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INTERIM MEASURES OF PROTECTION IN THE INTERNATIONAL COURT OF JUSTICE – ORDER OF 16 MARCH 2022 IN CASE UKRAINE VS RUSSIA

Tymczasowe środki zabezpieczające w Międzynarodowym Trybunale Sprawiedliwości – postanowienie z 16 marca 2022 r. w sprawie Ukraina przeciwko Rosji

W artykule przeanalizowano zarządzenie MTS z 16 marca 2022 r. wskazujące środki tymczasowe w sprawie stosowania Konwencji o zapobieganiu i karaniu zbrodni ludobójstwa (Ukraina vs Rosja). Zostały wyjaśnione warunki, przy zaistnieniu których Międzynarodowy Trybunał Sprawiedliwości wskazuje tymczasowe środki zabezpieczające, w oparciu o orzecznictwo MTS, szczególnie w odniesieniu do ich mocy wiążącej, po wydaniu wyroku w sprawie LaGrand, w którym Trybunał wyjaśnił, że jego postanowienia dotyczące środków tymczasowych są wiążące. MTS wziął również pod uwagę nowy wymóg – wiarygodności praw chronionych – sformułowany przez Trybunał po raz pierwszy w sprawie Belgia vs Senegal.

Pojęcia kluczowe: Międzynarodowy Trybunał Sprawiedliwości; Artykuł 41 Statutu MTS; tymczasowe środki zabezpieczające; wiarygodność praw chronionych; warunki przyznawania środków tymczasowych; skutki prawne środków tymczasowych; sposoby zapobiegania sporom.

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1. History of the proceedings

On 26 February 2022, Ukraine filed in the Registry of the Court an Application instituting proceedings against the Russian Federation concerning "a dispute ... relating to the interpretation, application and fulfilment of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide" (hereinafter the "Genocide Convention" or the "Convention").

Ukraine requested the Court to:

> (a) Adjudge and declare that, contrary to what the Russian Federation claims, no acts of genocide, as defined by Article III of the Genocide Convention, have been committed in the Luhansk and Donetsk oblasts of Ukraine.
> (b) Adjudge and declare that the Russian Federation cannot lawfully take any action under the Genocide Convention in or against Ukraine aimed at preventing or punishing an alleged genocide, on the basis of its false claims of genocide in the Luhansk and Donetsk oblasts of Ukraine.
> (c) Adjudge and declare that the Russian Federation's recognition of the independence of the so-called 'Donetsk People's Republic' and 'Luhansk People's Republic' on 22 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.
> (d) Adjudge and declare that the 'special military operation' declared and carried out by the Russian Federation on and after 24 February 2022 is based on a false claim of genocide and therefore has no basis in the Genocide Convention.
> (e) Require that the Russian Federation provide assurances and guarantees of non-repetition that it will not take any unlawful measures in and against Ukraine, including the use of force, on the basis of its false claim of genocide.
> (f) Order full reparation for all damage caused by the Russian Federation as a consequence of any actions taken on the basis of Russia's false claim of genocide."

Ukraine founded the Court's jurisdiction on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention.

Together with the *A*pplication, Ukraine submitted a Request for the indication of provisional measures with reference to Article 41 of the Statute and to Articles 73, 74 and 75 of the Rules of Court.

Ukraine asked the Court to indicate the following provisional measures:

> "(a) The Russian Federation shall immediately suspend 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.
> (b) The Russian Federation shall immediately ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, take no steps in furtherance of the military operations which have as their

stated purpose and objective preventing or punishing Ukraine for committing genocide.

(c) The Russian Federation shall refrain from any action and shall provide assurances that no action is taken that may aggravate or extend the dispute that is the subject of this Application, or render this dispute more difficult to resolve.

(d) The Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court."

Ukraine also requested the President of the Court "pursuant to Article 74 (4) of the Rules of Court . . . to call upon the Russian Federation to immediately halt all military actions in Ukraine pending the holding of a hearing, to enable any order the Court may make on the request for provisional measures to have its appropriate effects".

On 27 February 2022, the Registrar communicated by email to the Russian Federation an advance copy of the Application and Request for the indication of provisional measures. These documents were formally communicated to the Russian Federation on 28 February 2022, pursuant to Article 40, paragraph 2, of the Statute of the Court in respect of the Application, and pursuant to Article 73, paragraph 2, of the Rules of Court in respect of the Request for the indication of provisional measures.

Ukraine chose Mr. Yves Daudet to sit in the case a judge ad hoc, based on Article 31 of the Statute, because there was not judge of Ukrainian nationality upon the Bench.

On 1 March 2022, the President of the Court sent a letter to the Russian Federation asking for an action. At the same time, the Registrar of the ICJ informed the Parties by letters that, the Court had fixed 7 and 8 March 2022 as the dates for the oral proceedings on the Request for the indication of provisional measures and that the hearings would be held in a hybrid format.

By a letter dated 5 March 2022, the Ambassador of the Russian Federation to the Kingdom of the Netherlands indicated that his Government had decided not to participate in the oral proceedings on 7 March 2022.

At the public hearing held in a hybrid format on 7 March 2022, Ukraine presented oral observations on the Request for the indication of provisional measures and asked for the indication of the provisional measures from the application.

The Government of the Russian Federation did not appear at the oral proceedings and no formal request was presented. However, under cover of a letter received in the Registry of the Court on 7 March 2022, after the closure of the hearing, the Ambassador of the Russian Federation to the Kingdom of the Netherlands communicated to the Court a document setting out "the position of the Russian Federation regarding the lack of jurisdiction of the Court in the case" and "requests the Court to refrain from indicating provisional measures and to remove the case from its list"

On 16 March 2022, the Court delivered its Order on the Request for the indication of provisional measures submitted by Ukraine in the case concerning Alle-

gations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation)[1].

In its Order, which has binding effect, the Court indicated the following provisional measures[2]:

(1) By thirteen votes to two,
The Russian Federation shall immediately suspend the military operations that it commenced
on 24 February 2022 in the territory of Ukraine; IN FAVOUR: President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judge ad hoc Daudet; AGAINST: Vice-President Gevorgian; Judge Xue;
(2) By thirteen votes to two,
The Russian Federation shall ensure that any military or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control or direction, take no steps in furtherance of the military operations referred to in point (1) above; IN FAVOUR: President Donoghue; Judges Tomka, Abraham, Bennouna, Yusuf, Sebutinde, Bhandari, Robinson, Salam, Iwasawa, Nolte, Charlesworth; Judge ad hoc Daudet; AGAINST: Vice-President Gevorgian; Judge Xue;
(3) Unanimously,
Both Parties shall refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve.
Vice-President GEVORGIAN appended a declaration to the Order of the Court; Judges BENNOUNA and XUE appended declarations to the Order of the Court; Judge ROBINSON appended a separate opinion to the Order of the Court; Judge NOLTE appended a declaration to the Order of the Court; Judge ad hoc DAUDET appended a declaration to the Order of the Court.

It is interesting to underline, that the third interim measure is directed to both Parties. The Court said: "In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute"[3].

However, the Court did not indicate the measure requested by Ukraine, that: "83. The Court further recalls that Ukraine requested it to indicate a provisional measure directing the Russian Federa-

[1] International Court of Justice, General List No. 18, 16 March 2022, Allegations of genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukraine v. Russian Federation), Request for the Indication of provisional measures, https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf [*Allegations of genocide*].

[2] Ibidem, p. 19

[3] *Allegations of genocide,* p. 17.

tion to "provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court". In the circumstances of the present case, however, the Court declines to indicate this measure"[4].

In reference to the third precautionary measure, it seems strange that a country attacked by an aggressor should use the same measures as the aggressor, i.e., not to aggravate the dispute, or what does that mean? It cannot defend itself?

As for the fourth safeguard measure demanded by Ukraine, i.e. reporting on the implementation of these measures within one week after the order, which the Court has not indicated, this is very incomprehensible and detrimental to the functioning of the Court itself. If the Court had indicated this measure, it would have allowed the procedure for implementing these measures to be strengthened, to be checked and not only indicated, but the country against which such measures are indicated does not even come to the hearing and obviously does not implement these measures. The Tribunal declined to indicate such a measure and without any explanation whatsoever.

2. Conditions for the indication of provisional measures

A. PRIMA FACIE JURISDICTION

According to the jurisprudence of the ICJ, at the provisional measures stage, the Court, due to the urgency of the case, need not be certain that it has jurisdiction as regards the merits of the case, and it is sufficient that there are grounds for prima facie jurisdiction, it means a basis on which its jurisdiction could be founded[5].

Ukraine founds the jurisdiction of the Court on Article 36, paragraph 1, of the Statute of the Court and on Article IX of the Genocide Convention. Ukraine and the Russian Federation are both parties to the Genocide Convention. Article IX of the Genocide Convention reads as follows: "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

[4] *Allegations of genocide*, p. 18.

[5] (See, for example, *A*pplication 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. 9, para. 16). See also: Ewa Salkiewicz-Munnerlyn, Jurisprudence of the PCIJ and of the ICJ on Interim Measures of Protection, T.M.C. Asser Press, The Hague, 2022, ISBN 978-94-6265-474-7 ISBN 978-94-6265-475-4 (eBook) https://doi.org/10.1007/978-94-6265-475-4, p. 33-46.

be submitted to the International Court of Justice at the request of any of the parties to the dispute."

According to Ukraine, the dispute with the Russian Federation concerns interpretation, application or fulfilment of the Genocide Convention. Ukraine disagree with the allegation that genocide, as defined in Article II of the Convention, has occurred or is occurring in the Luhansk and Donetsk oblasts of Ukraine and that Ukraine has committed genocide. On multiple occasions since September 2014, Ukraine made this known to the Russian Federation, last time through a statement by the Minister for Foreign Affairs of Ukraine before the General Assembly of the United Nations on 23 February 2022.

Ukraine considers that the Russian Federation "has turned the Genocide Convention on its head", because based on the false claim of genocide, Russia took a military action that constitute grave violations of the human rights of people in Ukraine. Instead, Russia could have seised the organs of the United Nations under Article VIII of the Convention or seised the Court under Article IX thereof.

In the document communicated to the Court on 7 March 2022, the Russian Federation stated that, its "special military operation" on the territory of Ukraine is based on Article 51 of the United Nations Charter and customary international law and not on the Genocide Convention. That is why the Respondent stating that Ukraine's Application and Request for the indication of the interim measures manifestly fall beyond the scope of the Convention and of the jurisdiction of the Court, asking the Court to remove the case from its list.

The Court stated, that at the stage of making an order on a request for the indication of provisional measures, it has to establish only whether the acts complained of by Ukraine appear to be capable of falling within the provisions of the Genocide Convention. More detailed examination would take place in the stage of the examination of the merits.

The Court considers that, in the present proceedings, the evidence in the case file demonstrates prima facie that statements made by the Parties referred to the subject-matter of the Genocide Convention in a sufficiently clear way to allow Ukraine to invoke the compromissory clause in this instrument as a basis for the Court's jurisdiction. The Court concluded that, prima facie, it has jurisdiction pursuant to Article IX of the Genocide Convention to entertain the case[6].

B. IRREPARABLE PREJUDICE AND URGENCY- 65-77

Article 41 of the Statute of the International Court of Justice says, that "1. The Court shall have the power to indicate, if it considers that

[6] *Allegations of genocide,* p.5.

circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party"[7].

The jurisprudence of the ICJ shows, that in case when the irreparable prejudice is caused, and only if there is urgency, it means that there is a real and imminent risk that irreparable prejudice will be caused to the rights claimed before the Court gives its final decision, the Court indicates the interim measures[8].

Ukraine emphasized that there is an urgent need to protect the population from the irreparable harm caused by the Russian Federation launching "a military operation" on a pretext of genocide. This aggression by Russia caused many casualties among Ukrainian civilians and military personnel, the bombing of numerous cities across Ukraine, and the displacement of over one and a half million Ukrainian civilians both within Ukraine and abroad. The loss of life constitutes an irreparable harm and is taking place on daily basis in Ukraine. And the refugee crisis is another example of irreparable harm.

According to the Russian Federation, the urgency must pertain not to the situation in general, but to the protection of rights provided for by the Convention.

The Court said that: "74. The Court considers that the right of Ukraine that it has found to be plausible (see paragraph 60 above) is of such a nature that prejudice to it is capable of causing irreparable harm. Indeed, any military operation, in particular one on the scale carried out by the Russian Federation on the territory of Ukraine, inevitably causes loss of life, mental and bodily harm, and damage to property and to the environment"[9].

Also the Court underlined, that "77. In light of these circumstances, the Court concludes that disregard of the right deemed plausible by the Court (see paragraph 60 above) could cause irreparable prejudice to this right and that there is urgency, in the sense that there is a real and imminent risk that such prejudice will be caused before the Court makes a final decision in the case"[10].

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[7] Sałkiewicz-Munnerlyn, 2022, pp.47-61; Ewa Sałkiewicz-Munnerlyn, *Interim Measures of Protection in the International Court of Justice order of 23 January 2020 in case Gambia v Myanmar*, "Głos Prawa" 2020, t. 3, nr 1 (5), poz. 2, p. 14-15.

[8] 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 *A*pril 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.

[9] *Allegations of genocide,* p.16.

[10] *Allegations of genocide*, p.16

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 (50-64)

Article 73 para 1 of the new Rules of Procedure of the ICJ decides that:

1. A Party may request in writing a precautionary measures at any stage of the proceedings in respect of which it relates.

It replaces Article 66, para 1 of the 1972 Rules of Procedure / Article 61. 1946/. Normally, the Court does not invoke that article in its orders, since it is clear that safe guards protect the rights and interests at issue. This means that the party concerned is seeking the Court to order measures to protect the subject-matter of the dispute as it is at the time when the action is brought in order to enable the judgment to be delivered. Safeguard measures should protect the rights and interests of the parties to the dispute, with the exception of measures which would have effects beyond the subject-matter of the dispute[11].

The power of the Court to indicate provisional measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that 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 (see, for example, 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. 18, para. 43)[12].

In the paragraph 62 of its application, Ukraine claims that there is a clear link between the plausible rights that it seeks to preserve and the first two provisional measures that it requests. In particular, the first two provisional measures share a direct link to Ukraine's right under Article I to good faith performance of the Convention by any State party[13].

The Court has already found that Ukraine is asserting a right that is plausible under the Genocide Convention and the Court considers that, by their very nature, the first two provisional measures

[11] Exceptionally in the case concerning the Trial of Pakistani Prisoners of War (Pakistan v. India), ICJ Reports 1973, p. 330, the Court mentioned the requirement of a link between the safeguards and the substance of the case. See also ICJ Reports 1976, p. 3; ICJ Reports 1979, p. 7.

[12] Sałkiewicz-Munnerlyn, 2022, pp. 69-73

[13] https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf

sought by Ukraine are aimed at preserving the right of Ukraine that the Court has found to be plausible. As to the third and fourth provisional measures requested by Ukraine, the question of their link with that plausible right does not arise, in so far as such measures would be directed at preventing any action which may aggravate or extend the existing dispute or render it more difficult to resolve, and at providing information on the compliance with any specific provisional measure indicated by the Court (cf. 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. 24, para. 61). The Court concludes, therefore, that a link exists between the right of Ukraine that the Court has found to be plausible and the requested provisional measures.

D. PLAUSIBILITY OF RIGHTS

For the first time, the ICJ dealt with the Plausibility test in Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal)[14]. In para 57 of the Interim Measures Order, the ICJ stated: 'The power of the Court to indicate provisional measures should be exercised only if the Court is satisfied that the rights asserted by a party are at least plausible.' More recently, the ICJ has increasingly referred to this condition in its interim measures[15]. In 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 Federa-

[14] Order on interim measures of protection of 28 May 2009, ICJ Reports 2009, p. 142; see also Sałkiewicz-Munnerlyn, 2022, op.cit. pp.63-68.

[15] Uchkunova I (2013) Provisional measures before the International Court of Justice. The Law and Practice of International Courts and Tribunals 12: pp 391–430; Miles C (2017) Provisional measures before international courts and tribunals. Cambridge 139 University Press, Cambridge, pp 193–201; Lando M (2018) Plausibility in the provisional measures of the International Court of Justice.137 Leyden Journal of International Law 31: 641–668; Sparks T, Somos M (2019) The humanisation of provisional measures? Plausibility and the interim protection of rights before the ICJ. Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper Series No. 2019-20, pp 1–24. DOI: https://doi.org/10.2139/160 ssrn.3471141; Palchetti P (2008) The power of the International Court of Justice to indicate provisional measures to prevent aggravation of a dispute. Leyden Journal of International Law 21, p.623. Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures, Order of 8 March 2011, ICJ Reports 2011 (I), p. 18, para 53; Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures, Order of 3 March 2014, ICJ Reports 2014, p. 147, para 22: 'The power of the Court to indicate measures under Article 41 of the Statute has as its object the preservation of the respective rights claimed by the parties in a case, pending its decision on the merits thereof. It follows that 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 requesting party are at least plausible.' See also Request for Interpretation-Temple of Preah Vihear, Provisional Measures, Order of 18 July 2011, ICJ Reports 2011, p. 545, para 33: 'the rights which the party requesting provisional measures claims to derive from the judgment in question, in the light of its interpretation of that judgment, are at least plausible'.

tion)[16], and in two others, issued within six months (December 2016 to May 2017)[17], the ICJ extended that concept from the credibility (likelihood) of the plaintiff's rights to the credibility of the claims, that is to say, that they were infringed by the defendant.

The formula used by the ICJ in Questions relating to the obligation to prosecute or extradite (Belgium v. Senegal) that[18] the ICJ may indicate interim measures: only if the Court is satisfied that the rights asserted by a party are at least plausible' has been repeated in all orders which indicated or failed interim measures adopted after that case[19].

In the most recent case, Gambia v. Myanmar, the Court unanimously ordered safeguards for Rohingya groups on Myanmar territory[20]. In para 56 of the order, the ICJ stated: '... 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'[21].

On the occasion of the interim measures order in Gambia v. Myanmar, Judge Cançado Trindade, in his Separate Opinion to the Order of 23 January 2020, expressed his opinion on this test, noting that: 'In my own perception, human conscience stands above the will of States.' Referring to his opinion expressed in a separate sentence in Ukraine v. Russia, referring to the plausibility test, he reiterated that: '75. Therights protected by the present Order of Provisional

[16] ICJ Reports, Order of 17 April 2017; Sałkiewicz-Munnerlyn E (2018) Interim measures of protection (Ukraine v. Russia) – order of 19 April 2017. European & Comparative Law Journal 9(2): 2–16. http://journals.iir.kiev.ua/index. php/pravo/article/view/3641

[17] Immunities and criminal proceedings (Equatorial Guinea v. France), 2016, ICJ Reports, p. 1148; Jadhav case (India v. Pakistan), 2017, ICJ Reports

[18] Precautionary Measures Order of 28 May 2009, ICJ Reports, 2009, p. 142.

[19] See Certain activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) [2011] ICJ Rep 6, 19; Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thailand), Provisional Measures [2011] ICJ Rep 537, 546; 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), Provisional Measures [2013] ICJ Rep 354, 360; Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua), Provisional Measures [2013] ICJ Rep 398, 403–404;

Questions relating to the Seizure and Detention of Certain Documents and Data (Timor-Leste v. Australia), Provisional Measures [2014] ICJ Rep 147, 153; Immunities and criminal proceedings (Equatorial Guinea v. France), 2016, ICJ Rep 1148, 1165-1166; Jadhav case (India v. Pakistan), ICJ Rep. 2017, General Letter No 168, [35]; 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, ICJ Reports 2017, p. 26; Application of the International Convention on the elimination of all forms of racial discrimination (Qatar v. United Arab Emirates), Order of 23 July 2018, ICJ Rep. 2018 (II), pp. 421–422, para 43; Application of the Convention on the prevention and punishment of the crime of genocide (The Gambia v. Myanmar), ICJ Rep. (2020), Order of 23 January 2020, p. 14.

[20] ICJ Reports 2020, Order of 23 January 2020

[21] Ibidem, p. 18.

Measures of Protection are truly fundamental rights, starting with the right to life, right to personal integrity, right to health, among others. The ICJ, once again, refers to rights which appear to it "plausible" (e.g., para 56), as it has become used to, always with my criticisms. In referring to the arguments of the contending parties, only in paras 46-47 of the present Order, among others, appear there ten references to "plausible", related to rights, acts, facts, claims, genocidal intent, inferences. There is great need of serious reflection on this superficial use of "plausible", devoid of a meaning. I do not intend to reiterate here all the criticisms I have been making on resort to "plausible", whatever that means. May I just recall that, in the course of last year (2018), on more than one occasion I dwelt upon this matter. 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 v. United Arab Emirates), provisional measures of protection, Order of 23 July 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)[22].

I share fully this opinion, especially as regards situations where the case is based on the Convention for the Prevention of the Crime of Genocide, which is jus cogens, even for states that have not ratified it. In such situations, 'Nonus: Extreme human vulnerability is a test more compelling than resort to so-called "plausibility" of rights for the ordering of provisional measures of protection under the Convention against Genocide'[23].

Although the 'test of plausibility' is increasingly used in ICJ orders for interim protective measures, I believe that this is an imprecise term, understated by doctrine, and only used to indicate that it is necessary to be more certain of the Court's competence to hear the case. It depends on the type of case, but, for example, in cases where prima facie competence is based on jus cogens, e.g. the Convention on the prevention of genocide crimes, this type of test makes no sense. I therefore agree with Judge Cançado Trindade that the word 'plausibility' is undefined and superfluous when all other conditions are met to order these measures.

[22] Gambia v. Myanmar, separate opinion, *op. cit.*, p. 18

[23] Ibidem,p.21.

E. NON-AGGRAVATION OF THE DISPUTE

Ukraine also requested to indicate measures aimed at ensuring the non-aggravation of the dispute with the Russian Federation. When it indicates provisional measures for the purpose of preserving specific rights, the Court may also indicate provisional measures with a view to preventing the aggravation or extension of the dispute if it considers that the circumstances so require[24]. In the present case, having considered all the circumstances, in addition to the specific measures it has decided to order, the Court deems it necessary to indicate an additional measure directed to both Parties and aimed at ensuring the non-aggravation of the dispute.

The third measure ordered by the Court calls on both Parties to refrain from any action which might aggravate or extend the dispute before the Court or make it more difficult to resolve. I agree with the opinion expressed by the judge Patrick L.Robinson in his separate opinion to the order, that: "In my view, there is no justification for directing this measure to Ukraine. It should have been directed solely to the Russian Federation. Nonetheless, the formulation of the measure called for an affirmative vote in order to ensure that there would be a non-aggravation measure that would be applicable to the Russian Federation"[25].

The same opinion was expressed by the judge ad hoc Yves Daudet in his declaration, when he said: "In my view, this measure of non-aggravation of the dispute should have been directed solely at the Russian Federation, which I recall was designated by the United Nations General Assembly (United Nations, General Assembly, resolution A/RES/ES-11/1, 2 March 2022) as the perpetrator of aggression against Ukraine"[26]. And more: "If there is therefore one Party to the dispute, and only one, towards which non-aggravation measures make sense, it is the Russian Federation and only it. The Court was perfectly entitled to decide in this sense, since there is no rule that requires this kind of balance between the parties, which would make it necessary to address both of them at the same time in order to enjoin them to respect the same measure, even if it is its usual practice to do so"[27].

[24] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan), Provisional Measures, Order of 7 December 2021, para. 94; Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Azerbaijan v. Armenia), Provisional Measures, Order of 7 December 2021, para. 72; . See also:Salkiewicz-Munnerlyn, 2022, op. cit. pp.29-31*

[25] https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-04-EN.pdf

[26] https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-06-EN.pdf

[27] Ibid, pp. 1-2

3. The problem of the binding force

In the paragraph 84 of the order of 16.03.2022, the Court reaffirmed that its "orders on provisional measures under Article 41 [of the Statute] have binding effect" (LaGrand (Germany v. United States of America), Judgment, I.C.J. Reports 2001, p. 506, para. 109) and thus create international legal obligations for any party to whom the provisional measures are addressed.

Since the preparatory work on the drafting of Article 41 by the committee of lawyers who worked out the Statute of the PCIJ in 1920, there was a controversy over the validity of the interim measures of protection[28]. It is apparent from all the preparatory work that the order for interim protective measures is not binding. The position of the States regarding the binding force of the interim measures of protection indicates that they consider safeguards to be optional. All the States against which safeguards were ordered questioned the jurisdiction of the Court and were not even present at the hearing. Most of them, following the order for precautionary measures, issued statements which stated that they would not be taken into account[29]. Even in the time of the PCIJ, that is, for more than 80 years, we have been dealing in doctrine with different opinions about whether or not orders of interim measures are binding[30]. As noted by Judge Oda 'the provisional measures indicated by the Court in the past have usually not been implemented'. It was only in 2001, in the 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'[31]. 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[32]. In this case, the US did not comply with the interim safeguards and executed a citizen of another country under consular protection[33].

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[28] See: Salkiewicz-Munnerlyn, 2022, op. cit. pp. 85-91

[29] Nuclear Tests case, ICJ, Reports, 1973, p 100, Aegean Sea Continental Shelf case, ICJ, Reports, 1976, p. 5, Fisheries Jurisdiction case, ICJ, Reports, 1972, p. 14

[30] Vice President Weeramantry provides a useful summary of such debates in his Separate Opinion in *A*pplication of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, Order of 13 September 1993 (1993) ICJ Rep 325, 374–389

[31] LaGrand (Germany) v United States of America), Judgment, ICJ Reports 2001, p 506, para 109 and thus create international legal obligations which both Parties are required to comply with. *A*pplication of the International Convention It the Elimination of all Forms of Racial Discrimination (Georgia v. Russian Federation), Provisional Measures, Order of 15 October 2008, ICJ, Reports 2008, para 147 'Whereas the Court's "orders of provisional measures under Article 41 [of the Statute] have binding effect". Armed Activities in the Territory of the Congo, (Democratic Republic of the Congo v. Uganda), Judgment, ICJ Reports 2005, p. 258.

[32] Ibid, at para 93 (argument by Germany) and at para 96 (argument by the United States)

[33] Vienna Convention on Consular Relations (Paraguay v. United States of America), Provisional Measures, ICJ, Reports 1998, Order of 9 *A*pril 1998

Another reason why States have occasionally been non-compliant is that the Court lacks the power to enforce its decisions and that Article 94 para 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[34].

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[35]. In the case Gambia v. Myanmar, the Court reaffirms that its 'orders on provisional measures under Article 41 [of the Statute] have binding effect' and thus create international legal obligations for any party to whom the provisional measures are addressed.

4. The non-appearance of a party

The Russian Federation in the letter of 5 March 2022 decided not to participate in the oral proceedings on the request for the indication of provisional measures and the Court expresses its regrets about this decision.

As the Court underlined in its order in paragraph 21, the non -appearance of a party has a negative impact on the sound administration of justice, as it deprives the Court of assistance that a party

[34] 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), (Judgment), 2007, p 43 at [231], para 458); Sałkiewicz-Munnerlyn 2009, pp. 53–71, https://www.ceeol.com/search/article-detail?id=582668

[35] Application of the Convention on the Prevention and Punishment of the Crime of Genocide, (Interim Measures), Order of 13 September 1993, Separate Opinion of Judge Weeramantry 1993, pp. 325, 374–389; Lando M (2017) Compliance with provisional measures indicated by the International Court of Justice. Journal of International Dispute Settlement 8: pp. 22–55; Vucic Mihajlo, Binding effect of provisional measures as an inherent judicial power: An example of cross-fertilization, Annals FLB, "Belgrade Law Review" 2018, No. 4, pp. 127-142.

could have provided to it. Nevertheless, the Court must proceed the case as it was decided many times in its jurisprudence[36].

Non-appearing parties, though formally absent from the proceedings, sometimes submit to the Court letters and documents in ways and by means not contemplated by its Rules.[37] The Court stated the following: "It is valuable for the Court to know the views of both parties in whatever form those views may have been expressed (ibid.). The Court will therefore take account of the document communicated by the Russian Federation on 7 March 2022 to the extent that it finds this appropriate in discharging its duties"[38].

The Court recalled that the non-appearance of one of the States concerned cannot by itself constitute an obstacle to the indication of provisional measures[39]. If the present case continues, the Russian Federation, which remains a Party to the case, will be able, if it so wishes, to appear before the Court to present its arguments[40].

Conclusions

I agree with Prof. Palchetti, that the form of sanction that could be imposed on a party who does not exercise protective measures would be to impose on her the payment of court costs or part thereof[41]. This possibility is not precluded by the Statute of the ICJ, which provides in Article 64 that: 'Unless the Court decides otherwise, each party shall bear its own costs of the trial'. Already in 1952! this possibility was proposed by Prof. Barile[42].

As the Court held in LaGrand, Article 41 of the Statute of the ICJ is intended to prevent the parties from obstructing the exercise of their judicial functions[43]. When a party violates the obligation to comply with provisional measures, in accordance with a common customa-

[36] Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020, p. 464, para. 25; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 23, para. 27

[37] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 25, para. 31

[38] op. cit. p. 6

[39] United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran), Provisional Measures, Order of 15 December 1979, I.C.J. Reports 1979, p. 13, para. 13). It emphasizes that the non-participation of a party in the proceedings at any stage of the case cannot, in any circumstances, affect the validity of its decision (cf. Arbitral Award of 3 October 1899 (Guyana v. Venezuela), Jurisdiction of the Court, Judgment, I.C.J. Reports 2020, p. 464, para. 26; Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 23, para. 27

[40] Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, pp. 142-143, para. 284

[41] P. (Palchetti 2019), *Making and enforcing procedural law at the International Court of Justice*, QIL, 951 Zoom-out 61, p. 5–20.

[42] G. Barile (1952), *Osservazioni sulla indicazione di misure cautelari nei procedimenti davanti alla 838 Corte internazionale di giustizia*, "Comunicazioni e Studi" 4–154.

[43] ICJ, LaGrand (Germany v. USA), 27 June 2001, pp. P. 501–503.

ry rule, it is an internationally unlawful act[44]. It entails international responsibility[45]. And since the interim measures are binding, their non-implementing gives rise to a claim for reparation on the part of the injured party. Article 34 of the Draft Articles on state liability for internationally unlawful acts of 2001 decides that they may take the form of restitution, compensation or satisfaction[46]. After LaGrand, where a party had not complied with those precautionary measures, the Court informed that fact in the operative part of the judgment.

Also the fact, that the Court did not indicate the fourth meausure asked by Ukraine, that the Russian Federation shall provide a report to the Court on measures taken to implement the Court's Order on Provisional Measures one week after such Order and then on a regular basis to be fixed by the Court, does not mean the Court wants to implement its own interim measures.

One more observation - Kirill Gevorgian, the judge from Russia elected to the ICJ in 2014, who from 2003 to 2009 served as Russia's ambassador to the Netherlands, and the judge from China, Mrs XUE Hanqin, in their declarations, both did not join the majority on the first and second provisional measure indicated by the Court in this Order. Does it mean a random convergence of views or political correctness? *Nemo judex in causa sua*, "no-one is judge in his own cause." It is a principle that no person can judge a case in which they have an interest., like the Russian judge in Russian aggression case, while Russia can veto any resolution in the UN Security Council. This is the principle applied in the domestic jurisdiction, but not in the procedure before the International Court of Justice...

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