remain in the domain of *jus cogens* as they serve for the protection of fundamental human rights. In the public hearing of 10 December 2019 (the oral procedure before the ICJ), the delegation of Gambia made a reference to such acknowledgment of *jus cogens*[31]. The Court in its jurisprudence has addressed this issue, for example in the case of *Armed Activities in the Territory of Congo*, opposing Democratic Republic of Congo to Rwanda, the ICJ recognized (in its Judgment on jurisdiction and admissibility, of 3 February 2006, para. 64) the prohibition of genocide as a peremptory norm of international law. Also in the case of *Application of the Convention against Genocide* (*Bosnia-Herzegovina v Serbia and Montenegro*, Judgment on preliminary objections of 11 July 1996, para. 32), the ICJ observed *inter alia* that the terms of Article IX of the Convention against Genocide do "not exclude any form of State responsibility".

Unfortunately, the Court in the case we examine, did not address this issue but, in our opinion, it should do it. That is why we agree with the opinion expressed by the judge Cançado Trindade in his separate opinion that: "In my understanding, State responsibility and individual criminal responsibility cannot be dissociated in cases of massacres"[32].

The Court has addresses this issues in the following cases: *Application of the Convention against Genocide*, opposing Bosnia-Herzegovina to Serbia and Montenegro (Judgment of 26 February 2007), *Application of the Convention against Genocide*, opposing Croatia to Serbia (Judgment of 3 February 2015). In its 2007 Judgment, the Court confirmed the applicability of the rules on State responsibili-

measures as an inherent judicial power: An example of cross-fertilization, Annals FLB, "Belgrade Law Review" 2018, No. 4, pp. 127-142.

[30] Order of 23 January 2020, p. 24, para. 84; C. Miles, *Provisional measures and the margin of appreciation before the International Court of Justice*, "Journal of International Dispute Settlement" 2017, No. 8, pp. 1-21.

[31] ICJ, doc. CR 2019/18, of 10 December 2019, p. 51, para. 7.

[32] Separate Opinion of judge Cancado Trindade, *Gambia v Myanmar, ICJ Reports 2020*, p. 20; A. A. Cancado Trindade, *State Responsibility in Cases of Massacres: Contemporary Advances in International Justice*, Utrecht 2011, pp. 1-71.

ty between States in the context of genocide (para. 167) but not without underlining that in its view the recognition of State responsibility should not be understood as making room for State crimes, thus imposing limitations on the matter (paras. 167-170). And in its 2015 Judgment, the Court briefly referred to *jus cogens* without considering its legal effects (para. 87).

Grave violations of human rights and of International Humanitarian Law, such as acts of genocide, among other atrocities, are in breach of responsibility and call for reparations to the victims[33].

Conclusions

The examined case showed the importance of the procedural measure during the incidental jurisdiction of the ICJ, such as interim measures of protection in the framework of the Genocide Convention violation. It is a particular case, regarding protection of fundamental human rights and the obligation of prevention.

That is why, it involves many theoretical issues to be solved in international law such as Responsibility to Protect, [R2P], *actio popularis*, *obligations erga omnes*, *forum prorogatum*, enforcement of the ICJ orders indicating interim measures[34]. The Gambia acted against Myanmar because its actions were a violation of *erga omnes* obligation and the United Nations was not able to act or did not want to act (not important issue for Big 5, possibility of veto at the Security Council). In the *Barcelona Traction* case the ICJ proclaimed the concept of *erga omnes* obligations in international law such as: the outlawing of acts of aggression; the outlawing of genocide; protection from slavery; protection from racial discrimination. The violation of an *erga omnes* obligation entails "aggravated responsibility"[35].

There are some authors who believe that that R2P has filled part of the gaps in the Genocide Convention and allowed states to take affirmative actions to prevent genocide in the modern era (e.g. Libya

[33] P. Palchetti, *Responsibility for breach of provisional measures of the ICJ: between protection of the rights of the parties and respect for the judicial function*, "Rivista di diritto internazionale" 2017, pp. 5-22.

[34] S. Yee, F*orum Prorogatum and the indication of provisional measures in the International Court of Justice*, chapter 25, *The Reality of international law, Essays in honour of Ian Brownlie*, Oxford 1999, pp. 565-584; *The Right of Actio Popularis before International Courts and Tribunals*, F. Turab Ahmadov, St Anne's College, University of Oxford, A thesis submitted for the degree of Doctor of Philosophy, Trinity 2017, pp. 82-155.

[35] P. Picone, I*nterventi delle Nazioni Unite e obblighi erga omnes, [in:] Interventi delle Nazioni Unite e diritto internazionale*, ed. P. Picone, Cedam 1995, pp. 528, 536; *Case Concerning Barcelona Traction, Light and Power Company, Ltd (New Application: 1962) (Belgium v Spain) (second phase), ICJ Reports 1970*, p. 3; A. Cassese, *International Law*, Oxford 2001, p. 182; F. Borgia, *The Responsibility to Protect doctrine: between criticisms and inconsistencies*, "Journal on the Use of Force and International Law" 2015, Vol. 2, No. 2, pp. 223-237, http://dx.doi.org/10.1080/20531702.2015.1090217; M. Longobardo, *Genocide, obligations erga omnes, and the responsibility to protect: remarks on a complex convergence*, "The International Journal of Human Rights" 2015, Vol. 19, No. 8, pp. 1199-1212, http://dx.doi.org/10.1080/13642987.2015.1082834

2011). Three recent conflicts could be subject to an R2P intervention: The Yazidis in Iraq, Rohingya Muslims in Burma (Myanmar) and Libyans in Benghazi (circa 2011), (pp. 25-27)[36].

The possibilities mentioned above are political means, not judicial procedure, but it could be present in the case when country is unwilling to act.

If we want to enforce procedural law at the ICJ, one would propose to amend the Statute of the ICJ, according to its Article 69, which provides as follows: "Amendments to the present Statute shall be effected by the same procedure as is provided by the Charter of the United Nations for amendments to that Charter, subject however to any provisions which the General Assembly upon recommendation of the Security Council may adopt concerning the participation of states which are parties to the present Statute but are not Members of the United Nations". But the procedure of Statute amendments is not very convenient and is not practicable, in fact it never happened till now. Also, States don't participate in adopting Rules of the Court, leaving this possibility to the Court itself. Rules of the Court, including its Statute, should be interpreted according to the Vienna Convention of the Law of Treaties[37].

Non-compliance of parties with provisional measures it is not only private matter between parties, but it is also a matter of a public order, it means parties and their relations to the Court[38]. The question arises, what should be the reaction of the Court in case of a breach of provisional measure and what kind of sanctions it can impose on the non-complying party. It seems that this kind of punitive damages is not based on the ICJ Statute although, in some views[39], the Court has the authority to levy damages against the non-complying State.

We agree with the opinion of Prof. Paolo Palchetti, that: "a form of sanction that could be envisaged in response to lack of compliance with provisional measures is the imposition of costs, or part of costs, relating to the proceedings"[40]. In fact, the Statute of the ICJ in its Article 64 states that: "Unless otherwise decided by the Court, each

[36] Z. A. Karazsia, *An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention*, "Journal of Strategic Security" 2018, No. 4, pp. 20-31, DOI: https://doi.org/10.5038/1944-0472.11.4.1676

Available at https://scholarcommons.usf.edu/jss/vol11/iss4/2

[37] *LaGrand (Germany v United States of America), 2001, Reports 2001*, p. 501; P. Palchetti, *Making and enforcing procedural law at the International Court of Justice*, QIL, Zoom-out 61, 2019, pp. 5-20.

[38] M. Mendelson, *State responsibility for breach of interim protection orders of the International Court of Justice*, [in:] *Issues of State Responsibility before International Judicial Institutions*, eds. M. Fitzmaurice, D. Sarooshi, Oxford and Portland Oregon 2004, p. 42; Sh. Rosenne, *The Law and Practice of the International Court*, 1920-2005, Leiden: Nijhoff 2006, p. 1026.

[39] O. Schachter, *International Law in theory and practice: General course in Public International Law*, 1982, 178 Recueil des Cours, p. 223.

[40] P. Palchetti, *Making and enforcing...*, p. 17.

party shall bear its own costs". This issue was raised before the ICJ in the joint cases *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 of 16 December 2015, but the Court said that: "Taking into account the overall circumstances of the case ... an award of costs ... would not be appropriate"[41].

The practice of the ICJ after *LaGrand* case in the situation of non-compliance with provisional measures is that this fact is recorded in the operative part of the judgment. But in the view of some authors a finding of non-compliance "does not seem to address properly the damage caused to the Court's own standing by a lack of compliance with its provisional measures orders"[42].

As we see, there is no one simple way to solve this problem, but it is because there is a lack of compulsory jurisdiction for States in front of the ICJ. States prefer to abstain from judicial settlement of disputes by the ICJ because they do not want to be blamed by non-compliance.

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[41] *ICJ Reports 2015*, p. 718.

[42] G. Zyberi, *Provisional measures of the International Court of Justice in Armed Conflict situations*, "Leiden Journal of International Law" 2010, No. 23, p. 581. See opposite view T. Stein, *Contempt, Crisis and the Court: The World Court and Hostage Rescue Attempts*, 1982, 76 AJIL, p. 528, who says: "in a context where rectitude is the primary value at stake, censure by the Court is a significant sanction".

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